CHAPTER 1

IMPACT:
INJURY AND CAUSATION

Section 4 of the Clayton Act establishes a treble damages remedy for any person who is “injured in his business or property by reason of anything forbidden in the antitrust laws.” While this statutory language has spawned a host of judicial elaborations and limitations, this chapter addresses the minimum requirement for recovery: whether the plaintiff can prove an injury that was caused by an antitrust violation.

Antitrust violations may inflict harm in a number of ways. Collusive or monopolistic practices may increase the price that consumers or businesses pay for what they buy. Suppliers’ refusals to deal may limit or deny access to inputs that businesses purchase to use in their operations or for resale. Businesses also may suffer in their output markets because of violations that limit or foreclose access to customers, such as a competitor’s exclusive contracts, or violations that force reductions in their selling prices, such as a competitor’s predatory pricing or collusion among purchasers. An exhaustive list of how antitrust violations inflict private harm on consumers and commercial enterprises would be a long one.

These various types of harm produce tangible financial consequences. Paying more than they otherwise would for what they buy takes money out of consumers’ pockets and cash out of firms’ coffers. Disruptions in a business’s input and output markets may produce lower revenues or higher expenses, which translate into lower profits and, in some cases, losses, as well as an inability to continue operations. For a start-up business, the consequences may include a failure to begin what would otherwise be profitable operations, or wasted sunk costs. Efforts to counteract or minimize the effect of a violation may entail substantial disruptions and out-of-pocket costs.

1. 15 U.S.C. § 15. If liability can be established, the Clayton Act provides mandatory attorneys’ fees and costs as well as damages. A settlement with one defendant that gives plaintiffs more than the damages they could recover at trial—and thus moots a claim for compensatory damages—does not impair their right to recover attorneys’ fees and costs against another defendant. Funeral Consumers Alliance v. Service Corp. Int’l, 695 F.3d 330, 340-42 (5th Cir. 2012).
Proving Antitrust Damages

These potential financial effects of antitrust violations suggest a comparison: if the violation had not occurred, the plaintiff would be better off than it actually is. This is the familiar “but-for” proposition, and it is the central analytical approach to determining the impact of an antitrust violation. The but-for principle requires one to envision exactly how the world would be different without (“but for”) the challenged conduct. An antitrust plaintiff is harmed by a violation when the plaintiff would be in a better financial position but for the violation; conversely, if the plaintiff would be in the same position without regard to whether the violation occurred, the violation produced no harm.

The but-for principle fuses into one inquiry the concepts of injury and causation, the subjects of this chapter, and the measurement of damages, the subject of Chapters 4 to 6. If the plaintiff’s actual condition is worse than what it would have been in the hypothetical but-for world, a violation can be said to have “caused” an “injury” in but-for terms. Likewise, a damages award measures the extent of the difference in outcomes between the actual world and the but-for world to compensate the plaintiff for this injury. See Chapters 4 to 6 for a more thorough discussion of the

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2. See, e.g., Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433-34 (2013) (damages resulting from an antitrust injury measured by comparison to a “but-for” world that reflects conditions in the actual world in all respects except the alleged anticompetitive conduct); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566 (1981) (damages turn on “what plaintiff’s situation would have been in the absence of the defendant’s antitrust violation”); Reiter v. Sonotone Corp., 442 U.S. 330, 340 (1979) (a price-fixing conspiracy injures a consumer when it causes the consumer “to pay a higher price . . . than it otherwise would have paid”); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561-62 (1931) (the harm of a predatory pricing conspiracy is measured by “the difference between the prices [plaintiff] actually received and what would have been received but for the unlawful conspiracy”); In re Cardizem CD Antitrust Litig., 332 F.3d 896, 904 (6th Cir. 2003); Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 401-02 (7th Cir. 1993); Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 394 (8th Cir. 1987); Argus, Inc. v. Eastman Kodak Co., 801 F.2d 38, 41 (2d Cir. 1986).

3. See, e.g., Warrior Sports, Inc. v. Nat’l Collegiate Athletic Ass’n, 623 F.3d 281, 285 (6th Cir. 2010) (rule changes that never went into effect did not cause or threaten any injury); MetroNet Servs. Corp. v. US West Commc’ns, 329 F.3d 986, 1009 (9th Cir. 2003), superseded on other grounds sub nom. MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124 (9th Cir. 2004).
construction of a but-for world for damages purposes. Despite this interdependence between injury, causation, and damages, courts applying Section 4 of the Clayton Act have developed discrete inquiries under the headings of injury, causation, and damages.4

This chapter will address: (1) the definition of the plaintiff’s injury; (2) the causal test for linking an asserted injury to the alleged violation; (3) the standard of proof for establishing that the violation caused the injury; and (4) the types of proof typically offered to meet the standard. As will be seen, the determination of injury and causation sets the stage for the application of standing and antitrust injury requirements, discussed in the next chapter, and for the quantification of the plaintiff’s damages, the subject of Chapter 4. In addition, some injuries, even if proven to have been caused by an antitrust violation, are not compensable under Section 4 because of standing and antitrust injury requirements, statute of limitations, or because a sufficient quantification of damages has not been supplied. Each of these issues is addressed in greater detail in later chapters. It is important to recognize that there is no need to consider those issues if the plaintiff cannot meet the first bar of showing an injury causally linked to the asserted antitrust violation.

At the outset, it should be noted that courts have not arrived at a uniform vocabulary for discussing these issues.5 This chapter will use “injury” to refer to the detriment asserted by the plaintiff, “causation” to refer to the test for establishing the requisite connection between the injury and the violation, and “fact of damage,” or its more modern equivalent “impact,” to refer to the showing that the violation had a sufficient causal connection to the asserted antitrust violation.


6. Cf. ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES F-2 to F-6 (2005) [hereinafter MODEL JURY INSTRUCTIONS] (employing somewhat different terminology). Some courts use “causation,” “causation in fact,” “injury in fact,” and similar terms to describe what this chapter calls “fact of damage” or “impact.” Since the Supreme Court’s decision in Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977), courts on occasion have used “antitrust injury” to refer to proof of impact as well as the showing that a proven impact properly relates to the basis for antitrust liability. For the sake of clarity, however, the “antitrust injury” concept is better reserved for use only in the latter sense, which reflects the holding in Brunswick. See Ronald W. Davis, Standing
A. Injury

If there were a Hippocratic Oath for antitrust plaintiffs seeking damages, it would be “First, prove your harm.” That process starts with an identification of the injury that the plaintiff will seek to tie to the alleged violation.

In this context, an “injury” refers to a financial detriment suffered by the plaintiff, without regard to its source. The detriment may be defined in a number of ways. One is historical: the plaintiff is paying more than in the past for the product or service in question, or has suffered a decline in revenues, profits, or market share. Another is more broadly comparative: the plaintiff has fared less well than it or a comparable firm has fared in similar circumstances. For a firm that has attempted but failed to enter a market,
the detriment is the failure to start operations, but intent and preparedness to do so must be shown to establish an injury.  

Proof of an actual historical or comparative detriment is not necessary. Because the ultimate test involves the but-for principle, a plaintiff whose performance has improved over the relevant period, or exceeded relevant benchmarks, may nevertheless claim it has been injured because it should have and would have done even better in the absence of the antitrust violation. As proof of its disappointed expectations, the plaintiff may point to real-world projections of success surpassing what it has actually achieved.

As the foregoing suggests, an economic injury is inherently a relative, rather than an absolute, condition. It is insufficient to characterize costs or prices as “high” or sales levels as “low.” A business that has low profits or low market share, for example, may simply be achieving its full potential in a free market. What matters is a comparison of the plaintiff’s current condition relative to some specific baseline.

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10. See, e.g., Zenith Radio Corp., 395 U.S. at 126-29 (unsuccessful entrant made insufficient efforts to enter the restrained markets to prove injury to its “business or property” under § 4); Sanger Ins. Agency v. Hub Int’l, Ltd., 802 F.3d 732, 737-41 (5th Cir. 2015) (potential entrant showed sufficient preparedness to enter market where it had an office and experienced staff, marketed its services to trade association members, made ten sales, and incumbent viewed it as a threat).

11. See, e.g., Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 788-90 (6th Cir. 2002) (increase in plaintiff’s market share during violation does not negate injury); Chiropractic Coop. Ass’n v. Am. Med. Ass’n, 867 F.2d 270, 275-76 (6th Cir. 1989) (increase in chiropractors’ incomes does not defeat proof of injury because they “may have earned much more had AMA not taken the actions in dispute”); Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 991, 993-94 (5th Cir. 1983) (unsuccessful attempt to monopolize may cause injury by delaying successful plaintiff’s rise in market share); Lee-Moore Oil Co. v. Union Oil Co., 599 F.2d 1299, 1304-05 (4th Cir. 1979).


13. See Pollock, supra note 11, at 694-95.
D divorcing an injury from its source, which is the consequence of separating injury and fact of damage, gives “injury” a broad meaning. What the plaintiff defines as its injury may be wholly self-inflicted or the result of obvious market forces affecting all businesses. The plaintiff’s definition of its injury lays the foundation for consideration of such matters. As a practical matter, because the choice of the injury to assert is in the plaintiff’s hands, anticipation of the issues of fact of damage, antitrust injury, standing, and damages to be confronted down the road is critical even in the earliest stages of potential antitrust litigation.

B. Material Cause

Once the plaintiff has defined its injury, the next step is to link that injury to the asserted violation. “To prevail, a private party must establish some link between the defendant’s alleged anticompetitive conduct, on the one hand, and its injuries and the consumer’s, on the other.” The prevailing test of antitrust causation to satisfy Section 4 of the Clayton


15. See, e.g., Marucci Sports, L.L.C. v. Nat’l Collegiate Athletic Ass’n, 751 F.3d 368, 376 (5th Cir. 2014) (affirming dismissal of complaint focused on plaintiff’s own financial losses while its “assertions regarding market injury [injury to competition] are completely speculative”).

16. On grounds of policy and practicality, antitrust courts have shaped the scope of injuries that will be compensable for certain offenses. See Page, supra note 12, at 467-89. A prime example is the remedy for unlawful overcharges, for which the injury is deemed to be the overcharge itself without regard to consequential losses or loss-reducing downstream price increases. See also Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 487-93 (1968). Similar issues have arisen concerning the definition and scope of the injury that tying arrangements inflict on purchasers. Compare Kypta v. McDonald’s Corp., 671 F.2d 1282, 1285 (11th Cir. 1982) (injury based on the combined price of tying and tied products) with Crossland v. Canteen Corp., 711 F.2d 714, 722 (5th Cir. 1983) (injury based on price of tied product, with consequential losses recoverable in “extraordinary” cases). See Chapters 8 and 9 for a discussion of these matters in greater depth.

Act’s “by reason of” requirement for private actions is “material cause,” expressed by some courts in the tort language of “substantial factor” or “proximate cause.” It is routinely held that the violation does not have to be the sole cause of the asserted injury, but formulations of what it means to be a “material” cause vary. The material cause test allows courts to avoid the difficult task of parsing and precisely calibrating the relative

18. Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 114 n.9 (1969); see also Gulf States Reorg. Group v. Nucor Corp., 466 F.3d 961, 965 (11th Cir. 2006) (“Antitrust law does not require that the defendant be the exclusive cause of the plaintiff’s injury but only a ‘material’ one.”); Ezzo’s Investments, Inc. v. Royal Beauty Supply, Inc., 243 F.3d 980, 990 (6th Cir. 2001) (affirming judgment as a matter of law for defendant because plaintiff introduced insufficient evidence to exclude other possible causes and thus did not show that alleged violation was a material cause of its damage).


20. See, e.g., Gulf States, 466 F.3d at 965 (violation need not be “exclusive” cause of injury); MetroNet Servs. Corp. v. US West Comm’ns, 329 F.3d 986, 1009 (9th Cir. 2003) (violation must contribute significantly to the injury, even if other factors in the aggregate amount to a more substantial cause), superseded on other grounds sub nom. MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124 (9th Cir. 2004); Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 401 (7th Cir. 1993) (violation need not be “sole cause of the alleged injuries”); Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1497 (8th Cir. 1992) (insufficient if the violation was “one factor among many, and not a controlling or major factor”); Shreve Equip. v. Clay Equip. Corp., 650 F.2d 101, 105 (6th Cir. 1981) (“[t]o be one of several causes is not enough” (quoting Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 987 (9th Cir. 1979))); see also MODEL JURY INSTRUCTIONS, supra note 6, at F-3 (plaintiff may not recover if its injury “was caused primarily” by factors other than the violation).
significance of multiple causal factors, which can be invoked in virtually every case. The plaintiff need only show “some damage” flowing from the violation and need not “exhaust all possible alternative sources of injury.”

Embedded within the material contribution standard is a but-for inquiry: there can be no contribution to the injury, much less a material one, if the same injury would have occurred in the absence of the violation. As a corollary, material contribution implies that some material portion of the asserted injury would have not occurred if the violation had not occurred. It is that material portion of the injury—the difference between the plaintiff’s actual position and its position but for the violation—that must be quantified in the plaintiff’s damages calculation.

21. *Zenith Radio Corp.*, 395 U.S. at 114 n.9. Inquiry beyond the “minimum point” of proving some damage “goes only to the amount and not the fact of damage.” *Id.; see also* William Inglis & Sons Baking Co. v. Cont’l Baking Co., 942 F.2d 1332, 1339-40 (9th Cir. 1991), *vacated in part*, 970 F.2d 639 (9th Cir.), *amended*, 981 F.2d 1023 (9th Cir. 1992) (the causation requirement can be satisfied by “establish[ing] that the anticompetitive activities were a material cause of some of its injury; whether [plaintiff] proved that [defendant] caused all of the claimed injury is properly an issue affecting only the amount of damages proved”) (internal quotation marks and citation omitted).

This intuitive distinction between fact of damage and the amount of damages may be more difficult to apply when the plaintiff alleges a causal chain between the violation and the injury. For example, the plaintiff may allege that the violation led to the occurrence of an event that was responsible for at least a material portion of the plaintiff’s injury. Because it may not be possible to allege that the violation caused some portion of the event (which would either happen or not happen), to support fact of damage the plaintiff may have to prove that the event would not have occurred but for the violation. See Chapter 2 for a discussion of the complexities of alleged causal chains, which may in some cases lead to a denial of antitrust standing.

22. *See, e.g.*, *In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51, 67 (2d Cir. 2012) (reversing summary judgment for defendant because reasonable jury could conclude that executives’ agreement to follow competitors’ price increases was a material and but-for cause of elevated prices even though lower-level employees who did not know of the price-fixing agreement recommended price increases to defendant’s executive).