ECONOMIC ANALYSIS IN CRIMINAL ANTITRUST VIOLATIONS: A REVIEW OF RECENT MATTERS INVOLVING EXPERT ECONOMIST TESTIMONY

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The use of economic analysis as a tool to assess issues in per se criminal antitrust violations has been a source of debate. On one hand, there have been questions as to whether economic testimony is relevant for the inquiry into the existence of a per se illegal agreement. However, while economics cannot measure the occurrence or existence of an illegal action, it can provide insight into potentially relevant questions. For example, economics can provide a statistical basis for analyzing circumstantial evidence on industry characteristics, or whether industry outcomes are consistent with collusion or competition. This article provides a review of recent cases that involved expert witness testimony to highlight the types of economic analysis that have been offered.

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I. ROLE OF ECONOMICS IN CRIMINAL ANTITRUST VIOLATIONS

During the 2022 American Bar Association's Antitrust Law Section Spring meeting, officials from the Department of Justice ("DOJ") indicated and outlined several initiatives reflecting a commitment to more aggressive criminal enforcement. Until recently, most criminal cases brought by the antitrust authorities involved per se violations of Section 1 of the Sherman Act related to price fixing, bid rigging, and market allocation. The crux of these criminal cases historically hinged on proof of an agreement.

Given the DOJ's more aggressive stance on criminal antitrust liability under the Sherman Act, the role of the expert economist in criminal antitrust cases is likely to similarly expand. The starting point for an assessment of whether, or if, any expert (economic or otherwise) may testify is found in the Federal Rules of Evidence, Section 702 which requires:[2]

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.[3]

Debate often emerges about the role of economists in the antitrust criminal context and whether economic testimony is relevant in a per se case given the facts, circumstances, and underlying evidence brought forth by the government. One point of view is that economic testimony is unnecessary for a per se case — the mere fact that a case is alleged to constitute a per se violation implies that no economic analysis is required to assist the finder of fact. For example, in a recent criminal case involving alleged price fixing and bid rigging in foreign exchange markets, a DOJ motion *in limine* argued that the alleged conspiracy was not defensible through procompetitive justifications, the inquiry would end if the jury found that there was a horizontal price-fixing or bid-rigging agreement.[4] Similarly, in a recent criminal case involving alleged no-poach agreements in the health care industry, the DOJ moved to exclude Defendant's expert, again citing the supposed irrelevance of his opinions to a per se case.[5]

Economists do not have specialized expertise that would allow them to "diagnose" or "detect" the existence of a cartel; in other words, an economist cannot interpret communications and documents to conclude with certainty that an agreement existed between competitors. As Nobel Laureate George Stigler stated, even in the face of a written anticompetitive agreement and meetings between competitors:

> "A reasonable man, and often even an economist, would say that the documents seemed to present a conclusive proof of collusive behavior. The economist, however, would have no professional basis for reaching such a conclusion: he has no special skill in reading documents and relating them to actual behavior."[6]

2 See Federal Rules of Evidence, Rule 702, Testimony by Expert Witnesses, accessed at https://www.law.cornell.edu/rules/fre/rule_702.

3 "Faced with a proffer of expert scientific testimony under Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate." *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).*

4 See Memorandum of Law in Support of The United States' Motions in Limine, *United States of America vs. Akshay Aiyer, US District Court for the Southern District of New York, Case No. 1:18-cr-00333 (JGK)*, pp. 25-26.

5 See United States' Motion for a Daubert Hearing and to Exclude Certain Opinions, March 24th, 2022, *United States of America vs. DaVita Inc. and Kent Thiry, US District Court for the District of Colorado, Criminal Action. No. 21-cr-00229-RBJ*. Specifically, DOJ argued "but whether conspirators "have power to control the market" is irrelevant to a per se case."

6 Stigler, George J., "What Does an Economist Know?" Journal of Legal Education, Vol. 33, No. 2 (1983), p. 311.

Further, economists have no specialized training or expertise in interpreting the meaning or frequency of communications as evidence of a cartel. There is no scientific method by which an economist can quantify the frequency or content of communications that would be sufficient to establish collusion. This type of "conspiratology" is beyond the scope of proper economic analysis and potentially excludable under Daubert.[7]

What then is the role of an expert economist in criminal antitrust cases? While economists cannot provide supportive inference of collusion on its face, economic tools can be used to test whether certain elements or outcomes are consistent (or inconsistent) with collusive behaviors. Economists can offer statistical tools and economic analyses designed to test hypotheses about the economics of a well-defined relevant antitrust market. For example, an area of economics called econometrics provides statistical methods that can be used to test whether prices were artificially elevated around a certain time or whether price increases were consistent with competitive market conditions. These analyses, if properly done, can quantify the amount of price elevation, if any, and distinguish price elevations due to changes in supply and demand factors from elevations due to unexplained factors that might be attributable to collusion. Another field of study in economics called industrial organization offers economic theories that can also be utilized to study whether existing market conditions may allow collusive behaviors to arise and lead to pricing outcomes that are consistent with an anticompetitive agreement. The scope of the analysis depends in part on the availability of data, the questions at issue, and the facts of the case.

Recent cases have developed a track record of the types of opinions that economic experts have offered, or were prepared to offer, in matters involving criminal antitrust violations. This information is included in (i) disclosures from Defendants about the expected topics that an expert economist will testify to, (ii) Plaintiffs' motions to exclude the testimony of Defendants' economic expert (and corresponding oppositions made by Defendants), and (iii) court orders responding to these motions to exclude. The following discussion reviews the types of economic analysis proffered in these matters and examines the sets of questions that can be informed through the use of economics.

II. *UNITED STATES v. DAVITA INC. AND KENT THIRY*

In the matter of *United States v. DaVita Inc. et al.*, Defendants were indicted on charges of an agreement to allocate an employee market by means of "not soliciting" each other's employees.[8] In response, Defendants put forward an economic expert to opine that "economic evidence does not support the existence of a labor market allocation agreement."[9] The economist's opinions were summarized such that:

(a) Employee separations and employee compensation did not align with the expected effect of a labor market allocation agreement.
(b) Employees "received offers for promotions, increased compensation and/or different job responsibilities" contrary to the allegations.
(c) There was a "lack of economic incentive" to enter into market allocation agreements "making the existence of a labor market allocation agreement less likely."
(d) Recruiting and hiring was consistent with independent self-interest and "thus provides no economic basis to infer a labor market allocation agreement."
(e) Limitations on recruiting and hiring may help to promote or allow other joint economic activity.

In their motion to exclude, the government stated that Defendants "offer[ed] impermissible testimony concerning purported procompetitive justifications of the agreement — testimony that is prohibited in per se cases," particularly concerning the Defense expert's opinion on potential ancillary benefits.[10] In their later motion for a Daubert hearing, the government's reasoning focused on (i) the reliability of the methodologies taken to assess employee turnover rates and compensation amounts, (ii) that the assessment of actual employee outcomes (such as movement, promotions, or raises) does not assist a jury beyond what it is "capable of digesting on its own", (iii) the fact that the conduct "could

7 For example, pointing to trade associations as a means for collusion suffers from what economists call the "characterization" problem: "…[C]onsider the ubiquitous display of information and knowledge among competitors at a trade show or convention. There may be no evidence that any detailed discussion on price or output took place or that any of the meetings had an effect on a firm's decisions. Much of the practice in Section 1 litigation revolves around a plaintiff's attempt to characterize facts like these as if they were equivalent to an express illegal cartel "agreement". See Andrew M. Rosenfield, Dennis W. Carlton, & Robert H. Gertner, "Communication among Competitors: Game Theory and Antitrust Application of Game Theory to Antitrust," George Mason Law Review, Vol. 5, No. 423 (1997).

8 Indictment, July 14th, 2021, *United States of America vs. DaVita Inc. and Kent Thiry, US District Court for the District of Colorado, Criminal Action. No. 21-cr-00229-RBJ.*

9 United States' Motion to Exclude Defendants' Expert, Exhibit A, December 17th, 2021, *United States of America vs. DaVita Inc. and Kent Thiry, US District Court for the District of Colorado, Criminal Action. No. 21-cr-00229-RBJ.*

The expert's economic analysis purportedly relied on employee separation rate data, DaVita-specific compensation data, national compensation and turnover benchmarks, and LinkedIn data, amongst an assessment of communications, documents, labor market conditions, and economic theory.

10 United States' Motion to Exclude Defendants' Expert, December 17th, 2021, *United States of America vs. DaVita Inc. and Kent Thiry, US District Court for the District of Colorado, Criminal Action. No. 21-cr-00229-RBJ.*

have" been in Defendants independent self-interest was irrelevant and speculative, and (iv) that "competing with hundreds of other organizations" and whether Defendants "have power to control the market" is irrelevant to a per se case.[11] Ultimately, the United States' motion to exclude was "taken under advisement."[12]

The Defense's economist ultimately testified at trial to answer the question of whether the economic evidence "supports the idea" that the Defendants allocated a market for employees.[13] For example, economic evidence was offered in the form of a comparison between the number of employees hired by one of the alleged conspirators prior to the alleged agreement, as compared to the number of hires after the alleged agreement.[14] The economist concluded that there was no general change in the hiring pattern. This type of analysis is potentially informative if it can aid in assessing the direct or circumstantial evidence surrounding an alleged labor market allocation.

III. *UNITED STATES v. JAYSON JEFFREY PENN, ET. AL.*

In the case of the *United States v. Penn, et. al*, the Defendants were indicted on allegations of a conspiracy involving "bid rigging" to fix prices for broiler chicken products.[15] Again, the Defense offered economic expert testimony that the government moved to exclude. The expert's opinions included a study on "indicia of price fixing" such that they "do not point to the existence of the conspiracy," economic tests to identify supra-competitive pricing, whether pricing was consistent with the alleged conspiracy, competitive dynamics in the industry, and the "economic role of information exchanges."[16]

The court characterized the governments' objections into two parts: first, opinions that "do not supply sufficient bases and reasons," and second, opinions that "would not assist the trier of fact."[17] The court concluded that three of four opinions were sufficient. This included the fact that:

- The bases of economic indicia, how the indicia were to be measured, and how they relate to price fixing was sufficiently disclosed.
- That "benchmarking analyses" comparing prices at issue to prices that were not alleged to have been affected (using data on buyers and sellers of comparable products at various periods in time) should not be excluded.[18]
- That the government failed to identify how testimony on "competitive dynamics" was "irrelevant because price-fixing is per se illegal."

The fourth opinion at issue, the economic role of information exchanges and their occurrence even in the absence of price fixing agreements, was in part excluded. Specifically, the court found that any opinion that agreements to fix prices were "rational, beneficial, or promote competition" would be excluded as the government had charged a per se violation. However, the court acknowledged that the opinion was offered as part of the Defense's theory that there was in fact no agreement and would be admissible for this purpose.

IV. *UNITED STATES v. CHRISTOPHER LISCHEWSKI*

United States v. Christopher Lischewski provides an example of a per se antitrust allegation involving price fixing in which the government received guilty pleas from cooperating witnesses. The allegations included a conspiracy to fix "list prices" of packaged seafood products (e.g., canned tuna). In this matter the Defense brought an expert economist to provide testimony examining whether the alleged conspiracy affected

11 United States' Motion for a Daubert Hearing and to Exclude Certain Opinions, March 24th, 2022, *United States of America vs. DaVita Inc. and Kent Thiry, US District Court for the District of Colorado, Criminal Action. No. 21-cr-00229-RBJ.*

12 Coutroom Minutes, Daubert Hearing re: United States' Motion for a Daubert Hearing and to Exclude Certain Opinions, April 11th, 2022, *United States of America vs. DaVita Inc. and Kent Thiry, US District Court for the District of Colorado, Criminal Action. No. 21-cr-00229-RBJ.*

13 Transcript Trial to Jury – Day Seven, April 12th, 2022, p. 1294, *United States of America vs. DaVita Inc. and Kent Thiry, US District Court for the District of Colorado, Criminal Action. No. 21-cr-00229-RBJ.*

14 *Id*, at p. 1326.

15 Superseding Indictment, *United States of America vs. Jayson Jeffrey Penn, et. al, US District Court for the District of Colorado, Criminal Action. No. 20-cr-152-PAB.*

16 United States' Motion to Exclude Certain Expert Testimony and to Order the Defendants to File a New Expert Disclosure for Non-Excluded Testimony, Exhibit B, July 26th, 2021, *United States of America vs. Jayson Jeffrey Penn, et. al, US District Court for the District of Colorado, Criminal Action. No. 20-cr-152-PAB.*

17 Order on the United States' Motion to Exclude Certain Expert Testimony, October 15th, 2021, *United States of America vs. Jayson Jeffrey Penn, et. al, US District Court for the District of Colorado, Criminal Action. No. 20-cr-152-PAB.*

18 The court ordered that the Defendants supplement this disclosure to identify the outcomes and opinions reached.

the net prices charged to customers, and whether the prices paid by the retail customers were consistent with the conspiracy. Despite the existence of the guilty pleas, the Defense argued that the economic evidence could show "evidence of actual competition in the form of 'the prices actually charged'" to assess whether the Defendant "actually entered into an agreement to fix prices."[19]

In this case, the Defendant's economic expert was allowed to offer economic analyses that compared the patterns of list prices in relation to received net prices. Economic evidence derived from available data was used to argue that, even in the context of a per se conspiracy to fix list prices, there was no correlation between the alleged supra-competitive list prices and the net prices charged to retail customers. Additionally, the economist relied upon economic theories in the study of markets with a small number of competitors (commonly referred to as an "oligopoly") similar to the canned tuna market, and the interdependent strategies of the competitors in such markets that might lead to parallel pricing or seemingly related behaviors. The Defendant's expert further studied economic data and concluded that price outcomes were not consistent with a conspiracy to collude and fix net prices.

V. A REVIEW OF THE TYPES OF ECONOMIC ANALYSES OFFERED IN CRIMINAL ANTITRUST PROCEEDINGS

Economic testimony can aid the Court or jury by providing scientific evidence that can inform the relevant question at hand — such as whether there is economic and/or statistical evidence that an antitrust violation was committed. The tool set used by economic experts provides a framework to propose a testable hypothesis and — based on facts, data, and economic theory — provide the results of that test. Whether or not the court concludes that the economic evidence is admissible or can be presented in front of a jury depends on whether the opinions that the economist is prepared to offer meet the requirements deemed necessary by the Federal Rules of Evidence.

Recent cases have highlighted the types of analysis that have been offered by expert economists and allowed by Courts in criminal antitrust cases. The expert testimony that has been offered often includes an assessment of a firm's pricing data (or wage data in the context of labor market allocation allegations) and how or if the trends in that data changed between the conduct period and a benchmark period(s). Testimony has also included other analyses, such as analyses of the relationship between firm cost data and price levels, employee movements between firms under alleged "non-solicitation" provisions, and assessments of economic conditions in a given industry.

While there is a viewpoint that economic testimony in per se matters will not assist a jury beyond what it is "capable of digesting on its own," we have described several high-profile cases from recent years that did include economic experts. Depending on the specific facts of the case — and the methodologies and analysis offered by the expert — this type of testimony can be useful for a jury in assessing evidence and making its determination. Given the government's stated commitment to "aggressive" antitrust enforcement and the complexity of assessing companies' economic behavior, the increased role of economic testimony in criminal antitrust proceedings, including those with alleged per-se conduct, is likely to continue.

19 Defendant Christopher Lischewski's Opposition to the Motion to Exclude Testimony of Defendant's Economic Expert Witness, November 4th, 2019, *United States of America vs. Christopher Lischewski, US District Court for the Northern District of California, Case No. 3:18-cr-00203-EMC.*

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