

## A TORT-BASED CAUSATION FRAMEWORK FOR ANTITRUST ANALYSIS

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Causation is one of the most underexplored areas in antitrust law. What must a plaintiff show to connect a defendant's conduct with anticompetitive effects? Several tests are possible, including "but for" causation, proximate cause, sole causation, reasonable connection, and increased possibility of harm. Courts have applied variations of all these tests. This article focuses on the two settings in which the issue of antitrust causation has most often arisen: monopolization cases and, more generally, cases addressing antitrust injury.

Some of the most difficult causation issues occur in monopolization cases. One such issue involves determining the counterfactual scenario of what would have happened absent the monopolist's conduct. A second occurs when both the monopolist's actions and other events cause the injury to competition. In this setting, courts have diverged on whether the presence of other causes precludes a finding of monopolization.

In dynamic high-technology markets, these issues are even more challenging. It is particularly difficult to hypothesize the path not taken in a rapidly changing market or to separate the effects of the monopolist's conduct from those of other events affecting the market's development. These difficulties are compounded because of the concern of punishing procompetitive unilateral conduct and because the standards articulated by courts in monopolization cases are often not clear.

The second antitrust setting in which courts have frequently addressed causation is the analysis of antitrust injury. The Supreme Court and lower courts have famously explored whether a plaintiff suffers injury "of the type that the antitrust laws were intended to prevent and that flows from that which makes

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the defendants' acts unlawful."<sup>1</sup> This inquiry is designed to ensure that the plaintiff is able to show harm to "competition, not competitors."<sup>2</sup>

This article examines these causation issues and derives insights by turning to tort law, the law with the most developed causation framework. It focuses on two core concepts of causation in tort law: factual and legal cause. As exported to antitrust law, the tort factual cause inquiry would ask if a plaintiff can show a "reasonable connection" between the challenged conduct and the anticompetitive effects.<sup>3</sup> This range of potential causes is limited by the requirement of legal causation, which would determine if a plaintiff's harm results from anticompetitive—as opposed to other—conduct.

## I. CAUSATION JURISPRUDENCE: MONOPOLIZATION

The case law on the type of causation needed to establish antitrust liability is sparse. There are several explanations why courts have not sufficiently analyzed causation. For starters, courts have focused more on the standards governing the conduct that gives rise to antitrust liability. In addition, the causation issue is straightforward in many cases when anticompetitive effects appear to flow naturally from challenged conduct. Despite these observations, courts have addressed causation issues in three monopolization cases and a number of matters that focus on antitrust injury. The D.C. Circuit's *Microsoft* and *Rambus* decisions and the Third Circuit's *Broadcom* ruling are the three most significant instances in which courts have analyzed causation in a monopolization case.

### A. MICROSOFT

The case of *United States v. Microsoft*<sup>4</sup> centered on a wide range of actions that, according to the Department of Justice and a group of states, allowed Microsoft to maintain its monopoly in the market for computer operating systems.

Most relevant to this article, the plaintiffs challenged Microsoft's conduct in preventing Java and Netscape Navigator from developing into viable alternatives to Microsoft products. Microsoft allegedly harmed Netscape through exclusionary agreements with computer manufacturers and Internet access providers.<sup>5</sup> The plaintiffs also alleged that Microsoft excluded Sun Corporation's Java software by (1) entering into contracts requiring software vendors

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<sup>1</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

<sup>2</sup> *Id.* at 488.

<sup>3</sup> See *infra* note 91 and accompanying text.

<sup>4</sup> 253 F.3d 34 (D.C. Cir. 2001).

<sup>5</sup> *Id.* at 59–64, 67–71.

to promote Microsoft's version of Java, (2) deceiving Java developers, and (3) coercing Intel not to support cross-platform Java.<sup>6</sup>

The D.C. Circuit faced the task of determining how the operating system market would have developed in the absence of Microsoft's actions. In other words, did Microsoft's conduct reduce competition in the sale and development of operating systems? The court began its causation discussion by explaining that no courts had required plaintiffs to show that a defendant's monopoly power is "precisely attributable to" anticompetitive conduct.<sup>7</sup> Nor was it a defense to Microsoft's conduct that harmed Netscape and Sun that they were only potential—rather than actual—competitors. The court noted that "the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power."<sup>8</sup> In fact, "it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will—particularly in industries marked by rapid technological advance and frequent paradigm shifts."<sup>9</sup>

The D.C. Circuit then explained that because it is not possible to "confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct," the defendant "is made to suffer the uncertain consequences of its own undesirable conduct."<sup>10</sup> The court reasoned that requiring liability to "turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action."<sup>11</sup>

In short, the *Microsoft* court required only a reasonable connection between the defendant's conduct and monopoly power, with the defendant bearing the burden of the uncertainty of its actions. By definition, the link that would demonstrate a "reasonable connection" cannot be traced with precision. But that is the inevitable result of (1) conduct that cannot (in complex, multifaceted settings) be directly connected to a particular outcome and (2) a con-

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<sup>6</sup> *Id.* at 74–78.

<sup>7</sup> *Id.* at 79.

<sup>8</sup> *Id.*; see also *Morgan v. Ponder*, 892 F.2d 1355, 1363 (8th Cir. 1989); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983); 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626, at 83 (1978) (cited and quoted in both *Morgan v. Ponder* and *Wright v. ITT Grinnell*).

<sup>9</sup> *Microsoft*, 253 F.3d at 79.

<sup>10</sup> *Id.* (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78 (3d ed. 2008)). See also 3 AREEDA & HOVENKAMP, *supra*, ¶ 657a2, at 162 (noting that "[m]any exclusionary practices . . . are one-of-a-kind situations in which it is impossible to prove that an outcome would have been different absent the violation").

<sup>11</sup> *Microsoft*, 253 F.3d at 79. See also *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) (wrongdoer "shall bear the risk of the uncertainty which his own wrong has created").

cept, such as “reasonableness,” which requires an approximation or best estimate, rather than a precise mathematical threshold. In any event, under the *Microsoft* standard, a plaintiff need not prove with certainty that the defendant’s conduct was responsible for its harm. Instead, evidence supporting a reasonable inference of causation is sufficient.

### B. *RAMBUS*

The D.C. Circuit applied a higher standard of causation in the case of *Rambus Inc. v. FTC*.<sup>12</sup> Rambus develops, patents, and licenses technologies to companies manufacturing semiconductor memory devices.<sup>13</sup> The Federal Trade Commission brought a case challenging Rambus’s failure to disclose its patents and patent applications to the Joint Electron Device Engineering Council (JEDEC), a standard-setting organization (SSO) that adopted a standard incorporating Rambus’s patented technology. The FTC claimed that Rambus’s failure to disclose the information led the SSO to adopt a standard that it would not otherwise have selected or at least led implementers to pay higher royalties than they otherwise would have paid.<sup>14</sup>

After an administrative trial on liability, the Commission held that Rambus had engaged in deceptive exclusionary conduct that constituted unlawful monopolization.<sup>15</sup> The Commission concluded that Rambus’s conduct “contributed significantly” to its acquisition of monopoly power and that “but for Rambus’s deceptive course of conduct, JEDEC either would have excluded Rambus’s patented technologies from the JEDEC DRAM standards, or would have demanded RAND [reasonable and nondiscriminatory] assurances . . . with an opportunity for ex ante licensing negotiations.”<sup>16</sup> The Commission explained that JEDEC members were highly sensitive to costs and that alternative technologies were available.<sup>17</sup> Finally, the FTC concluded that the industry was locked into Rambus’s standards and that the SSO faced switching costs of, at a minimum, hundreds of millions of dollars.<sup>18</sup>

In a subsequent ruling, the Commission held that it had authority under Section 5 of the FTC Act to impose remedies other than injunctive relief. But it refused to order royalty-free compulsory licensing because it was not clear that, in the absence of Rambus’s nondisclosure, JEDEC would have selected

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<sup>12</sup> 522 F.3d 456 (D.C. Cir. 2008).

<sup>13</sup> Opinion of the Commission at 7, *Rambus Inc.*, FTC Docket No. 9302 (Aug. 2, 2006) [hereinafter *FTC Rambus Opinion*], available at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 74.

<sup>17</sup> *Id.* at 74, 76.

<sup>18</sup> *Id.* at 99, 104.

an alternative technology.<sup>19</sup> Instead, the Commission found evidence in the record to support each of the two outcomes that could have occurred absent Rambus's behavior:

- (1) JEDEC would have chosen alternative technologies, or
- (2) JEDEC would have incorporated Rambus's technologies into the standard but would have demanded, as a precondition of adopting Rambus's technology, that Rambus agree to license the technology on RAND terms.<sup>20</sup>

The D.C. Circuit reversed the FTC's decision. It assumed for purposes of its analysis that Rambus had deceived the JEDEC members and that, as the Commission found, but for the deception (if Rambus had disclosed its patents), JEDEC members either would have adopted a different standard or would have selected the same standard with RAND assurances.

The court assumed that Rambus's deceptive conduct would violate the anti-trust laws if it caused JEDEC to adopt Rambus's technology, but held that the conduct would not constitute an antitrust violation if it merely enabled Rambus to avoid a RAND commitment and thereby charge higher royalties. The court explained that the FTC, in its remedial opinion, stated that there was insufficient evidence that JEDEC would have selected an alternative standard if it had known the full scope of Rambus's intellectual property.<sup>21</sup> The Commission "expressly left open the likelihood that JEDEC would have standardized Rambus's technologies even if Rambus had disclosed its intellectual property."<sup>22</sup> To have shown causation, then, the FTC would have needed to eliminate the likelihood that JEDEC would have adopted Rambus's technology if Rambus had disclosed.<sup>23</sup> Since it at least was *possible* that JEDEC would have selected Rambus's technology, causation was not shown.

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<sup>19</sup> Opinion of the Commission on Remedy at 12, Rambus Inc., FTC Docket No. 9302 (Feb. 5, 2007) [hereinafter *FTC Rambus Remedy Opinion*], available at <http://www.ftc.gov/os/adjprof/d9302/070205opinion.pdf>.

<sup>20</sup> *Id.* For a critique of the D.C. Circuit's conclusion that the avoidance of RAND licensing terms did not present anticompetitive harm, see Michael A. Carrier, *The D.C. Circuit's Excessively High Causation Standard in Rambus* (Apr. 8, 2010) (arguing that the court (1) placed too much emphasis on a single sentence of dicta in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998); (2) ignored the very different timing of the activity in the two settings (with the defendant in *Discon* already a monopolist when it engaged in its conduct, as opposed to Rambus, which did not have monopoly power at the time the standard was selected); and (3) overemphasized the identity of the party to the exclusion of its behavior, with a RAND promise increasing the likelihood that Rambus would have charged lower royalties than a monopolist), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1586430](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586430).

<sup>21</sup> *Rambus Inc. v. FTC*, 522 F.3d 456, 464 (D.C. Cir. 2008).

<sup>22</sup> *Id.* at 466 (emphasis omitted).

<sup>23</sup> *See id.* at 466–67 (“[I]f JEDEC, in the world that would have existed but for Rambus's deception, would have standardized the very same technologies, Rambus's alleged deception cannot be said to have had an effect on competition in violation of the antitrust laws.”).

### C. *BROADCOM*

In *Broadcom Corp. v. Qualcomm Inc.*,<sup>24</sup> the Third Circuit articulated a third test for antitrust causation in another standard-setting case. The court analyzed Broadcom's claim that Qualcomm breached its obligation to an SSO addressing wireless phones by not licensing its patents on fair, reasonable, and non-discriminatory (FRAND) rates. The Third Circuit reversed the lower court's dismissal of Broadcom's claim on the grounds that Broadcom adequately alleged that Qualcomm had monopoly power in the relevant market and that it falsely promised to license its technology on FRAND terms. The *Broadcom* court did not consider the causation issue nearly as closely as the *Microsoft* and *Rambus* courts. And it focused less directly than the other two courts on anticompetitive effects, instead emphasizing harms to the "competitive process." Nonetheless, it offered the most flexible causation test of the three major opinions, holding that deception in the standard-setting context results in harm by "increasing the likelihood that patent rights will confer monopoly power."<sup>25</sup>

In short, in Section 2 cases, courts have reached an array of inconsistent decisions. The D.C. Circuit in *Microsoft* required that the challenged conduct be "reasonably capable of contributing significantly to a defendant's continued monopoly power."<sup>26</sup> That court set a much higher bar in *Rambus*, requiring the plaintiff to eliminate the likelihood that causes other than the challenged conduct resulted in harm.<sup>27</sup> And the Third Circuit in *Broadcom* offered the most lenient test, requiring only that the conduct "increase the likelihood" of attaining a monopoly position.<sup>28</sup>

## II. CAUSATION JURISPRUDENCE: ANTITRUST INJURY

The causation issue has played an even more prominent role in decisions where the courts have focused on whether the plaintiff has suffered antitrust injury. This section analyzes the major cases. It begins by describing the legal concept of antitrust injury. It then explores the factual element of the inquiry, determining if the challenged conduct was a material cause of the plaintiff's harm. The most frequent issue in resolving the factual inquiry involves the role played by alternative causes of the harm. In particular, the article criticizes a test applied by the Sixth Circuit that essentially requires sole causation

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<sup>24</sup> 501 F.3d 297 (3d Cir. 2007).

<sup>25</sup> *Id.* at 314.

<sup>26</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001).

<sup>27</sup> *Rambus*, 522 F.3d at 466.

<sup>28</sup> *Broadcom*, 501 F.3d at 314.

in asking whether the challenged conduct is the “necessary predicate” of the outcome.<sup>29</sup>

#### A. ANTITRUST INJURY: LEGAL CAUSATION

The seminal case setting forth the requirements of antitrust injury is *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*<sup>30</sup> In *Brunswick*, the plaintiff, a small bowling alley, challenged the acquisition of a rival by the defendant, a large manufacturer of bowling equipment and operator of bowling alleys. The plaintiff complained that, absent such acquisition, the rival would have gone out of business and the plaintiff would have received more income.<sup>31</sup> The Court famously explained that “[p]laintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.”<sup>32</sup>

This definition has primarily received attention for its explanation of the legal aspect of antitrust causation, which provides that a plaintiff must show a certain type of harm. In particular, the plaintiff must demonstrate harm that the antitrust laws were designed to prevent and that was caused by behavior that constitutes an antitrust violation. The *Brunswick* test also contains a factual element by requiring the plaintiff to show that it in fact has suffered harm.

The importance of the *Brunswick* case cannot be overstated. Antitrust injury has become a contested issue in many private antitrust cases, in particular mergers, vertical restraints, and competitor suits.<sup>33</sup> As Jonathan Jacobson and Tracy Greer demonstrated, the number of private cases fell from more than 1400 per year in the late 1970s to roughly 500 in 1990.<sup>34</sup> While it is impossible to pinpoint the precise reasons for this decline, the development of the antitrust injury doctrine likely played a role. For the doctrine ensured that courts analyzed the type of injury claimed and did not grant relief where the antitrust laws were used to protect competitors.<sup>35</sup>

The legal aspect of antitrust injury doctrine has been important in limiting cases in which the plaintiff cannot show harm related to reduced competition. Where the plaintiff complains only about harm to itself, there is no conduct

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<sup>29</sup> Some courts have explored overlapping issues in determining if the plaintiff has standing. *See, e.g., Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 389 (10th Cir. 1985) (plaintiff “must allege injury to his ‘business or property’” and “must show proximate causation—that the injury directly resulted from a violation of the antitrust laws”).

<sup>30</sup> 429 U.S. 477 (1977).

<sup>31</sup> *Id.* at 484.

<sup>32</sup> *Id.* at 489.

<sup>33</sup> Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat*, 66 ANTITRUST L.J. 273, 273 (1998).

<sup>34</sup> *Id.* at 285.

<sup>35</sup> *Id.* at 285–86.

that has caused an injury to competition. For that reason, courts appropriately have dismissed cases in which, for example, plaintiffs have challenged (1) lost profits due to price competition after a merger,<sup>36</sup> (2) a hospital's substitution of one services provider for another,<sup>37</sup> and (3) a loss of a position as exclusive sales representative,<sup>38</sup> regional aircraft carrier,<sup>39</sup> or hospital anesthesiologist.<sup>40</sup>

#### B. ANTITRUST INJURY: FACTUAL CAUSATION

Of most direct interest for this article, the antitrust injury doctrine also has a factual element. Most frequently, courts explain that the factual element requires the plaintiff to show that the conduct is a "material cause" of the injury. For example, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, the Supreme Court made clear that "[i]t is enough that the illegality is shown to be a material cause of the injury."<sup>41</sup> Some courts relatedly require the conduct to be a substantial factor in the defendant's injury.<sup>42</sup> And other courts explain that plaintiffs do not need to "exhaust all possible alternative sources of injury"<sup>43</sup> or show that the conduct is the "sole proximate cause" of the harm.<sup>44</sup>

These recitations of the law are frequently repeated. For example, the Supreme Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.* explained that the jury should determine whether the defendant's conduct "materially contributed" to the plaintiff's harm,<sup>45</sup> and the Fifth Circuit in *Hayes v. Solomon* stated that the plaintiff must show "with a fair degree of certainty" that "defendant's illegal conduct materially contributed to the injury."<sup>46</sup>

Despite the frequency with which these formulations have been articulated, courts' applications of the standard have been more varied. The next three sections examine cases in which courts correctly found material causation,

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<sup>36</sup> *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117 (1986).

<sup>37</sup> *Arnett Physician Grp., P.C. v. Greater LaFayette Health Servs., Inc.*, 382 F. Supp. 2d 1092, 1095 (N.D. Ind. 2005).

<sup>38</sup> *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 12 (1st Cir. 1999).

<sup>39</sup> *Fischer v. NWA, Inc.*, 883 F.2d 594, 600 (8th Cir. 1989).

<sup>40</sup> *Balaklaw v. Lovell*, 14 F.3d 793, 800-01 (2d Cir. 1994).

<sup>41</sup> 395 U.S. 100, 114 n.9 (1969).

<sup>42</sup> *See, e.g., Reibert v. Atl. Richfield Co.*, 471 F.2d 727, 731 (10th Cir. 1973); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 739 F. Supp. 2d 576, 596 (S.D.N.Y. 2010).

<sup>43</sup> *Zenith Radio*, 395 U.S. at 114 n.9. *See also, e.g., Tele Atlas N.V. v. NAVTEQ Corp.*, No. C-05-01673, 2008 WL 4809441, at \*22 (N.D. Cal. 2008).

<sup>44</sup> *See, e.g., Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 791 (6th Cir. 2002); *Nat'l Indep. Theatre Exhibitors, Inc. v. Buena Vista Distrib. Co.*, 748 F.2d 602, 607 (11th Cir. 1984).

<sup>45</sup> 370 U.S. 690, 702 (1962).

<sup>46</sup> 597 F.2d 958, 978 (5th Cir. 1979) (quotation omitted); *see also McClure v. Undersea Indus., Inc.*, 671 F.2d 1287, 1289 (11th Cir. 1982).

appropriately found a lack of causation, and incorrectly denied antitrust injury based on a “necessary predicate” standard.

### 1. *Material Causation Findings*

Issues of factual causation have most frequently arisen in cases that have addressed multiple causation. Numerous courts have examined the issue of whether the plaintiff has sufficiently demonstrated antitrust injury when both the defendant’s conduct and other causes play a role in the harm.

In the first group of cases, courts correctly found that the plaintiff was able to demonstrate antitrust injury by showing that the challenged conduct was a material cause of its harm. Most significant, the courts did not deny a finding of antitrust injury based on the existence of other causes. For example, in *Lee-Moore Oil Co. v. Union Oil Co.*, the plaintiff, a gasoline distributor, challenged the defendant’s termination of its supply contract.<sup>47</sup> It claimed that the termination was part of a conspiracy to raise price by driving from the market mavericks that promoted competitive self-service retail stations.<sup>48</sup> The district court found that the plaintiff did not suffer antitrust injury since its damages “could result from even the lawful termination of a supply agreement.”<sup>49</sup> In reversing, the Fourth Circuit explained that a plaintiff’s showing of damages caused by the defendant’s antitrust violation makes it “irrelevant” that the defendant could have caused the same harm through lawful activity.<sup>50</sup> The court “fail[ed] to understand” how a defendant’s legal conduct could “limit a plaintiff’s right of recovery” once it establishes an antitrust violation.<sup>51</sup>

In *Costner v. Blount National Bank*, the non-antitrust causes of the harm played an even more important role.<sup>52</sup> The plaintiff, a part owner of a car distributorship, challenged a tying arrangement by which the defendant lending bank required it to sell its installment paper<sup>53</sup> to the bank.<sup>54</sup> The Sixth Circuit refused to overturn a jury verdict finding causation since, even though “[t]here was evidence that general economic conditions and poor management caused a decline in plaintiff’s business,” there also was “evidence that the illegal tying arrangements contributed to the decline.”<sup>55</sup>

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<sup>47</sup> 599 F.2d 1299, 1300 (4th Cir. 1979).

<sup>48</sup> *Id.* at 1301.

<sup>49</sup> *Lee-Moore Oil Co. v. Union Oil Co. of Cal.*, 441 F. Supp. 730, 739 (M.D.N.C. 1977).

<sup>50</sup> 599 F.2d at 1302.

<sup>51</sup> *Id.*

<sup>52</sup> 578 F.2d 1192 (6th Cir. 1978).

<sup>53</sup> Installment paper is a “written agreement to pay for goods purchased, in payments of principal and interest at regularly scheduled intervals.” *Installment Contract*, ALLBUSINESS.COM, <http://www.allbusiness.com/glossaries/installment-contract/4944514-1.html>.

<sup>54</sup> 578 F.2d at 1194.

<sup>55</sup> *Id.* at 1195.

The court similarly did not treat the existence of a non-antitrust cause as precluding antitrust injury in the case of *City of Long Beach v. Standard Oil Co. of California*.<sup>56</sup> In that case, the plaintiff city alleged a conspiracy among oil companies to maintain an artificially low price for oil.<sup>57</sup> The district court denied the plaintiff's claims on the grounds that federal price control programs, rather than the companies' actions, caused the harm.<sup>58</sup> The Ninth Circuit reversed, finding that "[t]he establishment of price ceilings" did "not in itself mean that the companies' conduct could not have caused the injuries."<sup>59</sup> It concluded that the defendants could not "characterize the price control program as a supervening or superseding cause of the injury to the city" and that plaintiffs could show antitrust injury from price ceilings "based on prices set artificially low as a result of an unlawful conspiracy."<sup>60</sup>

## 2. *Insufficient Material Causation Findings*

Other courts have found that plaintiffs failed to prove material causation. Many of these cases appear to have been correctly decided because the plaintiff failed to sufficiently connect the conduct with the harm.

For example, in *El Aguila Food Products, Inc. v. Gruma Corp.*, the Fifth Circuit required plaintiff tortilla manufacturers to prove causation "as a matter of fact and with a fair degree of certainty."<sup>61</sup> That standard was not met in challenging the defendants' attempts to obtain desirable shelf space and induce retailers to promote its product because there were other factors that could have caused the plaintiffs' harm and because the plaintiff failed to introduce evidence of retail sales data, the effect of the defendants' agreements on shelf space, or market foreclosure.<sup>62</sup>

In *Foremost-McKesson, Inc. v. Instrumentation Laboratory, Inc.*, the Fifth Circuit found that the plaintiff failed to offer sufficient evidence that the defendant's actions caused harm and violated Sections 1 and 2 of the Sherman

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<sup>56</sup> 872 F.2d 1401 (9th Cir. 1989).

<sup>57</sup> *Id.* at 1405.

<sup>58</sup> *Id.* at 1407–08.

<sup>59</sup> *Id.* at 1408.

<sup>60</sup> *Id.* For other examples, see *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1042 (9th Cir. 1987) (finding that "alternative causes of the injury" introduced by defendant "constitute[ ] only a part of the information the jury may consider"); *In re Gabapentin Patent Litig.*, 649 F. Supp. 2d 340, 356 (D.N.J. 2009) (concluding that plaintiff generic firm need not discredit "all possible intervening causes" of its injury, such as failure to obtain FDA approval, and need not show that defendant's conduct in patent prosecution misconduct, false FDA certifications, and baseless litigation was the "sole cause" of its injury).

<sup>61</sup> 131 F. App'x 450, 454 (5th Cir. 2005) (citation omitted).

<sup>62</sup> *Id.*

Act.<sup>63</sup> In particular, the plaintiff's evidence was "scarce and fatally general," failing to "indicate and document specific losses of business."<sup>64</sup>

Finally, in *Addamax Corp. v. Open Software Foundation, Inc.*, the plaintiff security software company did not show causation. The company complained that the defendants "force[d] down the price for security software below the free-market level" and limited its ability to compete in the market.<sup>65</sup> The court found, however, that there were alternative explanations for the plaintiff's injury, as its product was costly, late, overly-sophisticated, and lacking certification, and that the plaintiff failed to demonstrate a sufficient causal link for the challenged conduct since—as a supplier not selected—the defendant joint venture's low price never applied to it.<sup>66</sup>

### 3. Necessary-Predicate Standard

Some courts have rejected claims of antitrust injury by using a "necessary predicate" causation standard that is too restrictive. Most notably, in several cases, the Sixth Circuit required plaintiffs to prove that the challenged conduct is a "necessary predicate" of the suffered injury. As applied in practice, such an inquiry required the plaintiff to disprove all potential alternative causes. Although this test has not been adopted outside the Sixth Circuit, and the court itself has softened its approach in recent cases, an analysis of the court's necessary-predicate opinions reveals the dangers of an overly restrictive causation standard.

For example, in *Hodges v. WSM, Inc.*, the plaintiffs, operators of an airport shuttle service, alleged a conspiracy by the defendants, operators of a tour company, amusement park, and shuttle service.<sup>67</sup> They claimed that other shuttle service companies agreed with defendants not to transport passengers from the airport to the amusement park, hotel, and convention center known as Opryland.<sup>68</sup> In return, the Opryland owner promised to hire vans and buses from the other shuttle service companies.<sup>69</sup> And the owner enforced the agreement by not allowing other shuttle companies (including the plaintiff) to enter the Opryland property.<sup>70</sup> The plaintiffs claimed that this conspiracy deprived it of its ability to compete in the shuttle service market.

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<sup>63</sup> 527 F.2d 417 (5th Cir. 1976).

<sup>64</sup> *Id.* at 420.

<sup>65</sup> 152 F.3d 48, 50 (1st Cir. 1998).

<sup>66</sup> *Id.* at 54. *See also* *Greater Rockford Energy & Techn. Corp. v. Shell Oil Co.*, 998 F.2d 391, 402–04 (7th Cir. 1993) (finding that plaintiff ethanol sellers failed to show material causation where there were numerous "alternative explanations" for the harm suffered).

<sup>67</sup> 26 F.3d 36 (6th Cir. 1994).

<sup>68</sup> *Id.* at 37.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

The court concluded that the plaintiffs' injury resulted not from reduced competition among shuttle operators but from "defendants' lawful refusal to grant . . . access to their private property."<sup>71</sup> Because the plaintiffs could not show that the challenged conduct was a "necessary predicate" to the harm, the court concluded that they could not demonstrate antitrust injury.<sup>72</sup>

The problem with this reasoning is that it extracts an element of the alleged anticompetitive behavior, the refusal to allow access to property, and divorces it from the setting in which it was employed. Freed from these constraints, the court treats the refusal as an independent basis for the plaintiffs' harm. And based on such a finding, the court concludes that the defendants' conduct was not a "necessary predicate" to the harm. This conclusion fails to consider the role that the refusal played in the anticompetitive scheme. Instead, by focusing excessively narrowly on one element of that scheme, it does not recognize the overall alleged conspiracy.

The Sixth Circuit used a similar approach in *Valley Products Co. v. Landmark*.<sup>73</sup> In that case, the plaintiff, a manufacturer of bar soap, challenged the decision of the defendant, a franchisor of hotels, to terminate its agreement and select a different vendor. The plaintiff claimed that the defendant used a tying arrangement by which franchise rights were granted only to vendors that purchased amenities used by rivals.<sup>74</sup>

The Sixth Circuit dismissed the case, concluding that the plaintiff could not satisfy the necessary-predicate test because its loss of sales "flowed directly" from the cancellation of its vendor agreement and because it would have suffered the loss regardless of the tying agreements.

In focusing exclusively on the termination, however, the court neglected the possibility that the tying arrangement might have explained why the plaintiff was terminated. It is conceivable that the defendant selected the vendors because they complied with the tying arrangement. The court thus appeared to parse the conduct overly finely, overlooking an element of the anticompetitive conduct. As the Sixth Circuit showed in *Hodges*, this is a hazard of the necessary-predicate test.<sup>75</sup>

In *In re Cardizem CD Antitrust Litigation*, the Sixth Circuit attempted to justify the holdings of *Hodges* and *Valley Products* by redefining the neces-

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<sup>71</sup> *Id.* at 39.

<sup>72</sup> *Id.*

<sup>73</sup> 128 F.3d 398 (6th Cir. 1997).

<sup>74</sup> *Id.* at 401.

<sup>75</sup> *Id.* at 404. *See also, e.g.*, *Watkins & Son Pet Supplies v. Iams Co.*, 254 F.3d 607, 616 (6th Cir. 2001) (dismissing claim on grounds of lack of antitrust injury since plaintiff's harm stemmed from termination of its distributorship and since an "antitrust violation was not a necessary predicate of the injury").

sary-predicate test. It explained that its prior decisions had dismissed the complaints in question “because each of the defendants had taken an action that it was lawfully entitled to take” and because such action was “the actual, indisputable, and sole cause of the plaintiff’s injury.”<sup>76</sup> Some courts and commentators have read *Cardizem* as a rejection of the argument that antitrust injury is foreclosed by the existence of *any* lawful alternative cause of the plaintiff’s injury.<sup>77</sup> But even if that is so, a problem with the *Cardizem* explanation is that the actions that defendants were “lawfully entitled to take”<sup>78</sup> could in fact have been an element of the antitrust violation. By artificially segmenting the conduct into numerous boxes, the courts failed to appreciate the overall anticompetitive scheme.

A final case provides a useful counterpoint to the Sixth Circuit necessary-predicate cases. In *Andrx Pharmaceuticals, Inc. v. Biovail Corp. International*, the D.C. Circuit reversed the lower court’s dismissal with prejudice of a challenge to the very same settlement agreement at issue in *Cardizem*, by which brand-drug company Hoechst paid Andrx, allegedly the only generic that could enter the market, to delay entry.<sup>79</sup> Andrx had claimed that it did not harm Biovail, the generic excluded from the market, since Andrx could have unilaterally—and legally—delayed entering the market.<sup>80</sup> This argument was consistent with the necessary-predicate line of cases.

The D.C. Circuit nonetheless correctly concluded that, regardless of the effects of Andrx’s unilateral decision not to enter the market, Biovail alleged that “Andrx entered into an anticompetitive agreement with [Hoechst] in order to exclude others.”<sup>81</sup> In other words, it did not matter that the defendant *could* have caused the same harm by acting legally. Because there was evidence that it brought about that result through an antitrust violation, the plaintiff was able to successfully allege antitrust injury.

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<sup>76</sup> 332 F.3d 896, 914 (6th Cir. 2003). *Cardizem* had held that the plaintiffs had properly pleaded antitrust injury because “[t]he fact that Andrx could have unilaterally, and legally, decided not to bring its generic product to a manifestly profitable market has no relevance in assessing whether the plaintiffs adequately alleged that the antitrust violation was the necessary predicate for their injury.” *Id.* at 915.

<sup>77</sup> See, e.g., ABA ANTITRUST DEVELOPMENTS 822 (6th ed. 2007) (noting that the Sixth Circuit decision in *Cardizem* “‘significantly limited’ [the] application of the [necessary-predicate] test to circumstances where it is clear that the plaintiff’s injury would have been caused by other factors”) (quotation omitted); *Bearing Distrib., Inc. v. Rockwell Automation, Inc.*, 2006 WL 2709779, at \*7–8 (N.D. Ohio Sept. 20, 2006) (noting that “[a]ntitrust defendants have interpreted” *Hodges* to “requir[e] a plaintiff [to] allege that the only way the defendant could have caused the plaintiff’s injury was by engaging in the antitrust violation” and concluding that “[t]he Sixth Circuit has since recognized the absurdity of this interpretation of the necessary predicate test”) (citing *Cardizem*) (quotation omitted).

<sup>78</sup> 332 F.3d at 914.

<sup>79</sup> 256 F.3d 799 (D.C. Cir. 2001).

<sup>80</sup> *Id.* at 813.

<sup>81</sup> *Id.* (emphasis omitted).

In short, the rise and fall of the necessary-predicate standard in the Sixth Circuit provides an example of an excessively high standard for antitrust injury that conflicts with basic principles of tort causation. The standard tempts courts to divide the defendant's conduct into categories that are overly fine, claim that one aspect of the conduct is legal, and then rely on this "legal" cause to deny antitrust injury. To be sure, in the *Hodges* and *Valley Products* cases, the plaintiff ultimately might not have had a successful claim. But the reason should have been based on the merits of the antitrust case rather than an artificially high bar of antitrust injury. Courts should continue to reject any standard that denies antitrust injury based on the mere existence of other causal factors.

### III. PROPOSAL FOR A NEW FRAMEWORK

Given that the antitrust law of causation is inconsistent and less than fully developed, a consideration of the area of law with the most elaborate causation framework, tort law, could prove useful. Exploration of such a framework could support one of the three widely divergent approaches used in the *Microsoft*, *Rambus*, and *Broadcom* Section 2 cases, as well as in the Section 1 matters. And it could shed light on why the necessary-predicate test (with its effective application of a sole-causation analysis) is not appropriate in determining antitrust injury.

Multiple reasons support the examination of tort law. First, on a broad level, the antitrust and tort fields share similar goals in seeking to deter and compensate for behavior that falls below certain standards and causes certain types of harm. Second, tort and antitrust causation objectives overlap; tort law tests the connection between breach of a duty and plaintiff's harm, and antitrust doctrine focuses on the link between challenged conduct and anticompetitive effect.

Third, the drafters of the Sherman Act anticipated that antitrust courts would rely on common law principles, which included tort law's proximate causation.<sup>82</sup> Fourth, the two elements of tort's causation analysis naturally apply to antitrust law. Factual cause demonstrates that the challenged conduct is responsible for the harm suffered. And legal cause limits the universe of factual causes that can give rise to liability by asking if the law should address the behavior.

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<sup>82</sup> *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531 (1983); *see also id.* at 532 n.24 (citing 3 JOHN D. LAWSON, RIGHTS, REMEDIES, AND PRACTICE 1740 (1890)), which stated that "Natural, proximate, and legal results are all that damages can be recovered for, even under a statute entitling one 'to recover any damage.'" (emphasis omitted).

Fifth, tort law's relaxed standards for demonstrating but-for causation are not dramatically more lenient than other regimes. For starters, many regimes, such as securities fraud and criminal law, rely on tort law.<sup>83</sup> And others, such as consumer protection and civil rights law, loosen causation requirements even beyond tort law.<sup>84</sup> In short, even the extrapolation of other legal regimes' causation rules would introduce notions of reasonableness and flexibility that are consistent with tort law.

Causation plays a role in multiple tort doctrines, such as strict liability, wrongful death, fraud, and intentional infliction of emotional distress.<sup>85</sup> It has been most developed in the context of negligence.

To be sure, causation analysis is not the same in every jurisdiction, and concepts like proximate cause often are unclear. Even the distinction between factual and legal cause is not as precise as initially appears.<sup>86</sup> Nonetheless, certain unifying principles emerge from a review of tort causation. The proposed antitrust framework relies on the two most overarching principles: factual cause and legal cause.

## A. FACTUAL CAUSE

### 1. *Reasonable Link*

The first element of the framework is *factual cause*, which tort law sometimes refers to as *cause in fact* or *but-for causation*. Conduct satisfies this standard when “the harm would not have occurred absent the conduct.”<sup>87</sup> In other words, “but for” the conduct, the harm would not have taken place. A central difficulty in determining factual cause is the counterfactual nature of the analysis. A plaintiff cannot know with certainty what would have hap-

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<sup>83</sup> See, e.g., *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (securities fraud); *United States v. Spinney*, 795 F.2d 1410, 1415 (9th Cir. 1986) (criminal law).

<sup>84</sup> See, e.g., *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 647 N.E.2d 741, 745 (N.Y. 1995); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

<sup>85</sup> See *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136 (5th Cir. 1985) (strict liability); *Claveloux v. Bacotti*, 778 So. 2d 399 (Fla. Dist. Ct. App. 2001) (intentional interference with expectancy); *Holmes v. Grubman*, 691 S.E.2d 196 (Ga. 2010) (fraud); *Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004) (intentional infliction of emotional distress); *Simpson Housing Solutions, LLC v. Hernandez*, 2009 WL 3231256, \*16 (Ark. Oct. 8, 2009) (wrongful death).

<sup>86</sup> Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 (1956).

<sup>87</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 & cmt. b (2010) [hereinafter RESTATEMENT (THIRD)]; see also 4 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 20.2, at 100 (3d ed. 2007) (“[N]egligence is a cause in fact of an injury where the injury would not have occurred *but for* the defendant's negligent conduct.”).

pened if another set of events occurred. History, with a single timeline marching forward, does not allow us this luxury.<sup>88</sup>

Because of these difficulties, a plaintiff is permitted to draw reasonable inferences. The civil burden of proof merely requires a preponderance of the evidence,<sup>89</sup> which means that it is more likely than not that the act caused the outcome.<sup>90</sup> In addition, some courts have replaced the but-for standard with a requirement that a plaintiff show a “reasonable connection between defendant’s act or omission and plaintiff’s damages or injuries.”<sup>91</sup> And other courts have sought “evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.”<sup>92</sup>

This article proposes that an antitrust plaintiff must show a *reasonable connection* between the challenged conduct and the anticompetitive effects. Following the courts requiring such a reasonable link forges a justifiable connection between the two points. To be sure, the question of exactly what threshold triggers a “reasonable” connection cannot be set with precision. But it sets a ballpark estimate at an appropriate level.

Such a test also would be superior to its closest analogue, a but-for analysis that allows reasonable inferences to be drawn. While such an analysis is similar, it is less desirable because a focus on the but-for world confronts the counterfactual difficulties addressed above. Because no one can know what would have happened in a hypothetical, alternate universe, with such uncertainties magnified in the high-technology context, such an inquiry is less certain.

In contrast, the test of reasonable connection mirrors the type of scrutiny in which courts often engage. Conceptions of reasonableness are found in many areas of law, including the reasonable person standard in negligence, whether there has been a seizure under the Fourth Amendment, and whether a work

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<sup>88</sup> Cf. *Standard Oil Co. v. United States*, 337 U.S. 293, 309–10 (1949) (“To demand that bare inference be supported by evidence as to what would have happened but for the adoption of the practice that was in fact adopted . . . would be a standard of proof if not virtually impossible to meet, at least most ill-suited for ascertainment by courts.”).

<sup>89</sup> See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* § 173, at 421 (2000).

<sup>90</sup> See, e.g., *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328–29 (2007).

<sup>91</sup> *Robertson v. Sixpence Inns of Am., Inc.*, 789 P.2d 1040, 1047 (Ariz. 1990). See also *Houde v. Millett*, 787 A.2d 757, 759 (Me. 2001); *Shackil v. Lederle Labs.*, 561 A.2d 511, 520 (N.J. 1989); *Giuffrida v. Citibank Corp.*, 790 N.E.2d 772, 777–78 (N.Y. 2003). See generally W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 263 (5th ed. 1984).

<sup>92</sup> *Ortega v. Kmart Corp.*, 36 P.3d 11, 15 (Cal. 2001). See also *Wilson v. Allen*, 612 S.E.2d 39, 41 (Ga. Ct. App. 2005); *Rhoten v. Dickson*, 223 P.3d 786, 801–02 (Kan. 2010); *Young v. Harper-Hutzel Hosp.*, No. 288406, 2010 WL 537746, at \*3 (Mich. Ct. App. Feb. 16, 2010).

has value for purposes of obscenity law.<sup>93</sup> In antitrust law, as part of the rule of reason analysis, courts have asked whether the defendant's activity is reasonably necessary to achieve a stated procompetitive objective.<sup>94</sup>

The reasonable-connection test also supports the material cause analysis in which courts have engaged. If the challenged conduct is reasonably connected to the anticompetitive harm, then it is a material cause. The framework also precludes reliance on tests with excessively high thresholds, such as the necessary-predicate test. The conduct need not be a necessary predicate if it only needs to be reasonably connected to the harm.

## 2. Multiple Causation

In many cases, there will be multiple causes of an event. Where there are multiple causes, each of which would (in the absence of the others) be viewed as the but-for cause, tort law considers *each* to be the factual cause.<sup>95</sup> If there are two independent causes of harm, one tortious and one nontortious, a defendant cannot avoid liability by pointing to the nontortious one and claiming that "but for" such activity, the harm would not have occurred.<sup>96</sup> Finally, particularly where there are multiple causes for an injury, courts have asked if the act was a substantial cause in bringing about the harm.<sup>97</sup>

Antitrust plaintiffs should be able to satisfy the causation requirement even if there are other, non-antitrust causes of the outcome. If a defendant's activity stifled competition where it reasonably—though not with certainty—appeared that the plaintiff would have competed in the market, causation should be satisfied. A plaintiff should never be forced to show that the defendant's conduct was the sole cause of its injury. Such a finding would unjustifiably block legitimate antitrust lawsuits. Incorporation of tort's multiple-causation analysis would make clear that courts cannot find a lack of antitrust injury by treating the challenged conduct as the necessary predicate—in other words, the only cause of the harm.

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<sup>93</sup> See, e.g., *Nelson v. Freeland*, 507 S.E.2d 882, 883 (N.C. 1998) (negligence); *United States v. Drayton*, 536 U.S. 194, 201 (2002) (Fourth Amendment); *Ashcroft v. ACLU*, 535 U.S. 564, 579 (2002) (obscenity).

<sup>94</sup> See, e.g., *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 970 (10th Cir. 1994); *Broad Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 769 (D. Del. 1981).

<sup>95</sup> RESTATEMENT (THIRD), *supra* note 87, § 27; see, e.g., *State v. Abbott*, 498 P.2d 712, 726 (Alaska 1972); *Peterson v. Gray*, 628 A.2d 244, 246 (N.H. 1993); *Holmes v. Levine*, 639 S.E.2d 235, 239–40 (Va. 2007).

<sup>96</sup> See *HARPER ET AL.*, *supra* note 87, § 20.3, at 139 ("Where [defendant's negligence and another cause] involve the wrongful acts of legally responsible human beings there is virtual unanimity among courts in holding both (or either) liable for the whole injury . . .").

<sup>97</sup> See, e.g., *Kyriss v. State*, 707 P.2d 5, 8 (Mont. 1985); *Goebel v. Warner Transp.*, 612 N.W.2d 18, 22 (S.D. 2000).

### 3. *Application in High-Technology Setting*

This conception of factual cause, which requires a reasonable link between the challenged conduct and anticompetitive effects, and which also allows for multiple causes, makes particular sense for cases that involve high-technology industries. Two examples are particularly useful in revealing the challenges of determining causation in this context: “new economy” industries and standard setting.

“New economy”-type industries include computer software, Internet-based businesses, communications, and biotechnology.<sup>98</sup> Such industries are characterized by falling average costs, dramatic innovation, quick and frequent entry and exit, and network effects.<sup>99</sup> In markets in these industries, companies engage in “leapfrog competition.” Because market positions can be overturned quickly, it is difficult to know what would have happened absent a monopolist’s activity.

For example, in the *Microsoft* case, it was not possible to know with certainty if Netscape or Java would have emerged as competitive threats to the Microsoft operating system. And because of the powerful network effects in the market, early success could have catapulted the firms to market dominance.<sup>100</sup> As a result, and as the *Microsoft* case shows, plaintiffs cannot be expected to show with absolute certainty that they would have competed successfully in the market if not for the defendant’s conduct.

Similarly, the fluidity and complexity of high technology markets make it unsound to require plaintiffs to show with absolute certainty the effects of a defendant’s conduct in standard-setting cases. SSOs are made up of numerous parties deciding among multiple technologies protected by patents of various strengths. As discussed above in connection with the *Rambus* case, SSOs can choose from an array of patented and unpatented standards.<sup>101</sup>

In addition, there are at least four types of firms participating in SSOs: (1) pure innovators, which earn revenue solely through licensing, (2) pure manufacturers, which do not conduct research but develop products, (3) vertically integrated firms that are involved in both research and commercialization, and (4) firms that do not fall into any of the categories but buy products that

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<sup>98</sup> RICHARD A. POSNER, *ANTITRUST LAW* 245 (2d ed. 2001); Robert Pitofsky, *Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy*, 16 *BERKELEY TECH. L.J.* 536 (2001).

<sup>99</sup> POSNER, *supra* note 98, at 245–50.

<sup>100</sup> Of course, the network effects also made it more difficult to overturn Microsoft’s established position in the market.

<sup>101</sup> *See supra* notes 12–22 and accompanying text.

incorporate the manufactured technologies.<sup>102</sup> These four types of firms each have different incentives, which complicates antitrust analysis.

### B. LEGAL CAUSE

The chain of factual causation could theoretically stretch over a near infinite number of steps. For that reason, tort law applies a second test of causation, known as *legal cause* or *proximate cause*. This conception limits the first: even if factual cause is satisfied, legal cause could bar liability. Courts have emphasized two factors in conducting the inquiry.

The first is foreseeability. Such a test asks if the injury “is of a type that a reasonable person would see as a likely result of his or her conduct.”<sup>103</sup> If a harm is not foreseeable, the actor will not be held liable.

Another, more common, conception of legal cause limits liability to the “harm within the risk.”<sup>104</sup> “An actor’s liability is limited to those harms that result from the risks that made the . . . conduct tortious.”<sup>105</sup> For example, if A gives a loaded gun to a child who drops the gun on B’s foot (which then breaks), A is not liable to B since a broken foot is not a harm within the risk of giving a child a loaded gun.<sup>106</sup> Similarly, if the conduct “causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury,” the actor will not be liable.<sup>107</sup> The *Restatement* recommends the risk standard rather than the foreseeability standard because of its greater clarity.<sup>108</sup>

Applied to the antitrust setting, the tort concept of legal cause supports the doctrine of antitrust injury. A court analyzing legal cause could ask whether a challenged anticompetitive effect falls within the scope of the risks that made

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<sup>102</sup> Damien Geradin & Anne Layne-Farrar, *The Logic and Limits of Ex Ante Competition in a Standard-Setting Environment* 4 (Jan. 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=960063](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=960063).

<sup>103</sup> See, e.g., *Ciomber v. Cooperative Plus, Inc.*, 527 F.3d 635 n.1 (7th Cir. 2008); see generally RESTATEMENT (THIRD), *supra* note 87, § 26 cmt. e.

<sup>104</sup> RESTATEMENT (SECOND) OF TORTS § 281 cmt. c (1965) [hereinafter RESTATEMENT (SECOND)]; see, e.g., *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

<sup>105</sup> RESTATEMENT (THIRD), *supra* note 87, § 29. See also, e.g., *Vanderbeek v. Vernon Corp.*, 50 P.3d 866, 872 n.4 (Colo. 2002); *Brim v. Wertz*, 35 Pa. D. & C. 4th 277, 282–83 (Pa. Ct. Com. Pl. 1996).

<sup>106</sup> If, however, that gun then discharges and injures C, A would be liable to C since a bullet wound is a harm within the risk of giving a loaded gun to a child. For another example, see *Hebert v. Enos*, 806 N.E.2d 452, 456 (Mass. App. Ct. 2004) (“Although we can envision a variety of foreseeable injuries arising out of a defective toilet, the electric shock to a neighbor when he touches a faucet outside the house is well beyond the ‘range of reasonable apprehension’ and therefore not foreseeable.”).

<sup>107</sup> RESTATEMENT (SECOND), *supra* note 104, § 281 cmt. c.

<sup>108</sup> RESTATEMENT (THIRD), *supra* note 87, § 29 cmt. j.

the defendant's conduct an antitrust violation.<sup>109</sup> This inquiry is satisfied by the analysis that courts undertake in determining antitrust injury. By requiring plaintiffs to show "injury of the type the antitrust laws were intended to prevent," the *Brunswick* court articulated a version of legal cause that serves beneficial purposes.<sup>110</sup>

For private parties, for whom the injury requirement applies, legal cause already is considered in the analysis. But antitrust injury has historically applied only to private parties who sue under Section 4 of the Clayton Act.<sup>111</sup> While the *Microsoft* court suggested that the requirement of antitrust injury applies "no less in a case brought by the Government,"<sup>112</sup> this statement is not sufficient to overturn the Act.<sup>113</sup> For that reason, the consideration of legal cause in government actions could serve a useful purpose by ensuring that the conduct challenged falls within the scope of activity targeted by the antitrust laws. To be sure, a court could (like the *Microsoft* court did) address these issues by requiring the government to show that the challenged conduct caused anticompetitive harm. But my proposal would make certain that courts consider causation through a tort-based framework that ensures that the government challenges anticompetitive—rather than other—harm.

In addition to benefits from incorporating legal cause into the analysis, the consideration of factual cause would ensure that courts require a reasonable connection between the challenged conduct and anticompetitive effect. More specifically, it would support the connection applied by the D.C. Circuit in the *Microsoft* case, soften the required link that the D.C. Circuit articulated in *Rambus*, and strengthen the one applied by the Third Circuit in *Broadcom*. And it would ensure that the standard employed by some courts (such as the necessary-predicate test applied by the Sixth Circuit) is not set at an unreasonably high level.

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<sup>109</sup> To be sure, the antitrust inquiry would not be as fine-grained, as (1) consumer harm reaches more broadly than tort injury to particular individuals and (2) a focus on a company's activity occurs on a higher plane than an individual's motive or action under tort law.

Applying the concept of foreseeability, a court could ask if the outcome was foreseeable to the defendant. This often will be met since actors generally are aware of the results of their conduct.

<sup>110</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

<sup>111</sup> 15 U.S.C. § 15.

<sup>112</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

<sup>113</sup> See, e.g., Mark S. Popofsky, *Section 2, Safe Harbors, and the Rule of Reason*, 15 GEO. MASON L. REV. 1265, 1295 n.176 (2008) (noting that "antitrust injury is not the same as anticompetitive effects" and that "the antitrust injury doctrine is inapplicable" in government suits); Alan H. Silberman, *The Evolving Face of Vertical Restraints*, 1861 PLI/Corp 591, 684–85 (2011) (proof of "antitrust injury" not required in government enforcement actions).

## C. BURDEN-SHIFTING ANALYSIS

The antitrust causation analysis I propose could be incorporated into the burden-shifting framework that courts currently apply throughout antitrust analysis. The rule of reason, though often called a balancing approach, more accurately resembles a shifting of burdens by which (1) the plaintiff demonstrates that a defendant's conduct has an anticompetitive effect, (2) the defendant introduces procompetitive justifications, (3) the plaintiff shows that the conduct is not reasonably necessary to achieve the proffered justifications or that there are less-restrictive alternatives, and (4) the court balances anticompetitive and procompetitive effects.<sup>114</sup> This analysis generally applies under Section 1 of the Sherman Act, although the *Microsoft* court applied this framework to Section 2 analysis in evaluating the array of activities in which Microsoft engaged.<sup>115</sup>

My approach would incorporate tort-based causation elements into this burden-shifting framework. Such a change would ensure that courts consider causation and that they apply a supported, reasonable analysis in doing so. It would envision causation elements in each of the stages of analysis.

In the first step, which requires a showing of anticompetitive effect, a plaintiff could now also be required to show factual and legal cause. The causation showings should not be onerous. Merely by showing antitrust injury, the plaintiff would be able to demonstrate legal cause. And showing a reasonable connection between the challenged conduct and anticompetitive effects should, in most cases, be straightforward.

Once the plaintiff makes these showings, the burden would shift to the defendant. At this stage, the defendant could show either procompetitive justifications for its conduct or a lack of causation. For example, it could show that its conduct did not reasonably result in the challenged effects.

If the defendant could show that its activity did not cause anticompetitive effects, the burden would shift back to the plaintiff to rebut the defendant's explanation. In showing that the defendant's conduct was not reasonably necessary, it could also rebut the defendant's causation explanations. If the plaintiff could not make its required showings at this third stage of the analysis, the defendant would win. If it could make the showings, the court would proceed to balancing.

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<sup>114</sup> Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009); Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 B.Y.U. L. REV. 1265.

<sup>115</sup> *Microsoft*, 253 F.3d at 58–59.

Incorporating causation into the burden-shifting framework would not require significant readjustment of the existing analysis. At the same time, it would reinforce the important elements of the framework and ensure that the defendant's conduct in fact was responsible for the anticompetitive effects.

#### IV. BENEFITS OF PROPOSED FRAMEWORK

The adoption of the causation test I propose would offer several benefits over the current case law, in particular the monopolization and antitrust injury analyses.

##### A. MONOPOLIZATION ANALYSIS

The proposed test would improve monopolization analysis. It offers a framework by which to evaluate and decide among the disparate approaches offered in the *Microsoft*, *Rambus*, and *Broadcom* cases. In a nutshell, it fully supports the appropriate framework the D.C. Circuit introduced in *Microsoft* and disapproves of the court's excessively strict standard in *Rambus*. In addition, for government actions, the framework promises to incorporate analyses similar to those currently considered in private actions in the determination of antitrust injury.

Of the three monopolization approaches, the test would recommend the approach applied in the *Microsoft* case, in which the D.C. Circuit asked if Microsoft's activity was "reasonably capable of contributing significantly to a defendant's continued monopoly power."<sup>116</sup> Such a test forges a connection between conduct and anticompetitive effects that requires an appropriate level of connection between conduct and harm. Not only is this the preferred approach of the three cases, but it also—without even referencing tort law—mirrors elements such as reasonable connection, multiple causation, and antitrust-injury-type analysis recommended by my tort-based framework.

On the other hand, the approach would suggest a more rigorous threshold than the standard articulated in *Broadcom Corp. v. Qualcomm Inc.*<sup>117</sup> In that case, the Third Circuit held that a false promise of FRAND licensing could "harm[ ] the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder."<sup>118</sup>

Merely increasing the likelihood of anticompetitive harm is not sufficient to forge the connection between challenged conduct and anticompetitive effect. Defendant Qualcomm emphasized that the plaintiff failed to introduce evi-

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<sup>116</sup> *Id.* at 79.

<sup>117</sup> 501 F.3d 297 (3d Cir. 2007).

<sup>118</sup> *Id.* at 314.

dence of viable technologies competing with Broadcom's technology.<sup>119</sup> A standard of "increasing the likelihood" does not indicate the level that is ultimately reached; it could, for example, still fall below 50 percent. The proposed test of reasonably leading to monopoly power sets a higher, more appropriate threshold.

At the same time, the framework would suggest a less rigid approach than that offered in the *Rambus* case. In that case, the D.C. Circuit required the FTC to eliminate the possibility that JEDEC would have adopted Rambus's technology even if it had disclosed its patents and patent applications. Adoption of this test would offer several benefits that would have avoided the pitfalls erected by the *Rambus* approach. Given the marked deficiencies of the approach the D.C. Circuit adopted in *Rambus*, the four benefits are worth elaboration.

First, the proposed framework would have constructed a link between the conduct and outcome that was not set at a level impossible to prove. The D.C. Circuit required the FTC to precisely trace what would have happened in a counterfactual world, one marked by Rambus's disclosure. But a plaintiff cannot make this showing, particularly in a setting as complex as standard setting. Courts following my test would not require a plaintiff to undertake the impossible task of eliminating the possibility of an outcome occurring through means other than the challenged conduct. The FTC, for example, would not be required to show, with 100 percent certainty, that Rambus's disclosure would have resulted in JEDEC's selection of a different standard. Instead, it would only need to demonstrate a reasonable connection between Rambus's lack of disclosure and JEDEC's selection of its technology.

Second, the framework would have made clear that the standard applied by the D.C. Circuit in the remedy context was overly strict. The D.C. Circuit relied on the FTC's remedy opinion in concluding that the Commission could "neither confirm nor reject the possibility that JEDEC would have preferred Rambus's technologies over the alternatives."<sup>120</sup> But the FTC needed to clear a higher bar in determining the remedy, showing that the relief imposed was needed "to restor[e] . . . the competitive conditions that would have been present absent Rambus's unlawful conduct."<sup>121</sup>

To support royalty-free licensing, the Commission was required to show that Rambus would not have received royalties in a but-for world. That does

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<sup>119</sup> *Id.* at 316.

<sup>120</sup> FTC *Rambus* Remedy Opinion, *supra* note 19, at 13.

<sup>121</sup> *Id.* at 6. See generally 3 AREEDA & HOVENKAMP, *supra* note 10, ¶ 653b, at 144–45 (noting that causation "is best defined broadly" for injunctions against future conduct but that "more extensive equitable relief" such as divestiture "require[s] a clearer indication of causal connection between the conduct and creation or maintenance of the market power").

not mean, however, that this uniquely high threshold should have been exported to the different determination of whether to find liability in the first instance.<sup>122</sup> For while the Commission might not have been *100 percent confident* that JEDEC would have selected a nonpatented alternative technology absent Rambus's nondisclosure, it could have found a reasonable connection to exist between nondisclosure and selection of the technology. One way of showing this connection is demonstrating that selection was *reasonably likely* to occur as a result of nondisclosure.

Third, as a factual matter, adoption of a reasonable causation standard would have recognized the significant evidence of alternative technologies available to JEDEC. In particular, the FTC pointed to twelve examples of viable, if not preferable, alternatives to the Rambus technologies offered by Samsung, Cray, Mitsubishi, Texas Instruments, IBM, Micron, and Silicon Graphics.<sup>123</sup> It noted that the SSO "gave these alternatives serious, searching consideration"; that JEDEC avoided a Rambus patent on the only occasion in which it knew of one; that JEDEC members were "highly sensitive" to costs"; and that the costs of Rambus's patents could have amounted to several billion dollars.<sup>124</sup>

Fourth, the proposed conception of factual cause would have effectively addressed an issue that was not discussed by the D.C. Circuit but that was raised by Rambus in earlier proceedings. Rambus had argued that Intel's technology choices, rather than Rambus's conduct, caused its monopoly.<sup>125</sup> The Commission concluded that such reasoning would assign to Complaint Counsel "the burden of proving that Rambus's conduct was the *sole* cause of Rambus's monopoly position."<sup>126</sup> Factual-cause analysis would make clear that a reasonable connection between the failure to disclose and monopoly power is sufficient. The FTC should not lose its ability to show that Rambus's failure to disclose caused its monopoly position just because of the independent cause of Intel's technology choice.

In addition to the standard-setting arena, the framework would offer benefits for other dynamic markets. In such markets, characterized by rapid innovation and leapfrog competition, it is difficult to know precisely what would have happened in the absence of a defendant's conduct. For example, in the *Microsoft* case, it was not possible to know with certainty if Netscape or Java would have emerged as competitive threats to the Microsoft operating system.

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<sup>122</sup> The *Microsoft* court similarly found that "Microsoft's concerns over causation have more purchase in connection with the appropriate remedy issue . . ." 234 F.3d at 80.

<sup>123</sup> FTC *Rambus* Opinion, *supra* note 13, at 74–76.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 79.

<sup>126</sup> *Id.*

The framework would make clear that the plaintiff would only need to show, to a level of reasonable certainty, that it would have competed in the market absent the defendant's conduct.

#### B. ANTITRUST INJURY ANALYSIS

The proposed approach also would have benefits for antitrust injury analysis.

First, it would ensure that determinations of antitrust injury do not incorporate excessively high standards. In earlier cases, the Sixth Circuit required plaintiffs to show that the challenged conduct was the "necessary predicate" of the harm.<sup>127</sup> But because it is so difficult to prove the counterfactual of what would have happened absent the conduct, it will almost always be impossible to trace the link between conduct and outcome with certainty. In addition, the necessary-predicate standard that the Sixth Circuit recently followed essentially requires the plaintiff to show that the challenged conduct was the only cause of the injury. The presence of any other causes absolves the defendant of liability.

Such a test is not consistent with tort law, which refuses to bar liability based on the existence of other, non-tortious causes. Antitrust plaintiffs should be able to show causation even if there are other, non-antitrust causes of the outcome.

In *Valley Products Co. v. Landmark*, for example, the fact that HFS terminated Valley's contract should not have barred causation if an illegal tying arrangement also was partly responsible for the harm.<sup>128</sup> And in *Hodges v. WSM, Inc.*, a defendant's ability to independently block plaintiff's tour vehicles should not have eliminated causation where such an action could have been an element of the anticompetitive scheme.<sup>129</sup>

The second benefit is that the framework would ensure that the analysis stays focused on the relationship between the challenged conduct and the effect, rather than between the conduct and other causes. In theory, a requirement that conduct be a "material cause" of the effect could trace the reasonable link I propose in my framework. But such a standard also could be used to impose a showing closer to sole causation that allows defendants to defeat causation based on the existence of other factors. Reminders rooted in factual and legal cause should make it absolutely clear that the plaintiff need

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<sup>127</sup> For another critique of the necessary-predicate test, see Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 ANTITRUST L.J. 697, 737-44 (2003).

<sup>128</sup> 128 F.3d 398 (6th Cir. 1997).

<sup>129</sup> 26 F.3d 36 (6th Cir. 1994).

not show that the conduct is the sole cause of the harm or that it is more likely than other causes.

Third, the framework would ensure that actions brought by the government are subject to the same types of legal-cause requirements as those brought by private parties. Courts developed the antitrust injury requirement in the context of private litigation under Section 4 of the Clayton Act. This application may be expanding, as the court in *Microsoft* explained that the *Brunswick* injury requirement applies “no less in a case brought by the Government.”<sup>130</sup> But to the extent the government does not need to show injury, my causation framework would ensure that the policies supporting antitrust injury apply beyond private parties.

## V. CONCLUSION

The issue of causation does not typically receive much attention in antitrust law. Courts’ focus on other issues crowds out the analysis of causation. This article has sought to fill this gap. It turns to tort law to incorporate two fundamental issues.

First, factual cause traces a justifiable connection between the challenged conduct and anticompetitive effects by requiring the plaintiff to show a reasonable link between the conduct and effects. Such a test buttresses the standard introduced by the D.C. Circuit in *Microsoft* in requiring a reasonable connection between conduct and effects in monopolization cases. It also supports courts that ask if the challenged conduct is a material cause of the plaintiff’s harm.

Second, legal cause examines whether the effects of the conduct fall within the scope of the risks that made the defendant’s conduct an antitrust violation. It ensures that the conduct challenged presents a harm to competition. And it is particularly useful for cases involving the government, which does not need to demonstrate antitrust injury. In short, enhanced attention to issues of causation promises benefits, in particular for monopolization cases and antitrust injury analysis.

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<sup>130</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (2001).