Keep Calm and Causation On: Reframing Causation Analysis in Private Section 1 Antitrust Actions at Summary Judgment

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ABSTRACT: A private plaintiff's ability to enforce antitrust violations critically hinges upon proof that the plaintiff's injury was in fact caused by the defendant's antitrust violation—a deceptively simple requirement. This Note traces the history of the treatment of the causation element in private Section 1 antitrust conspiracy claims, as well as the differing approaches courts apply to the causation element when ruling on motions for summary judgment in Section 1 cases. In particular, this Note elaborates on how the adoption and use of the traditional tort law concept of causation in antitrust, as well as the heightened standards found in unrelated antitrust inquiries, has rendered federal courts incapable of properly examining economic evidence of causation. This Note advocates for more procedurally prudent court practices when assessing the causation element in pretrial rulings. Such practices are intended to hold courts accountable for verifying that a Section 1 plaintiff has sound evidence of causation before a case reaches a jury, while also ensuring that courts do not go beyond their role as gatekeepers when ruling on motions for summary judgment.

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I. INTRODUCTION

In the whole of civil litigation, arguably no party has a more difficult time surviving a motion for summary judgment than a plaintiff alleging an injury from a violation of the federal antitrust laws. Although the forms of antitrust violations contain different elements, every private plaintiff must prove that

his or her injury was in fact caused by a defendant's antitrust violation.[1] While establishing causation is universally required in all civil claims, attempting to either prove or assess causation in the antitrust context is particularly challenging. The difficulty of proving a causal connection is most often felt in the context of motions for summary judgment, where even courts appear unsure of what level and form of proof is required to satisfy the causation element. Amidst this confusion, plaintiffs claiming a Section 1 conspiracy may have to overcome an additional burden of proof—namely, that it is more likely than not that the defendant in fact caused the plaintiff's injury.[2]

As such, there is currently a large degree of inconsistent analysis and outcomes in rulings on motions for summary judgment in Section 1 cases. More specifically, two polar-opposite approaches have created a spectrum of inconsistency: under the first, courts simply presume that a plaintiff has sufficiently established a causal connection once the judge deems the other elements can be reasonably inferred; and under the other, courts strictly require a determination as to whether a plaintiff has proved a causal connection to a reasonable certainty.[3]

In early 2014, this inconsistency came to light in a Sixth Circuit decision that reversed a grant of summary judgment against dairy retailers who alleged that a group of milk wholesalers had illegally fixed prices in violation of Section 1 of the Sherman Act.[4] While the district court found that the dairy retailers' expert failed to show that the alleged conspiracy did in fact cause milk prices to increase,[5] the court of appeals found that because there was enough evidence to reasonably infer a conspiracy and an unexplained rise in prices and thus an injury, the price increase "clearly result[ed]" from the price-fixing conspiracy.[6] The defendants petitioned the Supreme Court to

1. *See, e.g.*, El Aguila Food Prods., Inc. v. Gruma Corp., No. 04-20125, 2005 WL 1156090, at *2 (5th Cir. May 17, 2005) ("The fact of damage requirement is one of causation; the plaintiff must show that the defendant's unlawful conduct was a material cause of injury to its business."); Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 931 (4th Cir. 1990) (affirming summary judgment because plaintiffs "failed to show a causal link to anticompetitive activity").

2. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) ("To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984))); *Monsanto*, 465 U.S. at 764 ("[S]omething more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the [two defendants] were acting independently.").

3. *See infra* Part III.

4. *In re* Se. Milk Antitrust Litig., 739 F.3d 262, 268 (6th Cir. 2014).

5. *In re* Se. Milk Antitrust Litig., No. 2:08–MD–1000, 2012 WL 1032797, at *6 (E.D. Tenn. Mar. 27, 2012) ("Further, it appears to the Court that [the plaintiffs' expert] cannot, and did not, measure how prices would have increased in the absence of a conspiracy. He simply compared pre-merger prices to post-merger prices. In short, [the expert's] analysis does not create a material issue of fact on the question of whether the price increases were 'by reason of' an illegal conspiracy in violation of the antitrust laws . . . ."), *rev'd*, 739 F.3d 262 (6th Cir. 2014).

6. *In re Se. Milk Antitrust Litig.*, 739 F.3d at 286 ("[W]hen competition is limited pursuant to an agreement and customers are punished through higher prices, the injury clearly results from anticompetitive conduct.").

hear what they believed was a subtle yet meaningful circuit split—namely, whether a Section 1 plaintiff must present affirmative evidence of causation to survive a summary judgment motion, "or whether a court may instead *presume* causation at [the] summary judgment" stage.[7]

While the Supreme Court denied the cert petition, the issue received a good deal of attention from legal practitioners, scholars, and large companies that are often subject to similar Section 1 claims.[8] In particular, many sought additional guidance on one particular area: Assuming that causation may be presumed in some cases but not in others, how can courts consistently approach causation in antitrust cases at summary judgment?[9]

This Note seeks to answer this question by putting forth certain practices that courts can and should follow at summary judgment when assessing causation in Section 1 cases. Specifically, Part II discusses the mechanics of private antitrust actions, causation as an element of such an action, and the role of summary judgment motions and rulings in Section 1 conspiracy cases. Part III.A first analyzes the major difficulties and misunderstandings courts have historically faced when assessing causation in Section 1 conspiracy cases. Part III.B then analyzes how the historical treatment of causation has led modern courts to adopt two different approaches to causation when ruling on motions for summary judgment—one exceedingly deferential and the other exceedingly strict—before concluding that each approach is flawed in both form and substance. Part IV argues that these approaches can be cured in form through the use of more structured opinion writing that both separates the causation-in-fact requirement from those related to the antitrust standing and injury doctrines and treats causation as an element, rather than a result, in Section 1 cases. Lastly, Part IV asserts that both approaches can be cured in substance through greater reliance on substantive economic principles when evaluating the actual evidence of causation, which would refocus the courts' role as gatekeepers when ruling on motions for summary judgment.

II. THE FUNDAMENTALS AND DEVELOPMENT OF CAUSATION ANALYSIS IN SECTION 1 CASES AT SUMMARY JUDGMENT

Currently, the majority of private Section 1 suits are won by defendants at summary judgment due in large part to the difficulties of proving a Section 1 claim. Although many scholars focus on courts' differing approaches to the conspiracy element in summary judgment rulings, the appropriate treatment

7. Petition for a Writ of Certiorari at i, Dean Foods Co. v. Food Lion, LLC, 135 S. Ct. 676 (2014) (No. 14-110) (emphasis added).

8. *See, e.g.*, Shepard Goldfein & James Keyte, *Dairy Sellers Case Addresses Causation at Summary Judgment*, N.Y. L.J., Oct. 14, 2014, at 3, 8 (analyzing circuit splits regarding the approaches to causation); Vin Gurrieri, *High Court Should Mull Antitrust Causation Rules, Groups Say*, LAW360 (Sept. 15, 2014, 3:25 PM), http://www.law360.com/articles/576886/high-court-should-mull-antitrust-causation-rules-groups-say (elaborating on companies' problems with the Sixth Circuit's opinion).

9. *See* Goldfein & Keyte, *supra* note 8, at 8 (discussing issues regarding courts' inconsistent approaches to causation).

of a Section 1 claim's causation element at summary judgment is equally unclear.[10] The confusion surrounding causation arose out of early 20th-century jurisprudence that adopted a tort-like standard for assessing Section 1's causation element. While generally beneficial, the tort-based standard was unclear for three reasons. First, the tort-based standard lacked consideration of substantive economic principles necessary to assess market-based conspiracy claims.[11] Second, the standard conflated antitrust standing and antitrust injury.[12] Finally, the standard took factual determinations of causation away from the jury by instead assessing causation *as a matter of law* during summary judgment hearings and rulings.[13]

Accordingly, this Part briefly summarizes the purpose of antitrust law and the fundamental elements of a Section 1 claim, deconstructs causation's diminished role in modern antitrust concepts, and explores the relationship between Section 1 claims and motions for summary judgment. Specifically, Part II.A explains the technical requirements for a Section 1 Sherman Act claim brought under the Clayton Act, which allows private parties to bring antitrust claims against alleged antitrust violators. Part II.B then introduces antitrust causation concepts and their inherent difficulties, examines how the introduction of "antitrust standing" and "antitrust injury" compounded these difficulties for the courts and briefly notes the array of standards courts currently apply to causation in Section 1 cases. Finally, Part II.C chronicles the rise of a heightened summary judgment standard of review in Section 1 cases and how it indirectly blurred the courts' view of the causation element even further.

A. *Legal Rules for Bringing and Winning a Private Section 1 Conspiracy Claim*

1. The Clayton Act's Private Right of Enforcement

In 1890, Congress passed the Sherman Antitrust Act to protect economic competition in America.[14] Section 1 of the Sherman Act specifically prohibits activities that restrict commerce and competition in the interstate

10. *See infra* Part II.A–B. For a discussion and critiques of federal courts' inconsistent treatment of the conspiracy element when ruling on motions for summary judgment, see Ara Jabagchourian, *The Misapplications of Matsushita's Heightened Summary Judgment Standard*, 23 COMPETITION 178, 184–91 (2014) (arguing that many lower courts have both inconsistently and improperly applied the Supreme Court's *Matsushita* opinion to Section 1 claims).

11. *See infra* Part II.B.1.

12. *See infra* Part II.B.2.

13. *See infra* Part II.C.

14. *See* Claire Taylor-Sherman, Comment, *A Unified Approach to Predatory Pricing Analysis Under the Sherman and Robinson-Patman Acts:* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, A Case Against the Tide*, 76 MINN. L. REV. 1283, 1305 (1992) ("Courts and commentators agree that Congress passed the Sherman Act to protect competition. The Act's formal title, 'an Act to protect trade and commerce against unlawful restraints and monopolies,' renders this goal explicit.").

marketplace.[15] When the Sherman Act was first passed, only the federal government was capable of suing a defendant for Section 1 violations, but Congress soon disfavored this limited-enforcement regime, particularly in light of "continued growth of big business and seemingly 'soft' judicial enforcement."[16] As a result, Congress passed the Clayton Act to address these issues.[17]

Section 4 of the Clayton Act granted private plaintiffs the right to bring actions against antitrust law violators who have injured a plaintiff's business or property.[18] Section 4 was significant because it gave private parties the ability to sue for "anything forbidden in the antitrust laws," which until then was limited solely to federal enforcement.[19] Because Section 4 plaintiffs have the ability to recover treble damages, courts require that private antitrust plaintiffs make a special showing of "antitrust standing" before sending a treble damages case to a jury.[20] The antitrust standing doctrine was intended to limit both who may recover and what they may recover for,[21] and thus is a far stricter test than constitutional standing.[22] Most notably here, virtually all courts require proof commonly associated with causation in order for a plaintiff to have antitrust standing.[23]

Because most antitrust defendants challenge a Section 4 plaintiff's case under either a 12(b)(6) motion to dismiss or motion for summary judgment, courts must often assess antitrust standing before cases even make it to trial. To meet this strict standing requirement, an antitrust plaintiff must show: (1) that there is a causal connection between the antitrust violation and harm to the plaintiff, and that the defendants intended to cause that harm;[24] (2) the nature of the alleged injury was of "the type [that] the antitrust laws

15. Sherman Antitrust Act, 15 U.S.C. § 1 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .").

16. Taylor-Sherman, *supra* note 14, at 1286 (footnote omitted).

17. *Id.* at 1287.

18. Clayton Antitrust Act, 15 U.S.C. §§ 12, 15 (2012).

19. *Id.* § 15(a); *see also* Sherman Antitrust Act, 15 U.S.C. § 4 (2012) (limiting enforcement of Sherman Act violations to "several United States attorneys").

20. *See* Kevin D. Gordon, Note, *Private Antitrust Standing: A Survey and Analysis of the Law After* Associated General, 61 WASH. U. L.Q. 1069, 1070 n.5 (1984) ("Antitrust standing is similar, but not identical, to constitutional standing. Constitutional standing requirements are easier to satisfy than antitrust standing requirements, which more closely resemble the requirement of proximate cause in torts.").

21. *See* Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 ANTITRUST L.J. 697, 735–36 (2003) ("The material causation requirement long antedates the antitrust injury requirement, and the two are distinct, yet courts regularly confuse the two.").

22. *Id.* at 734.

23. *Id.* at 735.

24. John M. Desiderio, *Private Treble Damage Antitrust Actions: An Outline of Fundamental Principles*, 48 BROOK. L. REV. 409, 411 (1982).

were meant prevent'";[25] (3) the asserted injury was sufficiently direct;[26] and (4) that the plaintiff's claim does not rest on some abstract or speculative measure of harm.[27] The first two elements constitute what is known as the "antitrust injury" doctrine, while the final two elements deal with the proximity of the plaintiff's injury to the antitrust violation's impact on competition.[28]

Because antitrust standing is a threshold requirement, courts must typically determine antitrust standing as a matter of law from the face of the plaintiff's complaint.[29] As discussed in greater detail below, courts making this determination under motions for summary judgment must sometimes scrutinize complex, economics-based pleadings while also determining the basic elements of the actual antitrust claim—the violation, causal connection, and nature of the injury—under summary judgment's more plaintiff-favorable standard.[30]

2. Section 1 Conspiracy Claims

As touched on above, the difficulty of showing the heightened requirements for antitrust standing is particularly felt by plaintiffs suing under Section 4 to recover for a Section 1 violation of the Sherman Act.[31] Section 1 generally proscribes any contract, combination, or conspiracy that unreasonably restrains domestic or foreign trade or commerce.[32]

The Supreme Court defined "conspiracy" in two ways: first, as "a conscious commitment to a common scheme designed to achieve an unlawful objective,"[33] and second, as "a meeting of minds in an unlawful

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 421–30 (discussing the different formulations of antitrust standing alongside the antitrust injury requirement).

29. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584–87 (1986) (describing the courts' role in determining antitrust standing).

30. *See infra* Part II.B.

31. Therefore, a Section 1 plaintiff must put forth evidence of: (1) a conspiracy; (2) an injury to his or her business or property; and (3) a causal connection between the two. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1, 15 (2012) (detailing the requirements of a conspiracy claim); M. Brian McMahon, *Ten-Point Check List for Sherman Act Section 1 Antitrust Complaints*, MBM L. OFFS., http://www.brianmcmahonlaw.com/CM/Client-Bulletin/Ten-Point-Checklist-for-Sherman-Act-Section-1.html (last visited Apr. 23, 2017) (describing "the ten most important requirements for a Section 1 case that should be carefully considered by plaintiffs in drafting and filing Section 1 cases").

32. 15 U.S.C. § 1; *see also* WILLIAM C. HOLMES & MELISSA H. MANGIARACINA, ANTITRUST LAW HANDBOOK § 2:2 (2013–14 ed. 2013) (explaining the components of a Section 1 case, which includes horizontal price-fixing; vertical price-fixing; "[h]orizontal allocations of territories, customers or output"; "[v]ertical territorial, customer, or other nonprice restraints"; "[c]ompetitively motivated group boycotts and concerted refusals to deal"; typing agreements; and exclusive dealing agreements).

33. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)).

arrangement."[34] Typically, Section 1 plaintiffs lack direct evidence of such a "conscious commitment" because these conspiracies are inherently covert. Therefore, plaintiffs must present circumstantial evidence that would allow the fact-finder to properly infer that such an agreement existed.[35] This is difficult to do because oftentimes the available evidence of a defendant's conduct does not provide a basis on which to "infer" concerted action because it is "as consistent with permissible competition as with illegal conspiracy."[36]

In the typical situation where the conspiracy must be inferred, courts often require that Section 1 plaintiffs put forth more facts or higher-quality evidence that can justify allowing the case to proceed. For instance, one court may require a plaintiff show certain "plus factors," in addition to proof that competitors acted in parallel.[37] In others, a plaintiff may be required to put forth greater evidence relating to the *other* elements of a claim—namely, the plaintiff's injury and the causal connection.[38] This inconsistency in approach makes it difficult, if not impossible, to reliably define what is required in terms of proof for *any* of the elements in a private antitrust action. And while many judges and legal scholars have attempted to define both the scope and proper standard for evaluating these "plus factors"[39] and additional showings, there still exists "persistent dissatisfaction with the analytical methods commonly used in antitrust enforcement and litigation to distinguish plus factors in terms of their probative value."[40] In the context of causation, then, it is difficult to distinguish when these extra requirements go towards the conspiracy element or are a basic showing that must be met in order to satisfy the causation element.

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34. *Id.* (quoting Am. Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)).

35. *See* City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 569 (11th Cir. 1998) ("'[I]t is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators,' and from other circumstantial evidence (economic and otherwise), such as barriers to entry and other market conditions." (citation omitted) (quoting Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir. 1991))).

36. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (citing *Monsanto Co.*, 465 U.S. at 764).

37. Cases that rely on evidence of "plus factors" are outside the scope of this Note, but for a thorough analysis of the use of plus factors in Section 1 cases, see William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 395 (2011) ("In antitrust cases, courts permit the fact of agreement to be established by circumstantial evidence, but they have required that economic circumstantial evidence go beyond parallel movement in price to reach a finding that the conduct of firms potentially violates section 1 of the Sherman Act." (footnotes omitted)).

38. *See* Jabagchourian, *supra* note 10, at 186 (recounting the Eighth Circuit's application of the heightened *Matsushita* standard: "The court concluded that there 'is no evidence here that price increases resulted from any price verification' and therefore could not support a conspiracy for the setting of a broad market price. The court went further in its analysis by assuming that the price verification evidence was relevant in establishing a tacit agreement between the competitors." (footnote omitted)).

39. *See* Kovacic et al., *supra* note 37, at 398–409 (discussing different formulations of plus factors in the federal courts).

40. *Id.* at 396.

B. THE EVER-ELUSIVE NATURE OF ANTITRUST CAUSATION

All private antitrust plaintiffs must show an antitrust violation, an injury, and a causal connection between the two in order to recover damages against a defendant.[41] The causal connection requirement has two concurrent standards. First, the plaintiff must show that the defendant's violations were at least one of the causes of the plaintiff's injury in order for a case to continue as a matter of law.[42] Second, the plaintiff must show that the defendant's conduct was the material cause of the injury and therefore justifies an award of damages.[43]

Thus, both the "but for" causation and "material cause" requirements arise as an element of the plaintiff's actual claim, as opposed to a judicial restriction on who should be allowed to sue under Section 4 of the Clayton Act.[44] Even so, the difficult nature of causation has led courts to either confuse these two standards or treat causation as if it is something other than a basic element of a plaintiff's claim.

1. The Abstract Causation Element in Private Antitrust Actions

Because the basic elements of a private antitrust suit are similar to those in tort law, courts have adopted a tort-based framework for analyzing causation in private antitrust actions.[45] However, unlike a basic negligence tort like a car collision, where most injuries are easily verifiable and the cause readily apparent, an antitrust plaintiff cannot even prove an injury was sustained without *first* proving that there was an antitrust violation, let alone a consequential relationship between the two.[46] Thus, scholars have argued that this tort-based approach tends to cause judges to require an excessive amount

41. *See* Earl E. Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 NW. U. L. REV. 691, 692 (1963) (explaining how courts approach antitrust actions under a traditional tort-law framework that includes a breach of duty, cause-in-fact, proximate cause, and an ascertainable injury).

42. Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 437 (2d Cir. 2005); *see also* Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993) (stating that courts "must determine whether the [antitrust] violation was the cause-in-fact of the injury: that 'but for' the violation, the injury would not have occurred"). This requirement is typically referred to as "but-for" causation or "causation in fact."

43. *See* Desiderio, *supra* note 24, at 422 ("[T]he courts have attempted to fashion rules that permit recovery for injuries that are perceived to be the natural and probable effect of a particular violation, but bar recovery for injuries deemed to be too incidental or remote from the immediate and intended object of the unlawful conduct.").

44. *See* ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS: IN A NUTSHELL 465–66 (4th ed. 1994) (explaining policy goals behind antitrust standing).

45. *See* Hanns A. Abele et al., *Proving Causation in Private Antitrust Cases*, 7 J. COMP. L. & ECON. 847, 848 (2011) ("Tort law provides the general conceptual framework for the analysis of causation. It defines the standards of proof, the basic tests for proving causation and estimating damages, the rules on the burden of proof, and the access to information.").

46. Pollock, *supra* note 41, at 693–94.

of causation evidence from private antitrust plaintiffs, in both type and degree, during the early stages of a trial.[47]

Moreover, the inherently close relationship between the violation, causation, and injury often requires that the court determine the existence of one element by considering evidence of the other elements.[48] When analyzing an alleged antitrust violation then, courts do not determine as a matter of law each element in a vacuum. This is why courts ruling on antitrust matters typically read as being highly fluid—seemingly touching on causation, remoteness, market conditions, the violation, injury, and policy concerns in one fell swoop.[49]

Even in older cases where the other elements were more apparent, courts were nevertheless unsure of what level of causation should be required in light of the high degree of potential market influences that may alternatively explain a plaintiff's alleged economic injury.[50] For example, if a plaintiff can conclusively show that two competitors agreed to limit competition and that the plaintiff's business lost profits during this same period, causation still cannot simply be presumed for two reasons. First, the competitors' agreement may have failed to cause its intended anticompetitive effect. Second, other economic factors may have been the true cause of the plaintiff's economic injury. In light of this, early jurisprudence required only "that the illegality is shown to be a *material cause* of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4."[51] That said, courts have interpreted the "material cause" standard very differently, leading to some inconsistent formulations.[52]

Finally, judges had a difficult time intelligibly applying tort law's "cause-in-fact" and "material cause" concepts without first addressing the proper substantive economic standards that are often needed to assess causation evidence in antitrust cases.[53] Because the "material cause" standard fails to

47. *See id.* at 695 ("Such a showing might not be too difficult in some cases (for example, cutting off an established customer), but in many cases demonstrating that the plaintiff would have been *better off* may require a fairly extensive re-construction of history. Trying to figure out, for example, what *would* have happened over a period of several years to an industry price level 'but for' a price conspiracy might involve numerous variables—perhaps almost as many as trying to figure out what would have happened in the Civil War if Grant had not been given command or if the Union had not won at Antietam or Vicksburg." (footnote omitted)).

48. *Id.* at 694.

49. *See id.* at 694–95 (describing the complexities of analyzing market-based antitrust claims).

50. *See supra* note 46 and accompanying text.

51. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969) (emphasis added). Section 4 of the Clayton Act provides private plaintiffs the right to sue a defendant for injuries stemming from the defendant's alleged antitrust violations. *See* Clayton Antitrust Act, 15 U.S.C § 15(a) (2012) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . .").

52. *See* 1 JOHN J. MILES, HEALTH CARE AND ANTITRUST LAW § 2A:6 (2016) (outlining the federal courts' different formulations of causation in Section 1 cases).

53. Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 226 (3d Cir. 2008) ("[B]ecause proof that the concerted action actually caused anticompetitive effects is often

provide any "substantive economic principles for analyzing causation" in antitrust suits, lower courts have adopted their own substantive analysis of causation within the "material cause" framework.[54] As a result, courts have uniformly repeated the "material cause" standard in their analysis of causation in private antitrust cases, but the courts' actual substantive analysis is void of precedential guidance or consistency regarding the analysis of actual causation evidence.

2. Antitrust Standing and its Effect on the Causation Element

At the time the Supreme Court called for stricter antitrust standing requirements, courts could no longer rely on a jury to decide difficult questions of causation. At the same time, the Supreme Court gave little guidance in how to apply antitrust standing, so the antitrust standing doctrine grew haphazardly in the lower courts.[55] Specifically, the lower courts "created an antitrust standing requirement by interpreting the phrase 'by reason of' to imply not only the *fact* of causation but also the presence of *legal* causation."[56] By including such an inherently ambiguous concept as legal causation into the antitrust standing requirement—otherwise known as proximate or sometimes material cause—courts have found it difficult to distinguish the standard of proof of causation needed to pass antitrust standing analysis—"but for" causation—from the standard of proof of causation needed to win a case before the jury.[57]

Indeed, requiring multiple yet distinct causation showings in private antitrust actions compounded the difficulties attending the court's treatment of causation. For instance, in order to win at trial, an antitrust plaintiff must show that a defendant's antitrust violation: (1) was a cause-in-fact of the plaintiff's injury; (2) caused the plaintiff's injury with sufficient directness to give the plaintiff antitrust standing; (3) caused the plaintiff an "antitrust

impossible to sustain, proof of the defendant's market power will suffice." (quoting Gordon v. Lewistown Hosp., 423 F.3d 184, 210 (3d Cir. 2005))).

54. *See* Abele et al., *supra* note 45, at 848. Taken together, the legal rules pose a formidable task for the plaintiff to prove damages in a typical private antitrust case. The burden of proof rests upon the plaintiff; access to crucial information is limited; relying upon hypothetical reference scenarios about complex economic environments necessarily introduces vagueness into the analysis. Traditional tort law itself provides little relief to ease those difficulties because beyond the general rules and principles described above, it remains largely mute on how such challenges can be met. *Id.* at 853.

55. Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 812–13 (1977) (noting how "the body of antitrust standing law now displays a decaying formalism, characterized by contradictory, even arbitrary, applications of rigid rules to cases distinguished on tenuous grounds"); *see also* Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1148 (6th Cir. 1975) ("Some courts, however, have seized upon the statute's causation language ('by reason of') and incorporated it into their notions of standing, thus creating a second obstacle for any prospective plaintiff.").

56. *See* Berger & Bernstein, *supra* note 55, at 810–11. "The sparse legislative history of § 4 hardly suggests a congressional mandate for the legal causation limitation that courts have imposed on the seemingly all-inclusive language of § 4." *Id.* at 811–12.

57. *See id.* at 852–55 (discussing confusion in lower courts regarding causation concepts in antitrust context).

injury," or the violation injured competition generally; and (4) that a defendant's antitrust violation was a "material cause" of their injury.[58] As such, it is often difficult for an antitrust plaintiff to determine both what standard and type of causation proof is required and when.[59]

C. THE RISE OF SUMMARY JUDGMENT IN PRIVATE SECTION 1 CONSPIRACY CASES

Currently, virtually all Section 1 claims are subject to a motion for summary judgment, and a vast majority are decided there as well. This trend began in 1984 with the Supreme Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*,[60] and federal courts have increasingly relied on pretrial determinations—particularly summary judgment—to keep private antitrust cases from reaching a jury ever since.[61] This trend has been particularly felt by plaintiffs attempting to recover for a Section 1 conspiracy after the Supreme Court's decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, where the Court "limit[ed] the range of permissible inferences from ambiguous evidence" of a conspiracy at summary judgment.[62]

1. Summary Judgment Loses its Leniency

Prior to *Monsanto*, the Supreme Court had stated that motions for summary judgment should be granted only "sparingly" in private Section 1 actions because of the inherent difficulties in proving defendants' motive and intent, especially when "the proof is largely in the hands of the alleged conspirators."[63] This disfavor with granting motions for summary judgment was turned on its head in *Monsanto*, where the Supreme Court held "that there must be evidence that tends to exclude the possibility of independent action by the [defendants]."[64] Specifically in one footnote, the Court stated that complaints may have probative value, and plaintiffs maintained the burden of "introduc[ing] additional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy."[65] After *Monsanto* then, a Section 1 plaintiff must go beyond merely presenting a factual basis for inferring a conspiracy and instead put forth evidence that eliminates the

58. *See* GELLHORN & KOVACIC, *supra* note 44, at 465–66 (discussing factors to be considered for antitrust standing analysis).

59. *See id.* at 461–68 (stating that plaintiffs face a heavy burden when bringing a private antitrust claim).

60. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984).

61. FED. R. CIV. P. 56 advisory committee's note to 1937 adoption ("Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact.").

62. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

63. Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962); *see* Virginia G. Maurer, *Antitrust and RICO: Standing on the Slippery Slope*, 25 GA. L. REV. 711, 718 (1991) ("Courts of this era tended to set the parameters of the section 4 treble damages action within the concepts of causation and 'business or property,' disdaining summary dismissal of private antitrust cases." (footnotes omitted)).

64. *Monsanto Co.*, 465 U.S. at 768.

65. *Id.* at 764 n.8.

possibility of other explanations—and created tension between summary judgment's more deferential standard of review.[66]

Just two years later in *Matsushita*, the Supreme Court expanded and incorporated this heightened standard into the summary judgment standard of review.[67] There, the Court noted that the plaintiff's theory of the defendant's 20-plus year predatory pricing scheme was implausible because such a decades-long scheme "simply ma[de] no economic sense."[68] Because the theory was deemed implausible, the plaintiffs were required to "come forward with more persuasive evidence to support their claim than would otherwise be necessary."[69] To justify an inference of a conspiracy then, the Court held that the plaintiff had to put forth "evidence 'that tends to exclude the possibility'" of independent action by the alleged conspirator.[70] Importantly, a plaintiff's evidence would now be deemed insufficient if it was "ambiguous" or "as consistent with permissible competition as with illegal conspiracy," and thereby introduced an entirely new and unique hurdle for Section 1 plaintiffs.[71]

2. Summary Judgment Post-*Matsushita*: Plaintiff's Friend Turned Foe

After *Matsushita*, the general leniency of the summary judgment standard has all but dissolved in Section 1 cases.[72] Although inferences are still technically drawn in the plaintiffs favor, *Matsushita* raised the bar as to what evidence may establish a reasonable inference of conspiracy because "the very definition of reasonableness had been fundamentally altered by *Matsushita*, the history that preceded it, and the consumer welfare 'narrative' of which it was part."[73] In his dissent, Justice White asserted that this new standard

66. That is, the light most favorable.

67. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587.

68. *Id.*; *see also* Susan S. DeSanti & William E. Kovacic, Matsushita*: Its Construction and Application by the Lower Courts*, 59 ANTITRUST L.J. 609, 614 (1991) ("*Matsushita* is particularly noteworthy for its insistence that a plaintiff's claim be 'plausible' in two respects in order to survive a summary judgment motion: (1) it must be plausible that the plaintiff was injured by the illegal conduct, and (2) the claim itself must be economically plausible—i.e., the claim must make economic sense.").

69. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); *see also* DeSanti & Kovacic, *supra* note 68, at 616 n.39 ("[T]o have avoided summary judgment under the conditions of the Supreme Court's mandate, the *Matsushita* plaintiffs apparently would have needed to identify other evidence in the summary judgment record that had not been considered previously—an exceedingly difficult task if one assumes that the plaintiffs had invoked what they believed to be their best evidence to defeat summary judgment in the earlier proceedings.").

70. *Matsushita Elec. Indus. Co.*, 475 U.S. at 588 (quoting *Monsanto Co.*, 465 U.S. at 764).

71. *Id.* (citing *Monsanto Co.*, 465 U.S. at 764).

72. *See* Nickolai G. Levin, *The Nomos and Narrative of* Matsushita, 73 FORDHAM L. REV. 1627, 1631–32 (2005) (discussing *Matsushita*'s impact on private antitrust plaintiffs' general burden of proof).

73. *Id.* at 1632 ("Reasonable, as used in *Matsushita*, no longer referred simply to the case at hand. The term "reasonable" had incorporated . . . a 'case-external' dimension, whereby the reasonableness of any specific inference in a case also depended on how permitting the inference might affect business competition more generally.").

usurped the role of the jury and favors the court's personal "economic theorizing" to views of experts contained in the record.[74]

It is clear that *Matsushita* "fused a change in the *substantive* standard for proving horizontal conspiracy—extension of the 'exclude the possibility' standard from resale price maintenance to horizontal predatory price fixing—with a *procedural* shift from admissibility of evidence to sufficiency of proof of issues essential to antitrust litigation."[75] As a consequence of this conjoined shift, *Matsushita* made it incredibly difficult for courts to untangle when and to what extent this new standard would apply in Section 1 cases.

Matsushita's broad language created many questions: Should judges limit inferences at the summary judgment stage in *all* antitrust cases or only a subset (and, if so, which subset)? When ascertaining whether the evidence "tends to exclude" the possibility of independent action, should the judge weigh the evidence? How are deterrence concerns related to that standard? Does *Matsushita* apply outside antitrust?[76]

More importantly, the Court failed to elaborate a standard for determining whether a claim is "economically plausible" or not.[77] Again lacking substantive guidance, courts have formulated the economic plausibility question with reference to causation: Whether a defendant could and therefore would want to commit an anticompetitive harm.[78] As such, this analysis focuses not on a violation's likelihood of economically injuring the plaintiff, but rather on a violation's likelihood of economically benefitting the defendant.

To analyze this inverted causation requirement, the majority of lower courts apply an economic "screening," which requires a showing by the plaintiff of suitable market conditions for such a violation to occur, but to varying degrees. In predatory pricing cases, for instance, "results in individual cases can vary considerably according to how rigorously individual judges press plaintiffs to define sustainable relevant markets and prove that entry conditions are likely to permit recoupment."[79] In light of the earlier-discussed

74. *Matsushita Elec. Indus. Co.*, 475 U.S. at 603 (joint opinion of White, Brennan, Blackmun, and Stevens, JJ., dissenting); *see also* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 17 n.77 (2004) ("[A]s to *Matsushita*, it is at least debatable whether the 'economic plausibility' of the alleged predatory pricing conspiracy should have been taken from the jury by the mechanism of summary judgment.").

75. Andrew I. Gavil, *After* Daubert*: Discerning the Increasingly Fine Line Between the Admissibility and Sufficiency of Expert Testimony in Antitrust Litigation*, 65 ANTITRUST L.J. 663, 690 (1997) (emphasis added).

76. *See* Levin, *supra* note 72, at 1631.

77. *See* DeSanti & Kovacic, *supra* note 68, at 645–52 (discussing the uncertainty in the lower courts post-*Matsushita* due to the Supreme Court's lack of guidance).

78. *See* Gavil, *supra* note 74, at 15–16 ("The more likely explanation of aggressive pricing behavior, this line of reasoning goes, is that the alleged predator is engaged in competition on the merits . . . . Hence, a plaintiff, public or private, who challenges predatory pricing must make a threshold showing of the claim's economic 'plausibility.'" (footnote omitted)).

79. DeSanti & Kovacic, *supra* note 68, at 648. "Courts that have embraced *Matsushita*'s permissive implications have favored aggressive use of structural screens to determine whether

forms and variations of causation that modern courts must *also* analyze in a Section 1 summary judgment ruling, it is no wonder then that courts rule so inconsistently in these cases.

III. THE TWO PRIMARY STANDARDS—AND CAUSES—OF IMPROPER SECTION 1 CAUSATION ANALYSIS AT SUMMARY JUDGMENT

Following on the heels of a period that simultaneously pushed for greater summary judgment determinations of Section 1 cases and expanded causation into a loosely defined, multifaceted requirement, modern courts have all but lost the proper standard for the causation element at summary judgment. Currently, one can divide federal courts into two main camps regarding what evidence of causation they will require from a Section 1 plaintiff at summary judgment.[80] The first approach is highly deferential, wherein a court will seemingly presume but-for causation exists so long as the court can "reasonably infer" the violation and injury elements as well.[81] In contrast, the second approach requires that Section 1 plaintiffs put forth evidence of but-for causation—or even proximate cause—that passes *Matsushita*'s heightened standard before any such inferences are given.[82] Part III.A first identifies the troublesome origins of the first approach's overly deferential standard. In turn, Part III.B examines and dissects the second approach's mistaken application of the *Matsushita* standard.

A. *THE DEFERENTIAL APPROACH: A HISTORY OF PILING INFERENCE UPON INFERENCE*

The first major approach taken by modern courts is problematically over-deferential. Courts tend to use this approach in Section 1 "per se" violations, such as horizontal price-fixing agreements, because these violations are "'manifestly anticompetitive' or 'would always or almost always tend to restrict

market conditions would permit a predator, regardless of its price-cost relationship, to exploit the demise of firms targeted by a below-cost pricing campaign." *Id.* at 646 (footnote omitted).

80. Although this Note divides the courts into two groups as a function of deference, it would be wrong to imply that each camp also uses the same standard of causation. As touched on above, there are a multitude of causation standards and definitions being used by a court at any one time in the antitrust summary judgment context.

81. *See, e.g.*, *In re* Publ'n Paper Antitrust Litig., 690 F.3d 51, 66 (2d Cir. 2012) ("[I]f an act is deemed wrongful because it is believed significantly to increase the risk of a particular injury, we are entitled . . . to presume that such an injury, if it occurred, was caused by the act."); BCS Servs., Inc. v. Heartwood 88, LLC, 637 F.3d 750, 758 (7th Cir. 2011) ("Once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation.").

82. *See, e.g.*, El Aguila Food Prods., Inc. v. Gruma Corp., No. 04-20125, 2005 WL 1156090, at *3 (5th Cir. May 17, 2005) ("Though jury inferences of causation are in some instances permissible, 'the required causal link must be proved as a matter of fact and with a fair degree of certainty.'" (quoting Alabama v. Blue Bird Body Co., 573 F.2d 309, 317 (5th Cir. 1978))); *In re* Baby Food Antitrust Litig., 166 F.3d 112, 125 (3d Cir. 1999) (applying the second approach and denying summary judgment for insufficient evidence); Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 931 (4th Cir. 1990) (affirming grant of summary judgment and stating that "[w]hile [their] profit margin may have declined, the plaintiffs have failed to show a causal link to anticompetitive activity").

competition.'"[83] Thus, if a plaintiff presents sufficient evidence that allows a court to reasonably infer a per se violation, and an injury that would likely result from such a violation, the court will use these inferences to further infer the necessary causal link between the two elements.

Courts that have adopted the deferential approach often rely on two seminal Supreme Court cases—*Bigelow v. RKO Radio Pictures*[84] and *Zenith Radio Corp. v. Hazeltine Research, Inc.*[85]—to justify these presumptions of causation.[86] This is because both cases held that courts must "observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff" when the plaintiff suffers an economic injury, because such injuries lack "the kind of concrete, detailed proof of injury which is available in other contexts."[87] As a result, the Supreme Court put forth the following standard of proof for causation:

> [I]n the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs."[88]

Thus, by relying on the idea that the known tendency of an act to cause injury is an integral part of causation analysis—a concept of early American tort law[89]—the deferential approach to causation is typically couched wholly in substantive tort principles.[90]

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83. Rossi v. Standard Roofing, Inc., 156 F.3d 452, 461 (3d Cir. 1998) (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

84. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 263 (1946).

85. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123–24 (1969).

86. *See* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566 (1981) (expressing a "willingness to accept a degree of uncertainty in" proof of injury-in-fact given that "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation"); Edwards v. Nat'l Milk Producers Fed'n, No. C 11-04766 JSW, 2014 WL 4643639, at *6 (N.D. Cal. Sept. 16, 2014) (stating how "damages in antitrust cases need not be proven with exact certainty" (citing *Zenith Radio Corp.*, 395 U.S. at 123)).

87. *Zenith Radio Corp.*, 395 U.S. at 123.

88. *Id.* at 123–24 (quoting *Bigelow*, 327 U.S. at 264).

89. The typical elements of a cause of action in tort are: (1) "[a] legal duty to conform to a standard of conduct for the protection of others against unreasonable risks"; (2) "[a] failure to conform to the standard"; (3) "[a] reasonably close causal connection between the conduct and the resulting injury"; and (4) "[a]ctual injury resulting to the interests of another." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 175–78 (1941).

90. *See In re* Publ'n Paper Antitrust Litig., 690 F.3d 51, 66 (2d Cir. 2012) ("Our analysis is enriched and refined by study of causation principles as developed in the tort law context."); *see also* MacDermid Printing Sols., LLC v. Cortron Corp., No. 3:08-CV-01649 (MPS), 2015 WL 251527, at *6–7 (D. Conn. Jan. 20, 2015) (discussing causation element of a tort), *aff'd in part, rev'd in part*, 833 F.3d 172 (2d Cir. 2016). *Bigelow* also cited *Hetzel v. Baltimore & Ohio Railroad Co.*, a tort case, which held:

> [A] plaintiff is not bound to show to a certainty that excludes the possibility of a doubt that the loss to him resulted from the action of the defendant . . . and yet

Although the deferential approach to causation appears more in line with summary judgment principles, it not only is based on an incorrect interpretation of case law, but also improperly relies on presumptions as opposed to facts, and therefore should no longer be used when ruling on motions for summary judgment in Section 1 cases.

1. The Original Distinction Between Causation and Quantification

As stated above, the Supreme Court cases of *Bigelow* and *Zenith Radio Corp.* held that a court may infer the causation-in-fact element of a private Section 1 claim once the plaintiff has put forth enough evidence—viewed in the light most favorable to the plaintiff—to allow the court to infer the other two main elements.[91] This standard was allegedly an extension of *Eastman Kodak Co. v. Southern Photo Material Co.*,[92] and *Story Parchment Co. v. Paterson Parchment Paper Co.*,[93] two Sherman Act cases authored by the Supreme Court decades earlier. In the former case, the defendant attempted to form a monopoly and therefore refused to sell the plaintiff goods that normally made up his stock-in-trade.[94] To quantify his damages, the plaintiff presented evidence comparing his profits before and after the unlawful interference with his business.[95] The Court found this measurement sufficient, holding "that plaintiff's evidence as to the *amount* of damages, while mainly circumstantial, was competent; and that it sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury."[96]

In the latter case, the defendants were competing sellers who allegedly entered into an unlawful conspiracy that required them to undergo destructive pricing competition with the plaintiff.[97] Because the causal

> there might be a reasonable certainty founded upon inferences legitimately and properly deducible from the evidence that the plaintiff's loss was not only in fact occasioned by the defendant's [conduct], but that such loss was the natural and proximate result of such violation.

Hetzel v. Balt. & Ohio R.R. Co., 169 U.S. 26, 38 (1898).

91. *See supra* notes 81–85 and accompanying text.

92. Eastman Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 364–65, 379 (1927).

93. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

94. *Eastman Kodak Co.*, 273 U.S. at 368–69. Notably, this case is an exception to the general rule of Section 1 cases in that there was no issue of potential intervening causes. Typically, the violation impacts a market generally through indicators such as price changes. *See* RICHARD A. POSNER, ANTITRUST LAW 69–79 (2d ed. 2001) (discussing 17 indicators of collusive pricing).

95. *Id.* at 376–77.

96. *Id.* at 379 (emphasis added). On the fundamental distinction between the existence and degree of a defendant-caused injury, see Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 957 (10th Cir. 1959) ("While the court did tell the jury that reasonable possibility of harmful results was sufficient, it did emphasize that such harm must not be 'imaginary or illusive.'"); Flintkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir. 1957) ("[T]he *fact* of injury must first be shown before the jury is allowed to estimate the *amount* of damage." (emphasis added)); and Wolfe v. Nat'l Lead Co., 225 F.2d 427, 433 (9th Cir. 1955) (denying recovery where plaintiff passed the higher price on to his customers without loss to himself).

97. *Story Parchment Co.*, 282 U.S. at 559–62.

connection was less clear-cut here, the plaintiff sought to show his damages by proof of the difference between the amounts actually realized from his business after the conspiracy became effective and what his business would have realized "but-for" the conspiracy.[98] The Court first addressed the cause-in-fact issue, stating that the issue was properly given to the jury because there existed no other economic condition that would have caused the difference in price, as but-for the defendant's unlawful conspiracy, prices would have remained the same.[99]

In turning to the issue of quantification, the Supreme Court noted the distinction of standards between the *fact* of damages (causation) and the *amount* of damages:

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount.[100]

Indeed, the two concepts—one being causation-in-fact and the other the degree of damage caused—are subject to different burdens of proof: While the degree of damages standard is relaxed, the causation-in-fact standard requires that the fact of damages be proven "with reasonable certainty."[101]

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98. *Id.* at 562–63 (1931) ("It is sometimes said that speculative damages cannot be recovered, because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of." (quoting Judge Grover in Taylor v. Bradley, 4 Abb. App. Dec. 363, 366–67 (N.Y. 1868))).

99. *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) ("The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount." (quoting Judge Grover in *Taylor*, 4 Abb. App. Dec. at 367)).

100. *Id.* at 562 (emphasis added). In addition, the Court found

> inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact finding body. Whether the unlawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value, was a question, upon the evidence in this record, for the jury "to be determined as a fact, in view of the circumstances of fact attending it."

Id. at 566 (quoting Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U.S. 469, 474 (1877)). The Court's use of the term "fact of damage" here is synonymous with causation-in-fact.

101. *See, e.g.*, Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 958 (10th Cir. 1959) ("The ascertainment of requisite damages to the appellee's business and property was submitted to the jury on the theory that it was incumbent on the appellee to prove such damages with reasonable certainty, not by guess and conjecture."); Flintkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir. 1957) ("The cases have drawn a distinction between the quantum of proof necessary to show the fact as distinguished from the amount of damage; the burden as to the former is the more stringent one. In other words, the fact of injury must first be shown before the jury is allowed to estimate the amount of damage.").

2. How *Bigelow*'s Misinterpretation of Precedent Formed the *Zenith Radio* Standard

Even with this clear distinction, in 1946 the Court's majority opinion in *Bigelow v. RKO Radio Pictures, Inc.* nevertheless relied on *Eastman Kodak Co.* and *Parchment Paper*'s language discussing the damages-quantification standard to define its above-quoted causation standard.[102] There, the plaintiff was the owner of a movie theatre in Chicago, and alleged that the defendants—distributors of films and some also owners of their own theaters in Chicago—entered into an eight-year conspiracy whereby the theaters owned by the conspirators were able to show movies before independent theater operators.[103] Thus, the plaintiff claimed that its ticket profits would have been higher *but-for* the alleged conspiracy.[104]

The majority began by noting that there was sufficient evidence for the jury to find a conspiracy existed before turning to the question of causation. It then stated that this case was similar to *Eastman Kodak Co.* and *Parchment Paper*, "and that in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business . . . that defendants' wrongful acts had caused damage to the plaintiffs."[105] Yet immediately after this, the majority opinion justified its holding by citing back to the rationale for the *quantification* of damages standard:

> In this we but followed a well-settled principle. The tortious acts had in each case precluded ascertainment of *the amount of damages* more precisely, by comparison of profits . . . with what they would have been in its absence under freely competitive conditions. Nevertheless, we held that the jury could return a verdict for the plaintiffs, even though damages could not be *measured* with the exactness which would otherwise have been possible.[106]

In his well-reasoned dissent, Justice Frankfurter explained how the majority opinion misapplied precedent by confusing the measure of damage and causation-in-fact standards. He first "agree[d] that [*Eastman Kodak Co.*] and [*Story Parchment Co.*] should guide the disposition of this case," but did not believe the majority had observed those cases' "decisive distinction" between causation and damages quantification.[107] Specifically, he wrote:

> The distinction is between proving that some damages were "the certain result of the wrong" and uncertainty as to the dollars and cents value of such injuring wrong. Such difficulty in ascertaining the exact amount of damage is a risk properly cast upon the wrong-

102. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 263 (1946).
103. *Id.* at 253–54.
104. *Id.* at 254.
105. *Id.* at 264.
106. *Id.* (emphasis added) (citation omitted).
107. *Id.* at 267 (Frankfurter, J., dissenting).

> doing defendant. But proof of the legal injury, which is the basis of his suit, is plaintiff's burden. He does not establish it merely by proving that there was a wrong to the public nor by showing that if he had been injured ascertainment of the exact amount of damages would have had an inevitable speculative element to be left for a jury's conscientious guess.[108]

Turning to the facts of the case, Justice Frankfurter explained that the causation issue "necessarily involves substantial proof that the petitioners' business would have been more profitable if the distribution of movie films in Chicago had been a free-for-all"—that is, had it not been for the defendant's illegal conspiracy to "stipulate[] rentals by distributors in furnishing films to exhibitors."[109] He then noted that "[t]he record appears devoid of proof that, if competitive conditions had prevailed, distributors would not have made rental contracts with their respective exhibiting affiliates to the serious disadvantage of independents like the petitioners. They might individually have done so and not have offended the Sherman Law."[110]

Unfortunately, Justice Frankfurter's reasoned dissent apparently fell on deaf ears when, some 20 years later, the Supreme Court affirmed the *Bigelow* standard in *Zenith Radio Corp.*, which now stands as the most cited iteration of the rule today.[111] Yet it is the Court's lesser-cited opinion in *Continental Ore Co. v. Union Carbide & Carbon Corp.* that most highlights the transition in standard as it stands as the bridge between these two cases.[112] In *Continental Ore*, the Court went so far as to sign off on the appeals court's wording of the principle, namely that

> where the plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that the jury . . . *must be permitted* to draw from this circumstantial evidence the inference that the necessary causal relation exists.[113]

The problem is, however, that the "tendency" of a violation to cause a certain type of harm is not circumstantial evidence but rather a presumption or inference. This then allows a plaintiff to avoid putting forth fact-based evidence of causation and instead rely on summary judgment's required presumption in favor of the plaintiff regarding the conspiracy element, thereby violating the classic principle that a presumption or inference cannot

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108. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 267–68 (1946) (Frankfurter, J., dissenting).

109. *Id.* at 267.

110. *Id.*

111. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123–24 (1969).

112. *See generally* Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

113. *Id.* at 697 (emphasis added) (quoting Cont'l Ore Co. v. Union Carbide & Carbon Corp., 289 F.2d 86, 90 (9th Cir. 1961), *vacated*, 370 U.S. 690 (1962)).

be based upon another presumption or inference.[114] As such, the lower courts were left with a standard that allowed the fact-finder to infer a crucial element of any private antitrust claim—causation—in situations where the plaintiff suffered a market-based injury.

3. Too Great of Inferences

Under the minimum standard of evidence used in the whole of civil litigation—preponderance of the evidence—the law does not allow the fact-finder to hold a defendant liable based solely on "speculation." Indeed, a court has instructed a jury to "not pile inference on inference, but may draw an inference *only from facts or circumstances* which [one finds] to have been established by a preponderance of the evidence."[115] Under the modern pleading standards introduced by *Bell Atlantic Corp. v. Twombly*[116] and *Ashcroft v. Iqbal*,[117] federal district court judges may dismiss a complaint if it does not set out a "plausible" claim expressed through factual allegations. These standards were a departure from the rule established in the 1957 case *Conley v. Gibson*, that a court cannot dismiss a complaint for failing to state a claim unless it is apparent that the plaintiff could prove "no set of facts" that would entitle him to relief.[118]

And even beyond this new heightened standard lies the proper standard of review for motions for summary judgment, which requires that district courts determine, in the light most favorable to the non-moving party, whether each element of a claim is plausible, based in the pleaded facts, and presents a "*genuine* issue of *material* fact" for the jury.[119] Conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat a motion for summary judgment.[120] In other words, each element of an action must stand *on its own* as plausible and requires at least some showing of validity so as to pass summary judgment.

Unfortunately, the deferential approach breaks this rule by allowing courts to infer the causation element in private Section 1 actions based on *earlier* inferences of the violation and injury elements and *without* any independent inquiry into the soundness of the plaintiff's underlying economic theory or model.[121] The issue with this approach—especially in

114. *See, e.g.*, Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 884 (8th Cir. 1978) (cautioning against the use of presumptions to prove other presumptions); Standard Oil Co. v. R.L. Pitcher Co., 289 F. 678, 683 (1st Cir. 1923) (stating that inferences cannot provide the basis for other inferences).

115. *See* Juneau Square Corp. v. First Wis. Nat'l Bank of Milwaukee, 475 F. Supp. 451, 460 (E.D. Wis. 1979) (emphasis added) (quoting Transcript of Trial on March 20, 1978, at 10, 561–62).

116. Bell Atl. Corp. v. Twombly (*Twombly*), 550 U.S. 544, 559–634 (2007).

117. Ashcroft v. Iqbal (*Iqbal*), 556 U.S. 662, 677–80 (2009).

118. Conley v. Gibson, 355 U.S. 41, 45–46 (1957), *abrogated by Twombly*, 550 U.S. at 555–56.

119. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

120. *See* Falls Riverway Realty, Inc. v. City of Niagara Falls, 754 F.2d 49, 57 (2d Cir. 1985) (stating general standard of evidence required at summary judgment).

121. *See* Liriano v. Hobart Corp., 170 F.3d 264, 271 (2d Cir. 1999) ("When a defendant's negligent act is deemed wrongful precisely because it has a strong propensity to cause the type of

Section 1 cases—is that the other two elements could not have been earlier inferred "but-for" a presumption that a causal connection was possible, so each element must be analyzed both separately and together.[122] In other words, courts should not be allowed to presume causation based on an earlier, built-in presumption of causation. Indeed, unlike the common tort action,

> all three elements—violation, injury and causation—are really indivisible, and it beclouds the issue to treat them . . . as if the problem were simply to show some harm and then "connect it up" with defendant's violation. That simple approach might be all right for a garden-variety negligence case, but certainly not for most antitrust litigation.[123]

Moreover, the deferential standard stated in *Bigelow*, *Zenith Radio*, and *Continental Ore* applies "only to the comparatively unusual case '*where the plaintiff proves a loss*' as well as violation and needs only evidence of causal relation to 'connect up' the other two elements."[124] While this may have passed muster for fairly clear cause-and-effect antitrust claims before holistic market data was available, this is no longer the case in modern antitrust adjudication.[125] In fact, the very nature of private Section 1 cases *requires* evidence of causation. This is because Section 1 cases possess "the drastic nature of the treble-damage remedy, the unfairness of permitting a windfall to those harmed only incidentally, the danger of a flood of litigation, . . . and the burden that might otherwise be placed on a particular industry."[126] So unlike Section 1 cases brought by the government, where the interests of competition generally are being protected and therefore a violation is inherently injurious, a defendant's violation does not inherently injure a specific plaintiff. This is why intervening causes and market changes must still be at least accounted for or reviewed in summary judgment rulings. Thus, courts must require a standard that adequately addresses the causation element at summary judgment that is consistent with both substantive economic principles and modern pleading standards.

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injury that ensued, that very causal tendency is evidence enough to establish a *prima facie* case of cause-in-fact.").

122. Pollock, *supra* note 41, at 696–700.

123. *Id.* at 694. "Treating 'injury' and 'causation' as if they presented merely factual questions, dealing solely with time and space without reference to values, can only serve to confuse analysis and lead either to the jury's adjudication of a basically legal issue or the failure of both judge and jury to consider that issue at all." *Id.* at 699.

124. *Id.* at 696–97.

125. *See* Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1054–55, 1063 (8th Cir. 2000) (finding summary judgment appropriate, in part, because an expert's damages model was too simplistic and did not account for other market variables); Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 931–32 (4th Cir. 1990) (affirming summary judgment because the plaintiff lacked sufficient economic evidence of causation).

126. Pollock, *supra* note 41, at 699 (footnotes omitted).

B. THE HEIGHTENED APPROACH: AN UNCLEAR VISION OF CAUSATION-IN-FACT

As a result of lower court decisions implementing the "legal causation" language into the antitrust standing test, it is unclear what a Section 1 plaintiff must show in terms of evidence of causation on a motion for summary judgment. This confusion was further leveraged by courts misapplying *Matsushita*'s heightened burden of proof to both the conspiracy *and* causation elements of a Section 1 claim. Indeed, because *Matsushita* stands in stark contrast to summary judgment's typical standard—that courts must "draw[] all reasonable inferences from the underlying facts in the light most favorable to the non-moving party" for the sole purpose of determining if there exists any "genuine issue of material fact"[127]—courts that apply *Matsushita* to more than just the conspiracy element have made it vastly more difficult for a Section 1 plaintiff to survive motions for summary judgment.[128] So in sum, Section 1 plaintiffs face a dual burden to overcome in courts that have adopted the heightened approach: a *heightened* standard of causation under an unconvincing view on antitrust standing requirements[129] and *Matsushita*'s evidence-tending-to-exclude standard.[130]

In *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, for instance, the Seventh Circuit analyzed the sufficiency of the plaintiff's causation evidence presented on a motion for summary judgment under a framework that combined antitrust standing and injury.[131] First, the court concluded that antitrust standing—which included antitrust injury—involved "traditional common-law tort principles" and thus "read a *proximate cause* element into § 4 actions."[132] Then the court seemed to reverse itself when it stated that "courts

127. *See* Spain v. Gallegos, 26 F.3d 439, 446 (3d Cir. 1994) (quoting Petruzzi's IGA Supermarkets, Inc. v. Darling–Delaware Co., 998 F.2d 1224, 1230 (3d Cir. 1993)).

128. Kornegay v. Cottingham, 120 F.3d 392, 395 (3d Cir. 1997) (stating the court's standard of review when ruling on motions for summary judgment); *see also* Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 921 (3d Cir. 1999) ("By subsuming the proximate cause requirement under the concept of standing, the Supreme Court has acknowledged that a private plaintiff might validly plead (and even prove) that a defendant has committed an antitrust violation, but still lack standing to enjoin or remedy this violation if his own injury is too remotely connected to it.").

129. *See, e.g.*, El Aguila Food Prods., Inc. v. Gruma Corp., No. 04-20125, 2005 WL 1156090, at *3 (5th Cir. May 17, 2005) ("[P]laintiffs failed to present substantial evidence demonstrating that Gruma's conduct was a material cause of its actual or threatened injury."); Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 402 (7th Cir. 1993) ("[A]s a matter of law, plaintiffs have failed to show with a fair degree of certainty that the antitrust violation was a material and substantial factor causing their alleged injuries.").

130. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 600 (1986); *see also* Monsanto Co. v Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) ("There must be evidence that tends to exclude the possibility . . . .").

131. *Greater Rockford Energy & Tech. Corp.*, 998 F.2d at 394.

132. *Id.* (emphasis added); *see also* Gordon, *supra* note 20, at 1073–75 ("There are three basic standing tests based on the notion of proximate cause. Courts first developed the 'direct injury' test, which denies standing to plaintiffs not in a direct relationship with the defendant. While the direct injury test does not require privity of contract between the plaintiff and defendant, it is the most restrictive of the antitrust standing tests. . . . Application of this test is difficult because of problems inherent in identifying which injuries are sufficiently 'direct.'" (footnotes omitted)).

must first delineate the *type* of interests protected by the antitrust laws, and second, must determine whether the violation was the cause-in-fact of the injury: that 'but for' the violation, the injury would not have occurred."[133]

Then, upon its actual application of the antitrust injury test, the Seventh Circuit *again* flip-flopped its standard, stating that "plaintiffs have failed to show with a fair degree of certainty that the antitrust violation was a *material* and *substantial* factor causing their alleged injuries."[134] The plaintiff's failure was due in large part to the fact that the defendants had "identif[ied] numerous intervening economic and market factors" that may have caused the plaintiff's injuries, although the court agreed with the plaintiff that the defendant's conduct may have played a role.[135]

The Seventh Circuit's heightened standard for causation stands in contrast to the actual summary judgment standard, which is that courts must "draw[] all reasonable inferences from the underlying facts in the light most favorable to the non-moving party" for the sole purpose of determining if there exists any "genuine issue of material fact."[136] Indeed, the court in *Greater Rockford Energy* appears to have both indirectly applied *Matsushita*'s "evidence tending to exclude" standard to the causation element, and in turn required a heightened standard of causation by way of a questionable reading of the antitrust standing doctrine.[137]

Unfortunately, *Greater Rockford Energy* is not an isolated case of confusion.[138] Indeed, both the antitrust standing doctrine and the *Matsushita* standard caused a great deal of confusion in federal district courts when analyzing the causation element in Section 1 cases under a Rule 56 motion. First, the multi-factored and amorphous antitrust standing test "provide[d] a license to the lower courts to engage in imprecise, outcome-oriented decision making."[139] And with regard to the causation element in particular, the Supreme Court failed to distinguish antitrust injury from both causation and remoteness concerns.[140] This failure to distinguish has led courts to treat a plaintiff's proof of "but-for" causation—the actual showing of causation

133. *Greater Rockford Energy & Tech. Corp.*, 998 F.2d at 395 (citations omitted).

134. *Id.* at 402 (emphasis added).

135. *Id.* at 402, 404 ("Standing alone one of these alternative causes of the plaintiffs' injuries might be insufficient to put causation-in-fact in question.").

136. Spain v. Gallegos, 26 F.3d 439, 446 (3d Cir. 1994) (quoting Petruzzi's IGA Supermarkets, Inc. v. Darling–Delaware Co., 998 F.2d 1224, 1230 (3d Cir. 1993)); *see also* Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 921 (3d Cir. 1999) ("By subsuming the proximate cause requirement under the concept of standing, the Supreme Court has acknowledged that a private plaintiff might validly plead (and even prove) that a defendant has committed an antitrust violation, but still lack standing to enjoin or remedy this violation if his own injury is too remotely connected to it.").

137. *See supra* Part II.C.

138. *See* 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, 293–96 (1998) (discussing various decisions of lower courts that demonstrate the confusion between injury and causation).

139. *Id.* at 293.

140. *Id.* at 293–95.

needed to survive a motion for summary judgment—as *also* requiring evidence regarding proximate cause, antitrust injury, remoteness concerns, or all three.[141]

1. Misapplied Antitrust Standing and Injury Concepts

The confusion over the nature and scope of a framework involving antitrust standing and injury requirements has caused lower courts to require an inappropriately high level of proof of "but-for" causation.[142] Looking again to the *Greater Rockford Energy* case, it is clear that the Seventh Circuit struggled to identify what standard and type of evidence is required to show antitrust injury.[143] Although the court—and many other courts—labels its analysis of causation as a determination of an antitrust injury, the two concepts are actually conceptually distinct.[144] Antitrust injury is in fact "a concept requiring that the plaintiff's injury reflect the adverse effect of the defendant's conduct on *competition*" and thus focuses on the *character* of the plaintiff's injury, as opposed to the existence of a causal connection *between* the injury and violation.[145]

The courts' use of the "proximate cause" language, as it relates to the actual causal connection between an antitrust violation and a plaintiff's injury, is also misplaced.[146] As stated earlier, courts implanted proximate cause into summary judgment's "but-for" causation requirement without any real justification for doing so.[147] So while the proximate cause standard is indeed a factor of antitrust standing, it is best viewed as a question of the remoteness

141. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561–62 (2007).

142. *See supra* Part II.B.2. Several decisions have inappropriately used antitrust standing and antitrust injury concepts to find that complex theories of "but-for" causation cannot support Clayton Act Section 4 claims. For cases confusing antitrust injury and causation, see G.K.A. Beverage Corp. v. Honickman, 55 F.3d 762, 766–67 (2d Cir. 1995); O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc., 36 F.3d 565, 573 (7th Cir. 1994); *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 691 F.2d 1335, 1340–41 nn.6–7 (9th Cir. 1982); Reading Indus., Inc. v. Kennecott Copper Corp., 631 F.2d 10, 14 (2d Cir. 1980); and Bob Nicholson Appliance, Inc. v. Maytag Co., 883 F. Supp. 321, 326 n.7 (S.D. Ind. 1994). For a discussion of "remoteness" concerns as the rationale for finding that a plaintiff lacked evidence of "causation-in-fact" when the plaintiff sought damages for losses suffered when forced to sell, at depressed price, stock in corporation that defendants allegedly boycotted, see Stein v. United Artists Corp., 691 F.2d 885, 895–98 (9th Cir. 1982). For examples of cases confusing antitrust injury and remoteness concerns, see Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1379–80 (7th Cir. 1987); Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 219 (4th Cir. 1987); and Hairston v. Pac.–10 Conference, 893 F. Supp. 1485, 1490–93 (W.D. Wash. 1994).

143. Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 394–95 (7th Cir. 1993).

144. *See* Jacobson & Greer, *supra* note 138, at 289 ("These three criteria—injury in fact, remoteness, and antitrust injury—involve differing legal and policy issues. Each addresses an analytically distinct concern that may, in any given case, preclude the plaintiff's ability to recover.").

145. *Id.* at 290 (emphasis added).

146. For another example of a case applying "proximate cause" inappropriately, see Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910).

147. *See supra* Part II.B.2.

of a plaintiff's injury and involves policy concerns that seek to limit the Section 4's private cause of action.[148] As such, proximate cause in pretrial determinations of a Section 1 claim is a question of whether the plaintiff's injury is too remote from the alleged violation to provide the basis of an action and *not* whether the alleged violation is a substantial or material cause of the plaintiff's injury.[149] Because courts have yet to fully flush out the differences between the many concepts related to causation, however, courts are still mistakenly applying the proximate-cause standard to the causation-in-fact requirement.

2. Misunderstandings of *Matsushita* and Proof of "Economic Plausibility"

"*Matsushita* established that plaintiffs armed with disputed facts but without a plausible theory should not be allowed to proceed to trial."[150] Thus, courts often turn to the underlying economic theory of a plaintiff's claim to determine whether that plaintiff will be required to "come forward with more persuasive evidence to support [the merits of] their claim than would otherwise be necessary."[151]

Historically, this turn to the underlying economic theory in Section 1 cases has caused some federal courts—like the Seventh Circuit in *Greater Rockford Energy*—to then require a heightened showing of causation at summary judgment even when they ultimately find that *Matsushita's* heightened standard does or does not apply:

> Courts that have embraced *Matsushita*'s permissive implications have favored aggressive use of structural screens to determine whether market conditions would permit a predator, regardless of its price-cost relationship, to exploit the demise of firms targeted by a below-cost pricing campaign. The preoccupation within some courts with recoupment flows from *Matsushita*'s admonition that "[t]he success of any predatory scheme depends on maintaining monopoly power

148. Blue Shield of Va. v. McCready, 457 U.S. 465, 477 (1982) ("In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of 'proximate cause.'"); *see also* Jacobson & Greer, *supra* note 138, at 288 ("The courts have not always distinguished properly between causation, remoteness, and true antitrust injury, and have instead tended to lump them all into a broad 'standing' inquiry. The result has been some flawed analyses.").

149. *See* Jacobson & Greer, *supra* note 138, at 288–96 (discussing distinctions between remoteness and causation under antitrust precedent and principles). For an in-depth analysis of the Supreme Court's adoption of the proximate cause language into the antitrust standing doctrine, see Daniel C. Richman, Note, *Antitrust Standing, Antitrust Injury, and the Per Se Standard*, 93 YALE L.J. 1309, 1327–28 (1984), explaining that "[t]he Court's reliance upon [the proximate cause] common-law principle might, in part, be attributed to the many lower-court cases that—lacking a more systematic approach—had drawn upon 'proximate cause' to restrict the sweeping language of section 4."

150. Bruce D. Abramson, *Analyzing Antitrust Analysis: The Roles of Fact and Economic Theory in Summary Judgment Adjudication*, 69 ANTITRUST L.J. 303, 327 (2001).

151. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

> for long enough both to recoup the predator's losses and to harvest some additional gain."[152]

In the Section 1 conspiracy context then, these courts focus on whether the market conditions were favorable enough for the alleged conspiracy to have a high probability of success.[153]

Although the use of structural screens of market conditions is an admittedly important step in determining economic plausibility,[154] it can be stretched too far so as to require that the plaintiff come forward with fact-based evidence of a highly probable substantive causal connection.[155] This was the case in *Argus Inc. v. Eastman Kodak Co.*, where the Second Circuit affirmed summary judgment for the defendant because a reasonable fact finder would "not [be able to find] that Kodak caused [the] damages caused by" the plaintiffs.[156] After reviewing the record below, the court found the plaintiffs' causation claims were "thoroughly implausible," particularly noting that "[the plaintiff's] testimony [on the causation question], unsupported by documentary or other concrete evidence of the supposed lead line effect, is simply not enough to create a genuine issue of fact in light of the evidence to the contrary."[157]

Two antitrust scholars noted that "[i]t is difficult to square the Second Circuit's approach with the standard summary judgment language . . . that '[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.'"[158] Indeed, *Matsushita*'s "economic plausibility" requirement dealt only with the theoretical underpinnings of the violation, i.e., whether it made sense for the defendants to undertake an anticompetitive conspiracy.[159] The economic plausibility inquiry is wholly

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152. DeSanti & Kovacic, *supra* note 68, at 646 (alteration in original) (footnotes omitted) (quoting *Matsushita Elec. Indus. Co.*, 475 U.S. at 589).

153. *Id.* at 646; *see also* Gregory G. Wrobel et al., *Judicial Application of the* Twombly/Iqbal *Plausibility Standard in Antitrust Cases*, 26 ANTITRUST 8, 13 (2011) ("Courts often evaluate market structure and performance in determining plausibility, not only where the plaintiff makes specific factual allegations on these topics, but also where the court relies on economic principles and other analytical methods. Courts have considered market structure and performance as a plus factor for indirect proof of conspiracy, as context for market definition and market power allegations, and to establish standing, causation, and antitrust injury, among other purposes.").

154. For an in-depth discussion on the use of structural screens, see generally Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 244 (1979), proposing that courts only analyze price-cost relationships after first concluding "that there is a reasonable probability that monopoly power has been or could be sustained by the use of price reductions."

155. *See* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401 (7th Cir. 1989) ("Only if market structure makes recoupment feasible need a court inquire into the relation between price and cost."); Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1255–56 (5th Cir. 1988) (using *Matsushita* rationale to require higher evidence of causation to fight implausibility designation).

156. Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 39 (2d Cir. 1986).

157. *Id.* at 45.

158. DeSanti & Kovacic, *supra* note 68, at 643 (alteration in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

159. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

separate from whether or not such a decision actually caused the plaintiff's alleged injury, so a Section 1 plaintiff should not be required to put forth evidence that "tends to exclude the possibility that the"[160] plaintiff's injury was caused by something other than the defendant's alleged violation.[161]

IV. THE PROPER STANDARD OF ANALYSIS: RETURNING TO AN ANALYSIS OF CAUSATION THAT REQUIRES ECONOMICALLY SOUND THEORIES BASED IN FACTS

Courts should return to their traditional gatekeeping function when ruling on motions for summary judgment by (1) undertaking an independent analysis of causation-in-fact;[162] and (2) limiting such analysis to determining only whether the plaintiff's causation theory or model is supported by facts and based on accepted "economic authority" or principles.[163] Specifically, this Part argues that (1) courts should limit their analysis to whether the plaintiff's methodology is economically sound instead of whether the results are legally sufficient; and in turn (2) reduce any risk that the court simply punts on the causation element or conflates "but for" causation with the "material" cause standard.

A. EXPRESSLY SEPARATING CAUSATION-IN-FACT IN SECTION 1 CLAIMS

Causation-in-fact is a required element of a Section 1 claim and thus requires some factual showing at summary judgment to allow the courts to "reasonably infer" its existence.[164] It is also conceptually and analytically distinct from the causation standards required before a jury and in antitrust standing inquiries.[165] Thus, courts that either gloss over the required causation analysis or combine it with other causation requirements fail to both adequately and consistently apply the proper summary judgment standard.[166] This is not to say that other factors and circumstances of the case should not

160. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

161. *See* Yavar Bathaee, Note, *Developing an Antitrust Injury Requirement for Injunctive Relief that Reflects the Probability of Anticompetitive Harm*, 13 FORDHAM J. CORP. & FIN. L. 329, 355 n.205 (2008) ("In order to determine whether a causal nexus exists between the alleged antitrust violation and the alleged injury, courts do not address the probability of the plaintiff's argument that the antitrust laws have been violated.").

162. *See infra* Part IV.A.

163. *See infra* Part IV.B.

164. *See* Bathaee, *supra* note 161, at 346 ("Without the benefit of hindsight to assess the causal connection between an actual injury and the antitrust violation at issue, a court must speculate about the potential effects of a transaction. Further, the prophylactic nature of the antitrust laws makes it more difficult to minimize the speculative analysis. For example, section 7 of the Clayton Act prohibits mergers that lessen competition or tend to create monopolies. Acts that focus on stifling competition can also plausibly point to the natural effects of competitive behavior." (footnotes omitted)).

165. *See* Berger & Bernstein, *supra* note 55, at 817–19 (discussing differences in the causation requirement for legal causation under Section 4 of the Clayton Act and standing).

166. *See* Jacobson & Greer, *supra* note 138, at 302 ("[A] number of courts are using antitrust injury and 'standing' to avoid addressing squarely the question whether the plaintiff has adequately alleged or proven an antitrust claim.").

be considered, but rather that a court should write its ruling or opinion in a way that shows that the analysis of causation as an element of a plaintiff's claim *is separate from* questions of whether the plaintiff has satisfied antitrust standing or possesses an injury that the antitrust laws were intended to remedy.

To avoid these pitfalls, courts should always address and analyze causation-in-fact as a separate element in any Section 1 claim at summary judgment. By avoiding mere lip service to the causation element, even when a reasonable inference of a causal connection is obvious, courts will set clear precedent as to the proper standard of causation. In turn, "[a] separation of the inquiries as to causation, remoteness, and antitrust injury would improve the analysis in cases [which] would also be consistent with the actual holdings . . . of the Supreme Court's decisions."[167]

Courts should also separate Section 4 of the Clayton Act's standing concerns with the actual merits of a Section 1 Sherman Act claim "[b]ecause use of the term 'standing' leads to imprecision, and imprecision can yield incorrect results, analysis would be improved by referring to the specific concepts, i.e., causation, remoteness, and antitrust injury."[168] By expressly addressing the causation element at summary judgment, courts will ensure that plaintiffs will have the full opportunity to present all of their evidence of causation and injury.[169] This approach is most consistent with modern notions of procedural fairness and the role of private antitrust enforcement in "deterring potential antitrust violators and compensating the victims of antitrust violations."[170]

B. RETURNING TO THE GATEKEEPING FUNCTION

When ruling on motions for summary judgment, courts should also avoid weighing the sufficiency of causation evidence and should simply require that a plaintiff present a viable economic theory of causation that is supported by facts. This would help preserve questions of material cause—those that weigh the *degree* of causation—for trial, where they belong.[171] Moreover, because it

167. *Id.* at 295.

168. *Id.* at 295–96 ("Properly viewed, 'standing' is a requirement imposed by Article III of the Constitution, limiting the class of plaintiffs that can sue in any case to those who are within the 'zone of interests' protected by the applicable law. As used in many antitrust cases, however, the term has come to describe remoteness concerns, causation concerns, antitrust injury concerns, or some combination or aggregation of the three." (footnotes omitted)); *see also* Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 437 (2d Cir. 2005) ("[I]t is useful to distinguish the question of whether an antitrust violation occurred from whether plaintiffs have standing to pursue it. To avoid confusing these issues, some courts and commentators have suggested assuming the existence of a violation in addressing the issue of standing.").

169. *See* Berger & Bernstein, *supra* note 55, at 854–55 ("An antitrust plaintiff should not be denied an opportunity to present all its evidence on causation and extent of injury before the court rules on whether its allegations are sufficient as a matter of law; indeed, such a denial is contrary to accepted notions of civil procedure.").

170. *Id.* at 857.

171. *See* Gavil, *supra* note 75, at 666 (noting that since *Matsushita*, the "evaluation of economic testimony [in antitrust cases] has not been accomplished through motions in limine

is altogether rare for a modern Section 1 plaintiff to not rely on expert economic testimony and models, the standard of simply "presuming" causation is both unjust and unworkable in modern antitrust litigation.[172] Thus, a technical approach to causation would also ensure that the plaintiff's claims are fact-based and their causation model is reliable. Because this approach focuses on the procedural requirements of summary judgment and admissibility of causation evidence, it forces courts to adopt the substantive economic principles that are altogether missing (and needed) in their tort-based approach to Section 1 cases at summary judgment.

To return to their roles as gatekeepers then, courts must step away from substantively analyzing the degree of causation shown by a plaintiff's damages model and instead determine the reliability and soundness of such a model's methodology. This would alleviate the problem of courts confusing both procedural and substantive standards regarding causation analysis and evidence.[173] One such way courts can return to their role as gatekeepers is by requiring "appropriate statistical techniques in projecting the but-for world," in order to ensure that such a causal link is at least based on or represented by acceptable data.[174]

By requiring Section 1 plaintiffs to meet a certain economic-quality minimum, the courts' tort-based analysis of causation will then be guided by substantive economic principles without usurping the role of the jury.[175]

1. Focusing on Procedural Requirements Through Economic Substance

The two faulty approaches to causation discussed above both stem from an over-reliance on substantive tort law concepts. The problem with such

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brought under Federal Rules of Evidence 104 and 702, but through motions for summary judgment" (footnotes omitted)).

172. *See id.* at 663 ("Litigating an antitrust case absent the aid of an economist has become an increasingly perilous proposition. . . . [C]oncepts like market power, market definition, predation, efficiency, and even antitrust injury and damages, have become mandatory ingredients of antitrust offenses and defenses across a broad spectrum of allegedly anticompetitive conduct."); Peter K. Huston, *Capitalizing on Judicial Antitrust Experience*, 24 COMPETITION 113, 113 (2015) ("[B]oth antitrust law and economics are moving targets. Cases decided in the past can reflect outmoded thinking, even if they haven't been specifically overruled, creating a minefield for the uninitiated [judge].").

173. *See* Gavil, *supra* note 75, at 668, 688–92 (discussing "the very significant consequences of blurring the line between *Daubert*-admissibility and *Matsushita*-sufficiency").

174. John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 687, 689 (2005) ("Ideally, the damage model would isolate the antitrust offense as the single causal factor accounting for the difference between its actual condition and the but-for condition. Thus, the model must account for other major causal factors that may have affected the index during the relevant period." (footnote omitted)).

175. *See* Abele et al., *supra* note 45, at 853 ("The legal principles for proving causation are too general to be directly applicable to a private antitrust case. Hence, an economic interpretation of these principles is required."); Pollock, *supra* note 41, at 700 ("[I]n a private antitrust action the question of what losses should be made compensable cannot be considered in terms of 'duty' or violation (as in *Palsgraf*). Instead, the question must be considered in terms of 'injury' or 'causation', or *it cannot be considered at all.*").

reliance is that traditional tort law assumes that causation is an "*all or nothing*" issue—"[e]ither the defendant caused the damages or not."[176] This deterministic view of causation, typically found in opinions applying overly strict approaches, "is at odds with the economic complexity of a typical private antitrust damages case and the limited power of analytical tools available for the economic analysis of causation."[177] At the same time, not all analytical tools are created equal: For instance, statistical methods built upon tort law's deterministic view of causation "can only show that 'on average' prices were too high due to an antitrust violation," and therefore provide weak evidence of but-for causation because "[t]he possibility cannot be ruled out that some cases were not affected by damages."[178] Courts using the overly broad approach and thus presuming causation will often overlook such a flawed methodology and thereby compromise their roles as gatekeepers.[179]

To remedy the shortcomings of the broad approach, courts must both understand and apply accepted economic standards and distinctions between methods of modeling and analyzing causation. Economic standards "can provide valuable inputs for the broader legal assessment of causation."[180] For instance, economists universally determine causation in a marketplace through stochastic causation models—ones that take into account unexplained changes in the market under random probability distributions—and therefore courts should also reject deterministic models or approaches to causation.[181]

The Supreme Court has also recently stressed the importance of courts both understanding and relying more on economic standards than case law precedent in the antitrust context:

> We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences. Moreover, because the question in those cases was whether the challenged activity restrained trade, the Court's rulings *necessarily turned on its understanding of economics*. Accordingly, to overturn the

176. *See* Abele et al., *supra* note 45, at 852.

177. *Id.* at 868.

178. *Id.*

179. *See In re* Aluminum Phosphide Antitrust Litig., 893 F. Supp. 1497, 1506 (D. Kan. 1995) ("*Daubert* requires [a court] to act as a gatekeeper, to determine whether [the economic expert's] testimony and report are reliable and relevant under Rule 702."). Under Rule 702 of the Federal Rules of Evidence, federal courts are required to be "gatekeepers" regarding what expert evidence is factually and scientifically reliable enough to be admitted before a jury. *See* FED. R. EVID. 702 advisory committee's note to 2000 amendment.

180. Abele et al., *supra* note 45, at 865 ("[F]or an internally consistent legal and economic assessment of causation, it is very useful to examine the structure and development of the antitrust violation and its impact on markets.").

181. *See id.* at 868 (explaining that the deficiencies of a deterministic approach to causation in private antitrust cases exist because of the "fundamental conflict [that] exists between the analysis of causation in traditional tort law and in economics").

> decisions in light *of sounder economic reasoning* was to take them "on [their] own terms."[182]

Thus, it is most reasonable during summary judgment rulings for courts to restrain their analysis of causation evidence as legally sufficient and focus instead on whether the evidence is economically sound.

2. Untangling "But-For" Causation from Material Cause

Focusing on the economic soundness of a model inherently separates the but-for causation from the material-cause standard. For instance, courts that realize the material-cause question should be reserved for the jury do a good job expressly distinguishing between: (1) a defendant's questioning of an expert witness's *methodology* behind a plaintiff's causation model; and (2) the *degree of the results* of the causation model itself make a point of reserving the latter, which should be reserved for the material cause question before a jury.[183] In turn, these courts view the economic theory behind a plaintiff's causation evidence in conjunction with the plaintiff's other evidence in order to determine whether there is sufficient factual evidence that supports the theory's results.[184] By acting as an economic gatekeeper then, these courts properly assess but-for causation by both making a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid" while also determining whether the expert's model "is sufficiently tied to the facts of the case that it will aid the jury."[185]

One such case that applied substantive economics well is *Pharmanetics, Inc. v. Aventis Pharmaceuticals, Inc.*,[186] where the court found that a plaintiff's

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182. Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2412–13 (2015) (second alteration in original) (emphasis added) (citations omitted).

183. *See In re* Air Cargo Shipping Servs. Antitrust Litig. (*Air Cargo*), No. 06–MD–1175 (JG) (VVP), 2014 WL 7882100, at *42 (E.D.N.Y. Oct. 15, 2014) (focusing on the reasonableness of the causation model's methodology when discussing whether the plaintiff's case survived a motion for summary judgment); *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 100 (D. Conn. 2009) ("The real question before this court is whether the plaintiffs have established a *workable* multiple regression equation, not whether plaintiffs' model actually *works*.").

184. *See In re Air Cargo*, 2014 WL 7882100, at *43 ("Plaintiff's 'plausible' expert testimony, taken together with evidence of simultaneous price increase announcements, structural industry analysis, and plaintiff's argument that increased price announcements bolstered defendants' bargaining position was enough to show common impact." (citing *In re* Titanium Dioxide Antitrust Litig., 284 F.R.D. 328, 345–48 (D. Md. 2012))).

185. Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1055 (8th Cir. 2000) (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 591–93 (1993)).

186. *See generally* Pharmanetics, Inc. v. Aventis Pharms., Inc., No. 5:03-CV-817-FL(2), 2005 WL 6000369 (E.D.N.C. May 4, 2005). For other examples of proper economic analysis in antitrust cases at summary judgment, see, e.g., Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 776–77 (8th Cir. 2004) (finding expert damages testimony inadmissible due in part to its failure to "determine whether other factors, including the emergence of two direct competitors, may have affected" the plaintiffs' rate of growth); Blue Dane Simmental Corp. v. Am. Simmental Ass'n, 178 F.3d 1035, 1039–41 (8th Cir. 1999) (affirming lower court's exclusion of damage estimate that inferred causation element "without considering all independent variables that could affect the conclusion"); and *In re* Aluminum Phosphide Antitrust Litig., 893

damages model failed to present an issue of material fact because it was based on "several assumptions that do not reflect the circumstances of [the] case."[187] The plaintiff had brought a Section 1 conspiracy claim against the defendant, among several other causes of action that were dropped sometime before or during trial.[188] The plaintiff's economic damages expert presented a model of damages for the Section 1 claim "premised upon plaintiff's success on all of its causes of action, and [did] not allow, even in the alternative, for an adjustment of damages to account for those claims no longer remaining."[189] Thus, the court determined that the plaintiff lacked evidence of causation-in-fact to create an issue of material fact based on the expert's faulty approach and not the expert's results themselves.[190]

By limiting causation analysis in summary judgment rulings to a determination that the models of causation being used are economically sound, courts will properly apply a standard of analysis that harmonizes both the concerns of private antitrust and summary judgment standards. So long as courts are "applying economic reasoning to the facts," courts can determine whether a Section 1 plaintiff's causation model possesses the "potential for the available data reliably to explain or account for a relevant factual issue."[191]

V. CONCLUSION

Courts have conflated antitrust standing's legal causation requirement with Section 1's but-for causation requirement, which has led courts to be either too stringent or deferential when analyzing causation. Further, *Matsushita* caused courts to mistakenly require a greater degree of causation evidence than was intended. To remedy these faulty approaches, courts

F. Supp. 1497, 1504–05 (D. Kan. 1995) (deeming a damage estimate unreliable because it failed to account for several important market factors).

187. *See Pharmanetics*, 2005 WL 6000369, at *14 (noting how "although *Bigelow* and *Story Parchment* may provide authority to allow plaintiff to present other evidence 'having any tendency to show damages, or their probable amount' at trial, they do not support admission of [the plaintiff's] damages model in this case" (quoting S. Ry. Co. v. McMenamin, 73 S.E. 980, 982 (Va. 1912))). Furthermore, both *Bigelow* and *Story Parchment* involved fairly standard situations in which a plaintiff's direct competitors caused them to incur commercial damages. *See, e.g.*, Bigelow v. RKO Radio Pictures, 327 U.S. 251, 253 (1945); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 560 (1931).

188. *See Pharmanetics*, 2005 WL 6000369, at *9. The plaintiff's other causes of action included: "unfair competition, false advertising, breach of contract, tortious interference with contract/prospective economic advantage, fraud in the inducement and Unfair and Deceptive Trade Practices." *Id.*

189. *Id.* at *10. "It is [also] the role of the trial judge to ensure that expert testimony 'both rests on a reliable foundation and is relevant to the task at hand.'" *Id.* at *9 (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993)).

190. *Id.*

191. THE SEDONA CONFERENCE, THE SEDONA CONFERENCE® COMMENTARY ON THE ROLE OF ECONOMICS IN ANTITRUST LAW 21 (2006), http://sedona.civicactions.net/system/files/sites/sedona.civicactions.net/files/private/drupal/filesys/publications/2_06WG3Report_0.pdf ("Models used to make predictions or disentangle effects are properly excluded if they fail to account for important causal factors and therefore fail to isolate the cause of interest.").

should avoid simply presuming causation because of the potential "chilling effect" such treatment could have on competition. Courts should also avoid requiring such high standards of causation when ruling on motions for summary judgment so as to avoid usurping the jury's role. A middle-of-the-road standard can be achieved instead by independently analyzing causation under procedural, economic requirements of causation evidence. This approach will likely clarify the approach to be taken when analyzing causation, thus ensuring a substantively and procedurally fair outcome for both Section 1 plaintiffs and defendants.