

**Daubert and Rule 702 in the Context of Antitrust  
Economic Experts: A Practitioner's Guide**

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**I. INTRODUCTION**

Few practice areas are more dependent on expert economic testimony than antitrust. It is the job of every antitrust litigator not only to present expert economic testimony regarding key elements of a claim and to insure that such testimony will survive an adversary's *Daubert* attack, but to fashion appropriate *Daubert* challenges to opposing economic experts.<sup>4</sup>

In this paper we (a) review the general principles under *Daubert* and Rule 702 for appraising the admissibility of an expert report by an economist, (b) comment briefly on some procedural issues, (c) discuss the principles and some illustrative cases relating to challenges to expert testimony in four areas of substantive antitrust interest (product market definition, monopoly/market power, conspiracy, and damages), and (d) provide some general advice for the proponent of expert testimony.

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## II. THE *DAUBERT*/ RULE 702 STANDARD

Although *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), ushered in the modern era of challenges to expert testimony – and in particular, required trial courts to serve as “gatekeepers” to keep problematic expert testimony from the jury – the best starting point for appraising “*Daubert* motions” in the antitrust context is Federal Rule of Evidence Rule 702, as opposed to *Daubert* itself. As amended in 2000 following the Supreme Court’s *Daubert* decision, Rule 702 states in pertinent part:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In short, Rule 702 requires that testimony from a qualified expert must be both relevant and reliable to be admissible.<sup>5</sup>

The relevance prong of Rule 702 is fairly straightforward. Proffered evidence can satisfy this prong in two distinct ways. First, and most commonly, the evidence may “assist the trier of fact to . . . determine a fact in issue.” Such evidence would be relevant in the traditional sense of Federal Rule of Evidence 401 in that it makes some fact at issue either more or less likely. Alternatively, the proffered testimony may be relevant in the looser sense that it helps the trier of fact “to understand the evidence.” Thus, background testimony, such as an explanation of technology at issue in a case or the way an industry operates, may satisfy the relevance prong in this manner even though the expert does not express views on any disputed facts. *E.g.*, *Fresenius Med. Care Holdings, Inc. v. Baxter Int’l, Inc.*, No. 03-1431, 2006 U.S. Dist. LEXIS 90856, at \* 4-5 (N.D. Cal. 2006); *see also* Fed. R. Evid. 702 Advisory Committee’s Note (citing as illustrations testimony about “the principles of thermodynamics or bloodclotting, or [] how financial markets respond to corporate reports”).

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<sup>5</sup> “Expert testimony is also cabined by [Federal Rule of Evidence] 703 (which sets forth appropriate bases of expert opinions); FRE 704 (which prohibits ‘ultimate issue’ testimony, or testimony as to Defendant’s state of mind); and FRE 705 (which governs the disclosure of facts underlying an expert opinion). [A]n expert’s testimony, like all other testimony, must be relevant to the matter at hand pursuant to FRE 401, and more probative than prejudicial or confusing pursuant to FRE 403.” *United States v. Schiff*, 538 F. Supp. 2d 818, 833 (D.N.J. 2008).

The reliance prong of Rule 702 comprises the three numbered clauses at the end of the excerpt quoted above. In essence, an expert's testimony must be based on adequate facts, it must be based on a reliable type of methodology, and that methodology must be applied in a reliable way. These elements are somewhat interrelated, and they can be illustrated as follows. If an expert uses regression analysis to estimate lost sales that a plaintiff claims as damages, the reliability inquiries (put in a different order for clarity) would be (1) whether regression analysis (or perhaps a particular type of regression analysis, say a probit model) is deemed a reliable method in the field of economics (either in general, or for this particular type of problem), (2) whether the economist used reliable data in performing the regression analysis, and (3) whether the economist applied regression analysis in a reliable way (e.g., whether the form of the equation and the choice of dependent and independent variables satisfy the norms of the field of economics).

Focusing on Rule 702, rather than *Daubert* itself, avoids some of the confusion that might otherwise arise from applying certain language in *Daubert*, which concerned an experimental science, to the (mostly) non-experimental social science of economics. The *Daubert* Court articulated the following factors to be considered in weighing the admissibility of expert testimony:

1. Whether the expert's methods have been tested;
2. The potential or probable rate of error associated with the testing method selected by the expert;
3. Whether the expert's method has been subjected to publication and/or peer review;
4. The "existence and maintenance of standard controlling the technique operation"; and
5. Whether the method selected by the expert is generally accepted in the relevant expert community.

Not surprisingly, these criteria relate most directly to the type of experimental science that the Court confronted in *Daubert*.

For all of its rigor, economics is a social science rather than a physical science, and perhaps more importantly it is (for the most part) non-experimental. The five factors from *Daubert* enumerated above apply nicely if the proposed testimony is that of a biologist opining on whether a particular substance is a carcinogen. There are well established norms for such experiments, and the five factors would certainly help a court determine whether the proffered testimony constituted junk as opposed to real science. Notably, the underlying scientific work would have in most cases been performed before and independent of the litigation; i.e., the inquiry really would not be whether the expert testimony was good science, but whether the ongoing scientific work was good science. In contrast, economic testimony in an antitrust case will almost always reflect new work done for the litigation itself; it is very unlikely, for example, that there would have been ongoing research regarding the boundaries of a particular product market or whether there was collusion in a particular industry. Peer review and publication of the new work will rarely occur during the litigation itself. Moreover, because a substantial amount of expert economic testimony does not involve the type of hypothesis testing that lies at the core of most experimental science, the type of error measurements used in the experimental sciences are largely inapplicable to economic testimony.

This is not to say that almost all economic testimony fails under *Daubert* and Rule 702 because it does not meet the rigorous standards of experimental science. Nor do economists get a pass and are somehow excused from establishing reliability because the five *Daubert* rules do not fit them well. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), made clear that the general teachings of *Daubert* apply to all expert testimony, not just to testimony about pure science. Thus, even economic testimony must be appraised for reliability. As *Daubert* itself made clear, the five indicia of reliability it identified were not always either necessary or sufficient criteria for reliability. Indeed, Rule 702 does not itself use the five *Daubert* factors, providing instead a general requirement of reliability, followed by the Advisory Committee's recitation of *Daubert's* five factors coupled with a reminder that the list is not exhaustive or necessarily applicable. Several courts have uncomfortably attempted to appraise economic testimony using the five *Daubert* factors, but the better and increasingly prevalent approach is simply to test whether the proposed testimony satisfies the professional standards of the field of economics rather than those of the experimental sciences.

### III. PROCEDURE

The proponent of expert testimony bears the burden of establishing, by a preponderance of the evidence, that it satisfies the requirements of Rule 702. *Daubert*, 509 U.S. at 592; *Schiff*, 538 F. Supp. 2d at 834; *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001). Thus, the burden does not depend on who bears the burden of proof on the substantive issue addressed by the testimony. For example, while the plaintiff typically bears the burden of proving the scope of the relevant market, the defendant bears the burden of proving that its proposed expert testimony regarding relevant market definition satisfies Rule 702.

Most trial courts have, if sometimes reluctantly, accepted the gatekeeper role that *Daubert* imposed on them. They can no longer dismiss challenges to admissibility as a matter of course on the theory that the challenge goes to the weight rather than the admissibility of evidence. While some challenges do in fact go only to the weight of the evidence, the trial court is required to appraise whether the alleged shortcomings render proposed testimony unreliable under Rule 702 and to exclude any testimony found to be unreliable. That said, some courts have been relatively hesitant to exclude economic testimony. Indeed, some courts as a matter of practice actively discourage the filing of *Daubert* motions and leave weighing an expert's testimony to the trier of fact. *See, e.g., California v. Infineon Techs. AG*, No. 06-4333, 2008 U.S. Dist. LEXIS 81251, at \*38-39 (N.D. Cal. Sept. 5, 2008) (“Resolving the disputes raised by competing economic experts in complex antitrust cases such as this one is no easy task. The court is mindful, moreover, that in analyzing the experts' arguments, the court cannot weigh in on the merits of plaintiffs' substantive arguments, and must avoid definitively resolving disputes that amount to a battle of expert testimony.”); *In re Sulfuric Acid Antitrust Litig.*, 446 F. Supp. 2d 910, 925 (N.D. Ill. 2006) (“Matters of accuracy and truthfulness are generally left for trial. Vigorous cross examination, presentation of contrary evidence and careful jury instructions, the Court in *Daubert* said, are the traditional and appropriate means of attacking shaky but admissible evidence. The regime established by *Daubert* and confirmed by *Kumho Tire* [] was not intended to supplant the tools and techniques of the adversary system.”) (citations omitted); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 384 (S.D.N.Y. 1996) (“[W]e need not consider [defendants' expert affidavit] in detail, as it is for the jury to evaluate conflicting evidence and determine the weight to give the experts' conclusions.”).

*Daubert* challenges are frequently multifaceted, challenging (often on different grounds) several different portions of an expert's proposed testimony. Courts, accordingly, will often exclude some but not all of an economic expert's testimony. *E.g., American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031 (N.D. Cal. 2001); *SMS Sys. Maintenance Servs., Inc. v. Digital*

*Equip. Corp.*, 188 F.3d 11 (1st Cir. 1999). The trial court has substantial discretion regarding the procedure it employs to appraise Rule 702 motions. Although a court will often hold an evidentiary hearing, such hearings are not required. *See Clay v. Ford Motor Co.*, 215 F.3d 663, 667 (6th Cir. 2000)

#### **IV. MARKET DEFINITION**

##### **a. Legal and economic context**

1. Many, if not most, antitrust cases are effectively won or lost based on market definition. Given its inherently economic nature, market definition is almost always determined largely if not exclusively based upon competing testimony from expert economists. Thus, challenges to testimony of economic experts regarding market definition are often outcome determinative in an antitrust case and require the most careful consideration by counsel who make or oppose such motions.
2. The purpose of the market definition exercise is to identify a collection of products (or services) that compete with each other to a sufficiently strong degree that they may meaningfully be deemed a “market” within which market share and market power may be appraised. Products that are excellent substitutes for each other (*e.g.*, perhaps similar in usage, price, and quality) are included in the same market, whereas products that are only weak substitutes for each other are not. Most likely, different brands of cola would be in the same market. In contrast, fine wine and cola are probably not in the same market despite the fact that both can be used to quench thirst and provide a satisfying flavor. Whether root beers and colas are in the same market is a closer call. The market definition exercise requires drawing a boundary that includes products that compete heavily with one another

but that excludes other products that compete somewhat less intensely with those in the market.<sup>6</sup>

3. There is some disjunction between leading Supreme Court decisions on market definition and the modern approach to market definition reflected in the enforcement agencies' horizontal merger guidelines and adopted by most testifying economists.
4. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956), held that product market definition is determined largely by the reasonable substitutability of goods from the point of view of the purchaser, a proposition in accord with modern legal analysis and economic analysis. *DuPont* went further and emphasized the significance of the cross-elasticity of demand between different products, which is the ratio of the percentage increase in the sales of Product A to the percentage increase in the price of Product B. The Court observed that a high cross-elasticity tends to indicate that products are good substitutes and thus in the same market, whereas a low cross-elasticity suggests that they are not in the same market. *DuPont*'s discussion of cross-elasticity of demand ignored several critical issues. First, it did not indicate how high the cross-elasticity of demand needed to be to justify grouping two products in the same market. Second, it did not address whether there is any such magic number, or whether instead cross-elasticity of demand needs to be included with other data (e.g., profit margin) to define a market. Third, the opinion is silent about the complications arising from the fact that the cross-elasticity of demand between A and B is not necessarily the same as that between B and A; i.e., many customers may switch to B if the price of A increases 10%, whereas few customers may switch to A if the price of B increases by 10%.
5. Many economists testifying about market definition will refer conceptually to cross-elasticity of demand but will

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<sup>6</sup> Relevant markets, as the name implies, should be drawn with an eye toward the complained-of conduct, and the effects thereof. Similar factual circumstances may require rather different relevant markets, depending on the allegations in the complaints.

not actually use it in their formal analysis. For example, many economists will adopt the market definition approach of the horizontal merger guidelines which focuses on the own-elasticity of a hypothetical monopolist rather than on the cross-elasticity of competing products. See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 ("Merger Guidelines). Under this analysis, products are included in the same market if and only if a hypothetical monopolist who controlled those products would find it profitable to increase their price by a small but significant amount (typically 5-10%). This approach does not necessarily involve direct computations of cross-elasticities. It is, however, consistent with *duPont* in that (1) it seeks to identify reasonable substitutes and (2) it implicitly considers (despite not actually calculating) cross-elasticity of demand in that it inquires about the percentage decrease in output of all of the products in the market in response to a percentage increase in their price. An economist who proposes to apply the Merger Guidelines analysis should be prepared, in response to a Rule 702 challenge, to show both that the approach is widely accepted among industrial organization economists and that it is conceptually similar to, although mathematically different from, a pure cross-elasticity of demand approach.

6. *Brown Shoe Co. v. United States*, 370 U.S. 292, 325 (1962), introduced the notion that there may be submarkets within a relevant product market, and it indicated that they may be identified "by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Most economists would probably agree that to the extent the practical indicia listed in *Brown Shoe* are relevant, they are relevant to defining markets (rather than defining only submarkets). For example, cola and red wine are

probably in separate markets, rather than being in separate submarkets within a relevant market comprising all consumable liquids, or all wet things. Though the *Brown Shoe* practical indicia arguably are not necessary for purely economic analysis of a market, a testifying economic expert who does not discuss such factors should be prepared to explain why her analysis does not explicitly follow the *Brown Shoe* approach.

7. Conversely, the Merger Guidelines and contemporary economic analysis reflect a submarket concept not addressed in *Brown Shoe*. The theory is that sales to a particular group of customers can be deemed a separate market if those customers have a less elastic demand for the product (i.e., are less willing than other customers to switch to another product in response to a price increase), if those customers can be identified and charged a different (i.e., higher) price than other customers, and if arbitrage will not subvert the ability to price discriminate. An expert testifying about such a price discrimination market should be prepared to demonstrate its common use in modern economics and antitrust and show how it is consistent with the basic principles underlying the Supreme Court's decisions: identifying a group of products within which market power can be exercised.

**b. Illustrative cases**

1. In *McLaughlin Equipment Co. v. Newcourt Credit Group, Inc.*, No. 98-0127, 2004 U.S. Dist. LEXIS 13939 (S.D. Ind. 2004), the court, in granting summary judgment to the defendant based in part on the plaintiff's failure to prove a relevant product market, excluded an economist's expert affidavit on the grounds that it was "unsupported by sufficient facts or data and lacking in a reliable methodology." *Id.* at \*17. The court emphasized that the expert's conclusions were based on the allegations in the complaint, deposition testimony that a customer "might" not find certain products to be substitutes, and her opinion that customers were locked in to one brand, rather than on an "investigation of the market" or an "analysis of any

market data to support her opinion that [customers] did not change brands.” *Id.* at 19.

2. In *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*, 311 F. Supp. 2d 1048, 1120 (D. Colo. 2004), the court rejected a challenge to the plaintiffs’ expert economist. The defendants argued that the expert, who had concluded that the market comprised concerts by rock artists, “failed to utilize economic criteria in making a distinction between rock and non-rock artists,” pointing out that he had failed to calculate cross-elasticity of demand and had relied on his subjective views regarding music, an area in which he was not expert. The court noted that calculation of cross-elasticity of demand was not always required in market definition and that the expert had relied on “other economic data, including industry materials, pricing data, and public recognition of the market, all of which have been held relevant to determining the scope of the market.” The court also observed that the expert had relied not on his subjective beliefs about the music business, but on information gleaned from industry publications.

## **V. MARKET/MONOPOLY POWER**

### **a. Legal and economic context**

1. Market power and monopoly power are issues that present complications because of the ambiguity of the legal definitions and the tension between the legal and economic definitions. The Supreme Court has famously defined monopoly power as the ability “to control prices or exclude competition.” *DuPont*, 351 U.S. at 391. That definition raises several questions, including what degree of control over price is required and whether the ability to exclude some firms from competing confers monopoly power absent an ability to control price. Moreover, the term “monopoly power” does not have a generally accepted definition in economics.
2. “Market power” is often defined in economics as the ability to price in excess of marginal cost – a definition

that would apply to most sellers of most products. The case law generally adopts a narrower definition of the term, e.g., limiting it to cases where a firm can profitably price above a competitive level for a substantial period of time. However, given that economics teaches that in the perfectly competitive model, price equals marginal cost, it appears that this case law definition of market power is tantamount to a durable or substantial amount of what economists define as market power. It is not clear how, if at all, that differs from the legal definition of *monopoly* power. Thus, experts need to tread carefully amid this strange admixture of legal and economic definitions of these related concepts.

**b. Illustrative cases**

1. In *McLaughlin*, the court excluded the plaintiff's expert's opinion that the defendant had market power because, inter alia, the plaintiff did not establish that "anecdotal deposition testimony" that some customers would pay more for the defendant's product than for other products and the fact that products were differentiated were "the type of data or information reasonably relied upon by economists in forming opinions . . . about market power." 2004 U.S. Dist. LEXIS 13939, at \*26. The court also noted that the expert defined market power as the ability to price above marginal cost, whereas the case law defines it as "the ability to raise prices above those that would be charged in a competitive market." *Id.* at \*24. The court's discussion here was somewhat oblique, given that in a perfectly competitive market price is equal to marginal cost, and thus the expert's definition was not, on its face, inconsistent with the definition the court quoted from the case law. The court may have meant to distinguish between the perfectly competitive markets defined in basic economic texts and the imperfectly competitive markets of somewhat more advanced economics and the real world where virtually no products are priced at marginal cost, but it did not do so explicitly.
2. In *U.S. Information Systems, Inc. v. International Brotherhood of Electrical Workers*, 313 F. Supp. 2d 213,

228-29 (S.D.N.Y. 2004), the defendants moved to exclude expert testimony to the effect that a defendant union had market power as evidenced by its pricing its bids above the competitive level. The court was not persuaded by the defendants' argument that the expert "did not use regression analysis or any other econometric technique," but merely took the arithmetic average of a number of bids. The court pointed out that the expert applied economic theory to the results of his (admittedly simple) calculations, and it concluded that "the statistical analysis may not be as complex as the multiple regression analysis utilized in cases cited by the defendants, but the value of [the] testimony is found largely in his interpretation of the data." *Id.* (citation omitted). The court, however, found the proposed testimony unreliable because of problems with the price survey upon which it relied. After concluding that the small sample size went to the weight rather than the admissibility of the evidence, *id.* at 232, the court deemed the sample unreliably skewed because it was drawn heavily from the collection of bids identified in the complaint. The court explained that the bids identified in the complaint were not random because they consisted principally of cases where the defendant won the business at issue despite submitting the higher bid. Thus, this sample of bids could not reliably be used to demonstrate that, in general, the defendant union's bids were higher. *Id.* at 232-33. The court granted plaintiffs leave to file a corrected report addressing the data infirmities, and plaintiffs did so. No. 00-4763, 2004 U.S. Dist. LEXIS 18139, at \*4 (Sept. 9, 2004). The court held that the corrected report performed an additional analysis that demonstrated that the data used was actually not biased in any relevant way, and admitted the report. *Id.* at \*6.

## **VI. CONSPIRACY**

### **a. Legal and economic context**

1. Economists can offer important testimony concerning economic conditions that are conducive to collusion in an industry, but they risk disqualification under *Daubert* when opining on the presence of an actual conspiracy.

Certain economic conditions – such as high barriers to entry, few market participants, ease of enforcement, substantial start-up lead times, limited similar products/services – make a market more susceptible to collusive conduct. Such factors alone generally cannot demonstrate the presence of an unlawful conspiracy, but they nonetheless offer evidence suggesting that defendants would have been able to form a successful conspiracy. In addition, certain economic events – such as unusual price levels or output activity – can be suggestive of collusion, although in some cases they may be equally consistent with consciously parallel behavior.

2. Federal Rule of Evidence 704 explicitly permits expert testimony that addresses the ultimate issue to be decided at trial. Nevertheless, because of their concern about the unduly prejudicial effect of such testimony (*see* F.R.E. 403), courts are sometimes reluctant to admit such testimony, especially if there is a question about its reliability. *See, e.g., Estate of Sowell v. United States*, 198 F.3d 169, 171-72 (5th Cir. 1999); *United States v. Simpson*, 7 F.3d 186, 188 (10th Cir. 1993); *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993). “Although Fed. R. Evid. 704 was amended so as not to preclude expert testimony on the ultimate issue, the amendment was not intended to allow an expert to advise the court on what outcome to reach.” *Sparton Corp. v. United States*, 77 Fed. Cl. 1, 7-8 (Fed. Cl. 2007) (citing Fed. R. Evid. 704, Advisory Committee Notes, 1972 Proposed Rules, reprinted in Thomson/West, Federal Judicial Procedure and Rules at 436 (2005)). Ultimate testimony on whether defendants entered into a conspiracy has the potential to cause exclusion of at least parts of an economic expert’s testimony.

**b. Illustrative cases**

1. In *Ohio ex rel. Montgomery v. Louis Trauth Dairy, Inc.*, 925 F. Supp. 1247 (S.D. Ohio 1996), the court analyzed and rejected *Daubert* challenges to three of the plaintiffs’ economic/econometric experts. Two of the experts offered reports concerning market factors that facilitate

collusion, and further analyzed the defendants' bidding behavior that "indicates territory allocation or complimentary bidding." *Id.* at 1250. The defendants argued that "[p]laintiff's experts cannot distinguish between legal and illegal collusion." *Id.* at 1251. The court explained that although "illegal collusion requires proof of an agreement . . . [and s]tatistical analysis cannot directly demonstrate the existence of an agreement[, s]uch a conclusion does not necessarily mean that regression analysis is unhelpful in determining whether illegal collusion has occurred." *Id.* at 1253. "Circumstantial evidence derived from the business practices of the defendants can be used as an inference of illegal action," even if it alone is not necessarily sufficient to prove conspiracy. *Id.* The court allowed plaintiff's experts "to testify, however they will not be allowed make a legal conclusion regarding the existence of an illegal conspiracy." *Id.* at 1254.

2. In *In re Hydrogen Peroxide Antitrust Litigation* the defendants attacked the plaintiffs' economic expert at the class certification stage and offered their own expert report critiquing plaintiffs' expert's report. 240 F.R.D. 163, 171 (E.D. Pa. 2007). The district court rejected the defendants' *Daubert* challenge and allowed the plaintiffs' expert's report finding that the hydrogen peroxide industry was susceptible to a price-fixing conspiracy because the products were fungible and price was therefore the most significant means of competition, the defendant manufacturers controlled more than 99% of production capacity, and there were high barriers to entry. *Id.* at 172. The district court held that the fact that the defendants' expert "reaches a different conclusion is of no moment to our resolution of a *Daubert* motion. If *Daubert* required us to choose between the opinions of battling experts, a vital piece of the fact-finding puzzle would be taken from the jury. We are not permitted, in addressing defendants' *Daubert* motion, to weigh the relative credibility of the parties' experts." *Id.* at 171. The Third Circuit vacated the district court's ultimate decision to certify the class. The appellate court did *not* find the district court's decision to deny defendants'

*Daubert* motion to be an error. 2008 U.S. App. LEXIS 26871, at \*51-52 (3d Cir. 2008).

3. In *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1321-23 (11th Cir. 2003), the court of appeals upheld the exclusion of expert testimony that the defendants had engaged in collusion. The court observed that the proffered testimony indicated only that the defendants had likely engaged in either collusion or consciously parallel activity. Because mere consciously parallel activity did not, as a matter of law, constitute an agreement for purposes of Section 1 of the Sherman Act, “this testimony could not have aided a finder of fact to determine whether appellees’ behavior was or was not legal, and the district court properly excluded it.”
4. In *Miller v. Holzmann*, 563 F. Supp. 2d 54 (D.D.C. 2008), the court admitted expert economic testimony offered by the plaintiff to “explain how auctions and bidding work, [and] how collusion in auctions work[s].” *Id.* at 56. The defendants had challenged the proposed testimony on the ground that it was merely a recitation of common sense principles and was “unmoored from the facts of this case.” *Id.* The court rejected the defendants’ premise that the expert was required by Rule 702 to address the facts in the case and to apply the economic principles about which he testified to those facts. The court explained that, as reflected in the Advisory Committee Note to Rule 702 and substantial case law, Rule 702 permits the use of a “teaching expert”: an expert that provides background information that will help the trier of fact understand and determine the relevant facts. *Id.* at 56-57. Here, the expert explained how bidding markets would work with and without collusion, leaving it to the jury to determine which scenario better fit the facts of the case. In the court’s view, the subjects covered by the expert testimony – including the incentives of bidders to discover cost-reducing technology in collusive versus non-collusive auctions and the typical equilibrium points for winning bids in sealed-bid versus open auctions – “are precisely the sort of specialized, technical matters concerning which a lay jury may benefit from a qualified expert’s tutelage.”

*Id.* at 65. Interestingly, the defendants’ challenge to the expert testimony – that the expert merely discussed the characteristics of collusive bidding but did not conclude based on the facts that there was collusion here – was the opposite of the more typical complaint that the expert usurped the role of the finder of fact by opining on the ultimate conclusion that there was collusion.

5. The *In re Japanese Electronics Products Antitrust Litigation* case illustrates the fine line between proper and improper economic expert testimony concerning conspiracy in antitrust cases. In that case, the district court “eliminate[d] all parts of the report in which the expert economist, after describing the conditions in the respective markets, the opportunities for collusion, the evidence pointing to collusion, the terms of certain undisputed agreements, and the market behavior, expressed the opinion that there was concert of action consistent with plaintiffs’ conspiracy theory.” 723 F.2d 238, 280 (3d Cir. 1983). The Third Circuit reversed this part of the trial court’s decision, explaining that, “[c]onsidering the complexity of the economic issues involved, it simply cannot be said that such an opinion would not help the trier of fact to understand the evidence or determine that fact in issue.” *Id.* “[T]o the extent that the trial court’s discussion suggests that expressions of opinion on the ultimate fact in issue somehow impermissibly invade the province of the jury, it is inconsistent with the clear mandate of Rule 704.” *Id.* at 279. To further confuse matters, the Supreme Court, during its review of the case, noted – while *not* disturbing the Third Circuit’s holding on the admissibility of the expert’s report – that “[a]lthough the Court of Appeals reversed the District Court’s finding that the expert report was inadmissible, the court did not disturb the District Court’s analysis of the factors that substantially undermine the probative value of that evidence.” 475 U.S. 574, 594 n.19 (1986). “We,” the Supreme Court continued, “find the District Court’s analysis persuasive.” *Id.* Query why the “the District Court’s analysis of the factors that substantially undermine the probative value”

of the expert's report was not sufficient to bar that report from being admitted.

## VII. DAMAGES

### a. Legal and economic context

1. Economic experts are well positioned to offer testimony on the amount of damages a plaintiff suffers. Although legal theories of damages differ – e.g., one plaintiff may be seeking lost profits whereas another plaintiff, even in the same case, may be seeking to recover for overcharges – the legal theories are (or should be) inputs determined by counsel and characterized as assumptions relied upon by economic experts.<sup>7</sup> In other words, the expert would typically testify that she had been asked to calculate “lost profits” or “overcharges,” rather than arguing that “lost profits” or “overcharges” is the correct legal standard.
2. Damages analyses arguably are less likely to be found wanting because courts do not require plaintiffs to demonstrate complete precision when offering damages calculations. “[T]he basic principle [is] that in antitrust cases damages need only be proven to a reasonable degree of certainty, and that there is broad latitude in establishing antitrust damages.” *In re Sulfuric Acid Antitrust Litig.*, 446 F. Supp. 2d at 924-25. “Any other rule, the Supreme Court has said, would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and

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<sup>7</sup> We focus here on the computation of the amount of damages, rather than the related inquiry of impact – i.e., whether the plaintiff suffered any damage as a result of the anticompetitive conduct. In a single-plaintiff case, demonstrating impact often flows simply from the damages theory and calculations. For example, if a direct purchaser plaintiff shows that a defendant unlawfully maintained a monopoly in a given market and that the direct purchaser paid supracompetitive prices for the good or service in question as a result of the illegal maintenance of the monopoly, the impact of the defendant's conduct on the plaintiff is clear. *But cf. Vernon Walden, Inc. v. LIPOID GmbH*, No. 01-4826, 2005 U.S. Dist. LEXIS 28808, at \*29-30 (D.N.J. Nov. 17, 2005) (excluding report on *Daubert* challenge because economic expert failed to demonstrate, under a lost profits theory, that plaintiffs' volume decline was due to defendant's alleged unlawful conduct). However, in class action litigation, demonstrating class-wide impact is often substantially more complicated, and, potentially, difficult. Though it is beyond the scope of this article to discuss this burgeoning area of law, class-action practitioners must be aware of this issue.

complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. . . . The Court's willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages and on the principle that it does not come with very good grace for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *Id.* (citations and quotations omitted). *See also DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1201 (11th Cir. 1993); *National Farmers' Org., Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1303 n.33 (8th Cir. 1988) (affirming damage computation even though there were no actual figures available for certain periods included in the computation).

3. Practitioners may find it useful to explore with their economic experts whether analogues might help illuminate the analyses in specific cases. As discussed above, economists generally will not be able to run a controlled experiment to demonstrate the impact of the complained-of conduct. However, analogues may provide a helpful touchstone for analyses. For example, in several recent delayed-generic-entry pharmaceutical cases, where plaintiffs alleged that defendants' conduct kept less expensive generic drugs off the market, plaintiffs' damages experts modeled their damages calculations based on the experience of numerous other drugs that recently faced generic entry. These analogous experiences, plaintiffs' experts argued, provided a useful indication of both the price and volume that one would expect after generic entry of the drug in question. In other circumstances, experts rely on the contemporaneous projections made by the parties and other industry participants or analysts to derive the price and volume of the product in the but-for world. Practitioners should be cautioned not to have their own experts rely too heavily solely on testimony or data offered by their client; experts should at least perform an analysis to judge the soundness of such potentially self-serving projections.
4. Damages analyses are susceptible to *Daubert* challenges

based on the data used in experts' models. It is imperative that economic experts rely upon sound data. See *Vernon Walden, Inc. v. LIPOID GmbH*, No. 01-4826, 2005 U.S. Dist. LEXIS 28808, at \*31-32 (D.N.J. Nov. 17, 2005) (rejecting economist's report in part because data used "cannot pass muster under *Daubert*" where the expert's "damages calculations are not based on authoritative industry data or recognized financial data" but rather are "based on the deposition testimony, estimates, feelings and beliefs of [a] principal beneficiary" of the suit, if successful).

**b. Illustrative cases**

1. In *Champagne Metals v. Ken-Mac Metals*, 2008 U.S. Dist. LEXIS 100216 (W.D. Okla. 2008), the defendants sought to exclude the testimony of the plaintiff's damage expert. The court began by rejecting certain of the challenges to the testimony. First, the court refused to bar the testimony because of the expert's failure to apportion the damages between acts that occurred before the limitations period and those that occurred during the limitations period, expressing skepticism that such apportionment was required, or plausible, where events both before and during the limitations period culminated in a single result – a refusal to deal – that caused the damages. Second, relying on the statement in *LePage's Inc. v. 3M*, 324 F.3d 141, 166 (3d Cir. 2003), that it is "unnecessary, if not impossible" to establish such apportionment, and on the principle that a plaintiff need not prove the amount of damages with precision, the court held that the expert was not required to apportion damages between the defendants' unilateral conduct, which was not actionable, and their collective conduct, which was. Third, the court found that the expert's acceptance of some facts given to him by the plaintiff did not render his testimony unreliable, observing that "there is, in general, nothing objectionable about a damages expert assuming a plaintiff can establish liability." To the extent that the information from the plaintiff went to the amount of damages, the court found that the expert "made sufficient inquiry and investigation of the information to avoid excluding his

opinions on that basis alone.” 2008 U.S. Dist. LEXIS 100216, at \*38. The court nonetheless excluded the expert testimony as unreliable on other grounds. The court concluded that the lost sales estimates were inadmissible because they included not only lost sales of aluminum, the product at issue, but of steel as well. Although plaintiff’s counsel argued that the sales of the two products were linked, the court noted that the expert’s report did not allege such a link or otherwise explain why steel sales were included. Second, and in the court’s view more significantly, the expert’s lost sales estimates were based simply on “professional judgment,” not on a “discernible, identifiable theory or technique.” *Id.* at \*43. The court explained: “There is no way [the] method or technique can be or has been tested by others. There is no way it can be challenged in any objective sense, as it is simply his subjective judgment about how various factors fit together. There is no identifiable theory or technique to submit to review by others. There is no real basis for estimating an error rate to his approach. There are no standards of any kind that have been identified as supporting it.” *Id.* at \*45. Note that some, but not all, of the court’s criticisms may be misplaced because they are based upon language in *Daubert* that relates to experimental rather than social sciences. Separately, the court excluded the expert’s estimate of damages attributable to the defendants’ causing the plaintiff to pay a higher price for inputs, observing that the expert had assumed that the challenged conduct was the only explanation for the higher price paid by the plaintiff when the record indicated that some and perhaps nearly all of the price differential was attributable to the plaintiff’s inability to qualify for volume discounts, which were not at issue in the case. *Id.* at \*56.

2. *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1022, 1030-31 (D. Kan. 2006), demonstrates the danger of an expert economist’s relying too heavily on the proponent’s allegations or testimony rather than on the expert’s independent analysis when calculating damages. In excluding the expert’s report, the court described the

expert's methodology as "simply a house of cards[: it] may be mathematically accurate, but he has not shown that it is sound or reliable, or generally accepted in the field of economics." *Id.* The expert "did not independently analyze the [the proponent's sales] projections, and [the proponent] provide[d] no coherent explanation how it arrived at the projections. . . . Nothing in the record suggest[ed] that a reasonable economist would employ such a methodology to forecast sales, or assume that such a methodology, when conducted by others, is accurate. The record contains no data on market share, no market research and no evidence that absent wrongful conduct by defendants, plaintiff's sales would have increased[.]" *Id.*

3. Although it dealt with regulatory rather than economic experts, *Twin Cities Bakery Workers Health & Welfare Fund v. Biovail Corp.*, Nos. 01-2197 & 03-2075, 2005 U.S. Dist. LEXIS 5570 (D.D.C. 2005), illustrates the reluctance of some courts to accept an expert's ipse dixit on causation. The court excluded two expert declarations that concluded that but for the defendants' alleged misconduct the FDA would have approved a new drug application several months earlier than it did. While acknowledging that the experts had "extensive experience in or before the FDA," the court held the experts' opinions about timing unreliable because they were unaccompanied by data that demonstrate their reliability – no examples of the time lines by which the FDA has approved the ANDAs of other drug manufacturers, no personal experience of predicting what the FDA might do that turned out to be correct." *Id.* at \*13.
4. In *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), the court upheld the admission of damage testimony by the plaintiff's expert. After rejecting as a factual matter the defendants' claim that the expert's analysis did not focus on the bad acts at issue, the court turned to the contention that the expert failed to account for other market variables that could have been responsible for the plaintiff's lost sales. The court noted the expert's testimony that, using regression analysis, he

had tested all of the plausible explanations proffered by the defendants' experts for which he had data. *Id.* at 793. (The court did not address whether any explanations were improperly excluded on the grounds of implausibility or how many plausible explanations were not addressed because the data to test them were unavailable.) The court also stated that the failure to eliminate all other possible causes of damage did not render expert testimony inadmissible. *Id.* at 794.

5. In *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517 (6th Cir. 2008), the court rejected the defendants' challenge to the admission of testimony by the plaintiff's damages expert which was based on comparing average profits before and during the period of conspiracy. To derive these data, the expert used a published index that purported to list average industry prices for both periods of time. The publisher adjusted the manner in which it computed the average prices at two points during the relevant periods, and the expert, believing that the original method of computing the prices was reliable, backed out the adjustments so that prices for all periods were computed in a comparable manner. It turned out, however, that the original published numbers had been erroneous in that they had inadvertently excluded transactions in a particular geographic region. The court nonetheless upheld the admission of the expert's testimony, concluding that it was not clearly erroneous for the district court to conclude that the errors went to the weight rather than to the admissibility of the evidence. The court relied upon the facts that market participants relied upon the very data that the expert did and that the expert had not "merely pulled the numbers comprising his calculation out of thin air." *Id.* at 531.
6. In *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056 (8th Cir. 2000), the court of appeals held that the district court had improperly admitted testimony by the plaintiffs' damages expert that "was not grounded in the economic reality of the . . . market." The expert had opined that absent the challenged misconduct the market would have become a Cournot duopoly with two firms

with 50% shares, and he computed the damages attributable to the alleged misconduct by using the Cournot model to predict the extent to which the equilibrium price for a firm with the defendant's actual market share – about 75% – exceeded the price that would have resulted from a 50% share. The Court found the premise that the defendant would have had a 50% share absent the misconduct unsupported given evidence that it had a 75% share at certain times before it engaged in the challenged conduct and evidence suggested that it had gained share because of matters unrelated to the challenged conduct, including a recall of a competing product and adverse market reaction to a competitor's joint venture.

## **VIII. PRACTICAL GUIDANCE FOR PROPONENTS OF EXPERT TESTIMONY**

We have provided a brief outline of some of the major issues facing antitrust practitioners when they seek to introduce the testimony of economic experts. This paper is neither comprehensive in its scope of issues explored, nor exhaustive in the depth of coverage of each issue. Indeed, one would easily fill a book if one had either of those goals. Rather, this paper aims to highlight the most common, and often the most crucial issues facing antitrust litigators seeking to use economic expert testimony to bolster their cases.

In addition to the cases discussed above, which provide a paradigm to assess economic expert testimony in specific situations, we offer the following suggestions for antitrust litigators contemplating using expert economists.

### **a. Consult with your economic experts early and often**

In complex antitrust cases, we highly recommended that plaintiffs consult with economic experts before filing an initial complaint. Expert economists and econometricians can provide analyses of the market that are vital to pleading a cognizable claim. They can assess whether the challenged conduct likely would lead to the complained-of harm. And, expert economists can offer an outside perspective that may uncover issues that make a case substantially stronger – or, as importantly, reveal flaws that render a case not worth filing. Similarly, defendants are advised to engage economic experts soon after receiving a complaint.

As important as consulting early with economic experts is consulting with the *right* economic experts. Typical diligence includes researching experts' backgrounds, credentials, and prior testimony (including stricken testimony),<sup>8</sup> and assessing potential testimonial competence. Parties are advised to discuss the case with several experts to investigate differing approaches to the issues.

**b. Continue communicating with your economic experts**

Economic experts should be consulted throughout the discovery process. As discussed above, courts assess the reliability of the data that experts use as inputs for their model. A sound model with bad data will disqualify an expert's report just as easily as reliance on a poor model. Parties that maintain a continuing dialogue with their experts can minimize the risk that the experts need to rely on questionable data (or, at the least, can make a record that they diligently pursued the best available data).

In addition to data, economic experts may have a "wish-list" of materials that they would expect to find if the allegations in the complaint are either true or untrue. Such supporting data will buttress an expert's report, and help insulate them from attack. Economic experts may be able to offer suggestions for different avenues of discovery, and can be especially helpful when preparing to take depositions on more technical topics. Open lines of communication will ensure that valuable information is not left unexamined.

**c. Question your expert's methodology**

Ask your expert whether the methodology she uses is typically employed in the field of economics and whether she has employed it using the same rigor and approach that she would if her report were being prepared for a peer-reviewed journal rather than for a litigation. To the extent that the approach is less rigorous in any respect, the expert should be prepared to demonstrate that the approach is nonetheless acceptable in the field of economics and that it can be expected to produce reliable results.

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<sup>8</sup> While it is generally not a good thing if a potential expert has had prior reports stricken, this factor ought not be dispositive. Bear in mind that numerous top economists have had reports stricken, while still offering valuable testimony in other matters. In addition, attempting to sully your opponent's economic expert on the basis of prior disallowed testimony can backfire. As one court has explained, the decision whether to admit an expert's testimony "must be based on his testimony here, not on what other courts have found about different testimony on different facts." *Hydrogen Peroxide*, 240 F.R.D. at 170 n.8 (denying defendants' *Daubert* motion and strongly criticizing defendants for "[b]latantly ignoring both the legal standard and the weight of the factual record [by] open[ing] their brief by citing four cases in which courts have criticized [the expert's] findings").

**d. Know what you need – and what you don't need**

Economic experts often have their testimony stricken when they go too far afield from their technical expertise. Antitrust practitioners can help minimize this risk by clearly understanding what exactly they need from economic experts, and, as importantly, what they do *not* need. Counsel is advised to separate potential topics of expert testimony into buckets (such as Necessary, Helpful, and Dangerous). By focusing on the Necessary, avoiding the Dangerous, and *de-emphasizing* the Helpful, practitioners can lessen the risk that their economic experts will be disqualified.

For example, in cases in which defining a relevant market is necessary, a plaintiff's economic expert generally must offer an expert opinion drawing such a market. Losing or failing to offer such Necessary testimony can be case dispositive. However, expert testimony on whether the defendants in the case did engage in an unlawful conspiracy, while Helpful, could detract from the rest of the expert's testimony. As discussed above, such testimony is not always excluded – and expert testimony limited to market conditions favorable to collusion is generally acceptable. But, especially where other evidence exists of a conspiracy, asking an economic expert to offer an expert opinion on the presence of a conspiracy, a merely Helpful topic, probably should be avoided.

Having a clear understanding of the case and not asking your experts to do too much is one of the best ways to help protect you economic experts from being stricken during *Daubert* challenges.