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# The Expert **Economist**

## An antitrust litigator's guide to working with these crucial witnesses.

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SINCE THE EARLY 1980s, antitrust law has become increasingly dependent on economic theory, which is widely believed to provide the most sound basis for antitrust policy. Today, it is difficult to imagine litigating an antitrust case of any complexity without the use of one or more expert economists.[1]

As a result, familiarity with basic concepts in microeconomics, understanding the appropriate parameters of economic expert testimony, and fitting the facts of a case into a broader economic narrative have become core competencies for the antitrust litigator.

A natural consequence of the marriage between antitrust and economics is that counsel must respond not only to changes in the law, but also to trends and countertrends in microeconomics. While economic theory has become more refined in recent decades (for example, in its treatment of vertical restraints), many core policy questions remain subject to intense ongoing debates, debates that may play out in the courtroom when distinguished economists appear on opposite sides in litigation.

Some question whether the evolution of economic theory has outstripped the capacity of the legal system to create administrable rules. Indeed, there is an inherent institutional tension between the discipline of economics, which continually refines its hypotheses and models, and the law, which seeks to establish settled precedent.[2] In science, the conversation never ends, but in the law it must, if cases are to be adjudicated. Trial courts and juries must draw principled distinctions based on the facts and experts before them.

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As a result, counsel must embrace the confrontation of opposing economic theories as an opportunity for advocacy. In order to best position economics testimony for the courtroom, this article examines the qualities to look for in choosing an expert, the issues to consider in ensuring that your expert will satisfy *Daubert*, and strategies for undermining the narrative force of the opposing expert's testimony.

**Choosing an Expert**

As noted, economists have moved with striking assertiveness to the center of antitrust thinking, and antitrust cases. As a result, the selection of economics experts is among the most important strategic decisions that antitrust litigators will make.

The opinions of economists often contain deeply embedded value judgments that opposing counsel will challenge from every angle. "Economic analyses do not 'come from out of the air.' Rather such analyses are typically based on important assumptions. Those assumptions… should be based on the totality of the evidence in the case."[3]

These unspoken assumptions, which may appear nowhere in the expert's written report, often dictate the economist's conclusions. Counsel, therefore, must consider the bases of an economist's theories, and prior publications and testimony, from every aspect of the case.

Of course, counsel must also consider the audience to which the expert's testimony will be presented. Judges typically are not trained economists, and necessarily apply the tools of a lawyer in evaluating economic testimony. As a result, "the judge's task is less one of economic learning than it is of achieving a perspective emanating from the evidence… Drawing from the evidence and the economic analysis together enables the judge to verify or discredit the parties' contentions and moves the judge to a decision."[4]

Similarly, jurors will (with few exceptions) have little or no prior exposure to economic theory. An expert who cannot use her testimony to educate jurors, therefore, risks losing the very audience she seeks to persuade.

The testifying economist's task, therefore, is principally narrative rather than technical; the ideal expert is one who can present a coherent model in which conflicting factual evidence can be understood and weighed.

An expert economist should possess the qualities of a good narrator, among which are clarity, humility and trustworthiness. The economist whose testimony is too complex may alienate the court and the jury; by contrast, a narrative that is too simple, or that avoids evidence that may be ambiguous or even point toward a contrary result, is vulnerable to easy cross-examination.

Similarly, an expert must maintain a tone that enables the judge or jury to understand him, neither confusing on the one hand, nor condescending on the other. The lawyer's role, therefore, is to guide the economist to a level of exposition that balances a proper appreciation for nuance with a recognition that his testimony must be understandable if it is to aid, and persuade, the trier of fact.

**Meeting 'Daubert'**

Of course, a testifying expert is only useful if she can satisfy *Daubert*.

The *Daubert* analysis embodied in Federal Rule of Evidence 702 applies to the testimony of "scientific, technical, and other specialized knowledge," a formulation that clearly includes the testimony of trained economists. While this is an established legal construct, it is important to remember that economics differs in important ways from the hard sciences.

At the core of the scientific method lies the concept of falsifiability, the notion that a result must be reproducible in order to be valid.[5] Much of the economic theory that underlies core antitrust doctrine does not meet this definition,[6] and *Daubert*'s dependence on testability and error rates as indicia of reliability is therefore problematic in its application to economics. As one experienced trial judge has observed, "economic experts as a whole present a lot of problems for the courts. We have no extremely clear-cut definition of the field of economics, so it is difficult to decide what methodologies are accepted generally within that field."[7]

Economists have moved with **striking assertiveness** to the center of antitrust thinking and antitrust cases, as a result of which the **selection** of economics **experts** is among the **most important strategic decisions** that antitrust litigators will make.

Courts have struggled to establish a *Daubert* approach to economic testimony.[8] They have generally responded to the falsifiability problem identified above by admitting economics testimony in spite of infirmities but examining that same testimony with skepticism upon a motion for summary judgment.

Indeed, summary judgment may present the higher hurdle when the expert's economic theory does not fit the facts of the case. "[O]ne of the hallmarks of antitrust litigation since *Matsushita Electrical Industrial Co. v. Zenith Radio*[9] has been the assertive use by federal district courts of summary judgment under standards that often require the court to second guess, dispute, or otherwise minimize the testimony of an economic expert even though the testimony is fully admissible."[10]

Nonetheless, there may be strategic advantages to challenging an opposing expert with a *Daubert* motion even if the party is more likely to succeed at summary judgment.

First, a trial court's decision to exclude testimony under *Daubert* is reviewed under an abuse of discretion standard, whereas summary judgment is reviewed de novo, thereby providing a distinct appellate advantage to a *Daubert* victory.

Second, even a *Daubert* motion that is ultimately unsuccessful may expose weaknesses or limitations in the expert's testimony that will bear upon the court's summary judgment analysis.[11] Of course, this is by no means to say that a *Daubert* motion is advisable in every instance; a motion not made in good faith squanders judicial resources and may cause counsel to lose credibility with the court.[12]

Counsel should not assume that her expert is invulnerable to a *Daubert* challenge by virtue of the expert's lengthy publications list or his prestigious institutional affiliation. Federal judges are growing more assertive in applying *Daubert* to economics, and recent years have seen the testimony of several economists of unquestioned distinction struck when the court concluded that there was a lack of "fit" between their models and the industry context.[13]

Indeed, expert economists are rarely attacked principally on the basis of their academic qualifications; the decisive question is usually whether the "perfect world" of the economist is sufficiently connected to the facts.[14]

Likewise, counsel should beware the economist who tries to take refuge behind a "standard" technique like regression analysis or a game theory model. An approach that is widely accepted by the expert's peers may nonetheless fail to survive challenge if it is founded on assumptions that are inconsistent with the factual record.

**Tackling the Opposing Expert**

Given the importance of expert economic testimony in an antitrust case, confronting your opponent's expert is as critical as choosing your own. On this task, there is no substitute for preparation.

Thoroughly understanding the opposing expert's report, opinions, bases, prior testimony and publications will best situate a practitioner for undermining the assumptions and conclusions that underlie his testimony. Indeed, cross-examination of an expert economist is often most persuasive when it makes clear that the expert's conclusions are contingent upon assumptions that are not supported by the evidence.

Here the expert is on counsel's ground, since a lawyer who has lived with a case for months or even years is inevitably more familiar with the record than is the economist. This is especially so if opposing counsel has made the mistake of shielding the expert from troubling documents, of choosing an expert with insufficient knowledge of the relevant industry, or not preparing the expert to deal with evidence that undermines his conclusions.

Even if the expert's assumptions are not wholly unsupported by the record, the trier of fact's confidence in the expert's conclusions

may be undermined by a sensitivity analysis that demonstrates that the result of his model would be different if even a single variable were tweaked.[15] A model that is formally elegant but fundamentally fragile is not likely to persuade, especially if there are weaknesses or limitations in the underlying data.[16] While the trial lawyer may dream of exposing the opposing party's expert as a charlatan, the same result can often be achieved by showing that the expert is well-meaning but overreaching.

Counsel should likewise resist the temptation to impress the opposing expert with her mastery of economics concepts. While there may be times that it is necessary to "discipline" the witness by demonstrating knowledge in the field, more often than not confronting the witness on his area of expertise is a mistake, and risks being needlessly overmatched.

Indeed, it is sometimes more effective to feign less understanding that one actually possesses, luring the expert into "educating" you on areas helpful to your case. An appeal to the vanity of the witness is particularly helpful when his or her demeanor betrays his lack of humility or when such an approach causes the witness to underestimate the counsel questioning him.

The **world** of the leading antitrust economists is a **small** one, and experts retained in significant cases have **often confronted one another** in prior litigation or as discussion panelists. **Turn** this **to your advantage** by making your own expert a full participant when preparing to cross-examine the opposing expert.

That said, cross-examination need not be overly deferential. Counsel should not assume that opposing experts will "cancel each other out," and the best approach is to expose as many fundamental flaws as possible.

Finally, in preparing to examine the opposing expert, one should make the fullest use of one's own expert in preparation. The world of the leading antitrust economists is a small one, centered around relatively few academic institutions and consultancies. Experts retained in significant cases have often confronted one another in prior litigation or as discussion panelists. They are likely to understand one another's tendencies of thought, and counsel should seek to turn this familiarity to her advantage through the strategic use of her expert's insight.

Understanding the give-and-take, the standard critiques and the customary responses, among economists associated with different schools can allow counsel to think several moves ahead in cross-examination. One's expert, therefore, should not be limited to offering technical critiques, but should be a full participant in developing cross-examination strategies.

## Conclusion

Economic theory has shaped and strengthened antitrust doctrine over the past 30 years. Antitrust practitioners must embrace this evolution and understand how economics informs, and is informed by, the particular industry context, fact testimony, and documents in a case.

Best used, economic experts are fundamentally narrative, providing a common-sense economic context in which competition can be understood. The economics-literate lawyer can more confidently identify the best expert for the case, ensure that the expert survives *Daubert* and more skillfully undermine the opposing party's expert.

1. See "Interview with Judge Vaughn Walker," 17 Antitrust 26 (2003) ("It's impossible, it seems to me, to prosecute or to defend an antitrust case without significant expert testimony. Even in a garden variety price-fixing case, you have to establish damages, and expert testimony is crucial in that regard. In many other areas, liability hinges on the expert testimony.")

2. "It cannot be helped, it is as it should be, that law is behind the times," Oliver Wendell Holmes, Jr.

3. David Scheffman and Mary Coleman, "FTC Perspectives on the Use of Econometric Analyses in Antitrust Cases," in John D. Harkrider and Daniel Rubinfeld (eds.), "Econometrics," ABA Section on Antitrust Law (2005).

4. Vaughn R. Walker, "Merger Trials: Looking for the Third Dimension," 5 Competition Pol'y Int'l 35, 38-39 (2009). Judge Walker, the chief judge of the U.S. District Court, Northern District of California, was the trial judge in *United States v. Oracle Corp*.

5. "Science is defined by the specification and testing of logical hypotheses. If a hypothesis cannot be falsified, it is, by construction, not science. Implicit in this definition of science is the ability to replicate the result. Thus, a valid scientific result or finding must be reproducible." Id. (arguing game-theoretical constructions associated with Post-Chicago Economics "suffer from an embarrassment of possible equilibria," are not verifiable, and are thus of little predictive value).

6. 5 David Faigman et al., "Modern Scientific Evidence: The Law and Science of Expert Testimony" §45:5 (Vols. 1-5 2007-08, West/Thomson Publishing Co.) ("[E]conomics is much more visibly value laden than the other social sciences…many of the propositions of economics are not falsifiable in the same sense as the propositions of the other social sciences.")

7. "Interview with Judge Kathryn Vratil," 17 Antitrust 19, 24 (2003).

8. "The courts, along with the private bar, are still in the process of learning how to apply the *Daubert* standard. In some cases, the parties do not make the appropriate *Daubert* challenges, allowing what appears to be technically inadmissible evidence into the record." Malcolm B. Coate & Jeffrey H. Fischer, "Can Post-Chicago Economics Survive *Daubert*?" 35 Akron L. Rev. 795, 837.

9. 474 U.S. 574 (1986).

10. 5 David Faigman et al., "Modern Scientific Evidence: The Law and Science of Expert Testimony" §45:2 (Vols. 1-5 2007-08).

11. "Interview with Judge Kathryn Vratil," 17 Antitrust 19, 20 (2003) ("Even a *Daubert* motion that isn't totally meritorious can sometimes serve an incredibly helpful role in helping to narrow the issues or clarify the basis for an expert opinion and facilitate rulings at trial.").

12. Id. at 20-21 ("[O]ften you go to practice seminars… where the speakers counsel a strategy of filing *Daubert* motions…even when they aren't particularly well taken… In my opinion, those are all serious abuses of the *Daubert* procedure. Courts also have a sense of when parties are misusing the *Daubert* process, and it ultimately discredits the party's case.")

13. John E. Lopatka & William H. Page, "Economic Authority and the Limits of Expertise in Antitrust Cases," 90 Cornell L. Rev. 617, 644 (2004) (citing as examples *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1046, 1057 (8th Cir. 2000) and *In re Brand Name Prescription Drugs*, 1999 WL 33889, at *10-11 (N.D. Ill.)).

14. Id. at 644 ("[I]n most antitrust cases the expert's qualifications are not challenged… Most disputes over expertise relate to the proposed testimony itself, which may be inadmissible, irrelevant, or insufficient even if the witness is a distinguished economist.")

15. See "Interview with Judge Vaughn Walker," 17 Antitrust 26, 29 (2002) ("[A] technique I have seen… puts up on a screen a standard multi-variable regression model. And by picking and choosing variables you can change the results quite dramatically… It shows how you can—I'll hesitate to say manipulate—but how you can change the conclusion that you've drawn based on these assumptions.")

16. Counsel need to be alert to the phenomenon of data-dredging, the selective use of data to yield a predetermined result. Nobel Laureate in Economics Ronald Coase is often quoted as observing that, "If you torture the data long enough, Nature will confess."