NAVIGATING ECONOMIC EXPERT WORK IN CRIMINAL ANTITRUST LITIGATION

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Criminal antitrust enforcement has recently attracted heightened attention due to several high-profile cases covered widely in the media. In this article, we provide insight into the role of economic experts in criminal cases, including the expert discovery process and the scope of opinions that have been accepted by the courts, based on our experience with three recent criminal cases involving price-fixing and/or bid-rigging allegations across various industries. Although there are salient differences in the process and scope of expert work and testimony in criminal and civil antitrust litigation, where permitted by the court, recent cases demonstrate that economic expert analysis and testimony can add powerful insights relevant to the fact finder in criminal antitrust matters.

I. INTRODUCTION

Criminal antitrust enforcement has garnered significant attention in recent years, with many high-profile cases attracting front-page headlines. Over a three-year period spanning 2021 – 2023, the U.S. Department of Justice ("DOJ") brought 35 criminal antitrust cases[2] and announced multiple plea agreements, some with associated fines exceeding $100 million.[3] In 2021, the DOJ announced its first criminal indictment involving allegations of nopoach and wage-fixing agreements,[4] and it published updates to its primer on price-fixing, bid-rigging, and market allocation schemes.[5]

As the government's approach to criminal antitrust investigations has evolved, the role that an economic expert can play in criminal litigation has also grown. In our experience, the role of an economic expert in criminal cases can differ from that in civil antitrust matters in several important ways, including from expert discovery to the nature of the testimony and judges' willingness to consider economic evidence in a *per se* environment. In this article, we offer insights into these special considerations around an economic expert's role in criminal antitrust cases based on our experience in recent criminal cases involving price-fixing and/or bid-rigging allegations in various industries: *U.S. v. Richard Usher, et al*.[6] (foreign exchange markets); *U.S. v. Christopher Lischewski*[7] (packaged tuna); and *U.S. v. DaVita Inc. & Kent Thiry*,[8] the first criminal prosecution of an alleged no-poach agreement, which the DOJ brought against a kidney dialysis company and its former CEO.

Our goal is to provide a helpful perspective on the role of economic experts in criminal cases for practitioners, including the expert discovery process and the scope of opinions that have been accepted by the courts. We begin with an examination of the expert discovery process in criminal antitrust matters, highlighting the most salient differences from the typical process in civil antitrust litigation. Next, we examine the scope of analyses and opinions that an economic expert might be able to offer in a *per se* environment, as well as challenges and debates surrounding the admissibility of economic expert testimony.

II. THE EXPERT DISCOVERY PROCESS

Although the expert discovery process and the nature of expert disclosures in criminal and civil antitrust litigation matters share certain characteristics, there are salient differences between them that can affect preparation for and presentation of economic arguments and expert testimony.

A. Civil Antitrust Cases

In civil matters, the facts alleged by each side are disclosed in the lead-up to the trial, starting with the plaintiff's complaint, which often reveals the basis of the plaintiff's case and information on the relevant episodes of alleged conduct or market definitions that the plaintiff alleges to prove in the case. As the matter progresses towards trial, fact witness depositions, document production, interrogatories, and requests for admissions establish additional facts and may even shed some light on the legal strategy of both sides, as well as the economic analyses and opinions that will be central to each side's case. Expert discovery (which typically involves the submission of one or more expert reports by each side) and expert depositions further reveal each side's approach and help identify both common ground and key areas of disagreement. Dispositive motions prior to trial can further define the scope of an economic expert witness's testimony at trial.

Pretrial disclosures in civil cases provide comprehensive and detailed support for the expert's proffered opinion, including expert reports that can stretch to hundreds of pages and often contain dozens of exhibits, figures, and graphs. Expert deposition is an opportunity for the opposing side to identify the nature and limitations of the expert's opinions. The process is designed to avert surprises for the opposing side as to the expert's opinions that will be presented at trial, and the basis for those opinions.

2 *Antitrust Case Filings*, U.S. DEP'T OF JUSTICE [DOJ], https://www.justice.gov/atr/antitrust-case-filings.

3 Press Release, DOJ, One of the Nation's Largest Chicken Producers Pleads Guilty to Price Fixing and is Sentenced to a $107 Million Criminal Fine (Feb. 23, 2021).

4 Press Release, DOJ, Health Care Company Indicted for Labor Market Collusion (Jan. 7, 2021). This was the first publicly disclosed criminal no-poach indictment since the DOJ and Federal Trade Commission's jointly issued antitrust guidance for human resource professionals in October 2016.

5 *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For*, DOJ (Feb. 2021), https://www.justice.gov/atr/file/810261/download.

6 *United States v. Richard Usher, et al.*, 17 Cr. 19 (RMB) (S.D.N.Y. 2018) [*Usher*].

7 *United States v. Lischewski*, 18 Cr. 203 (EMC) (N.D. Cal. 2019) [*Lischewski*].

8 *United States v. DaVita Inc. and Kent Thiry*, 21-cr-00299 (RBJ) (D. Colo. 2022) [*DaVita*].

B. Criminal Antitrust Cases

By contrast, depending on the proceeding and the presiding judge, relatively little is revealed by either party in a criminal case prior to trial. In a Section 1 (15 U.S.C. § 1) criminal felony enforcement matter, insight into the prosecution's strategy prior to trial may only be available in the criminal indictment. The indictment typically provides a general sense of the pleadings made (e.g. price-fixing), and the prosecution may not be able to deviate from the claims submitted to the grand jury.

However, many specifics about the nature of the alleged conduct may only be revealed slowly and partially by the prosecution between the indictment and the trial. In *Usher*, for example, the prosecution disclosed at-issue "episodes" — defined as specific dates/times and currency pairs — in which anticompetitive conduct had allegedly occurred. However, these episodes were only gradually disclosed over time and could be added to or subtracted from the asserted claims at the prosecution's discretion. As another example, in *Lischewski*, the prosecution disclosed episodes during which the defendant allegedly "jabbed" executives at other companies about their aggressive prices. In certain cases, the prosecution may be required to turn over evidence that may provide economic experts with insight into the economic facts that may be part of the prosecution's case in chief and help define the scope of the expert's analysis. Otherwise, much of the prosecution's case will only be revealed at trial.[9]

Depending on the nature of the allegations, the defense and/or prosecution in a criminal antitrust case may offer testimony from an expert economist to provide context, rebut opposing experts, or provide affirmative testimony directly relevant to the allegations. Either side might also choose to forgo economic experts or move to exclude opposing economic testimony on the grounds that proof of a *per se* criminal violation does not require economic analysis. In our experience, the latter strategy is more likely to be favored by the prosecution than by the defense, both to simplify the proceedings and to increase the likelihood of a criminal conviction. In *Lischewski* and *DaVita*, the prosecution did not offer any economic expert testimony. However, in *Usher*, the prosecution relied on an economist to describe the mechanics of foreign exchange trading and the basic economics of foreign exchange markets, and on a data scientist to present trading data to the jury. In that case, the prosecution's economic expert refrained from reviewing any evidence in the case or testifying about any of the alleged conduct; the prosecution's data scientist provided the jury with summaries of the data but offered no opinions on its implications.

Early notification of economic expert testimony can occur before a criminal trial, either in the form of an affidavit or in an expert disclosure provided by counsel. These requirements must satisfy Federal Rule of Criminal Procedure 16(a)(1)(G) for government experts or 16(b)(1)(C) for defense experts. Similar to the requirements under Federal Rule of Civil Procedure 26(a)(2)(B), these rules require disclosure of the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications. As in civil matters, expert testimony in criminal matters is subject to Federal Rules of Evidence 702, 703, and 705, which require, among other stipulations, that the testimony be the product of reliable principles and methods applied to the facts of the case. However, prior to amendments of Rules 16(a)(1)(G) and 16(b)(1)(C) in December 2022, an expert report or backup materials supporting the analyses offered by the expert was generally not required by the courts as part of an expert disclosure and, in our experience, was usually not provided. Instead, disclosures for economic expert witnesses have tended to provide relatively few details about the experts' proffered opinions and left their identities and CVs as perhaps the most informative aspects of the disclosures.[10] DaVita was an exception in that the court ordered an expert report and production of backup to be shared prior to trial after the government challenged the sufficiency of expert disclosure typical of criminal proceedings.

The absence of expert witness deposition prior to a criminal trial has further limited any requirement for experts on either side to commit to their position prior to fully understanding the prosecution's focus at trial. Since the recent amendment of Rules 16(a)(1)(G) and 16(b)(1)(C), the disclosure requirements for experts in criminal proceedings resemble much more closely those for civil cases, and now require the inclusion of "a complete statement" of the expert's opinions along with "the bases and reasons for them."[11] It remains to be seen how these changes will impact the two sides' strategies for preparing for economic expert testimony at trial.

Irrespective of the scope of expert disclosure prior to trial, economic questions are often central to both sides' case strategies. In particular, the data-intensive nature of the prosecution's allegations in many criminal trials and their focus on the economic interpretation and implications of communications can make economic analysis highly relevant for the development of legal strategy. In *Usher*, for example, economists worked with defense counsel to (i) assemble and review trading data and (ii) examine the relationship between the alleged exchange of information and any alleged attempt to fix prices, given the observed currency trading and data patterns. These analyses formed the basis for

9 In *Usher*, the court denied the defendants' request for a bill of particulars, but it did require the prosecution to provide a list of at-issue episodes.

10 Note that in *Lischewski*, the court ruled that the expert could not testify as to whether the data available to the defendant were consistent with competition or that the economic data showed no changes after episodes.

11 Fed. R. Crim. P. 16(a)(1)(G) and 16(b)(1)(C).

the economists' testimony and helped counsel prepare to cross-examine cooperating witnesses who were expected to testify about specific instances of alleged coordination in the foreign exchange markets. Another example is *Lischewski*, in which an economist examined voluminous financial and sales records and documented the relationship between tuna prices and costs. Finally, in *DaVita*, the economic expert collected data on the employment histories of directors and executives at issue to measure the number of employees that DaVita and its alleged co-conspirators hired from each other in and outside the relevant allegation periods.

III. OPERATING IN A *PER SE* ENVIRONMENT

Differences in economic experts' roles in civil and criminal antitrust cases are not limited to process and procedures. Disparities in the legal standard of proof in criminal and civil antitrust cases raise questions about the relevance and scope of economic testimony.

In criminal antitrust enforcement matters, violations of Section 1 of the Sherman Act are assessed under the per se standard. A key distinction between *per se* and rule-of-reason antitrust cases is the focus on the *existence* rather than the *effect* of an alleged conspiracy. Another distinction is that the legal standard for a criminal conviction is proof beyond a reasonable doubt, whereas preponderance of the evidence is the standard for a civil conviction. Under the rule-of-reason standard, the plaintiff must show by a preponderance of the evidence that a significant anticompetitive effect is not outweighed by any related procompetitive justification or effect.[12] Under a *per se* standard, however, the existence of an agreement is sufficient to violate Section 1, even if the agreement is not actually effective in harming competition.[13] No assessment of reasonableness, potential economic justifications, or other underlying factors can provide a legitimate justification for conduct that is *per se* illegal.[14]

To establish a criminal *per se* Sherman Section 1 violation, the prosecution must prove three elements beyond a reasonable doubt:

(1) An agreement to fix prices, rig bids, or allocate markets was knowingly formed and was in existence at or about the time alleged.
(2) The defendant knowingly joined the alleged agreement for the purpose or with the effect of unreasonably restraining trade.
(3) The alleged agreement affected interstate or foreign commerce of the United States.[15]

The first element — and sometimes the second element — is the most contentious and often the focus of the prosecution's case at trial.[16] The prosecution's case in criminal cartel litigation often relies heavily on communications between alleged cartel members. While proving a negative — that an agreement did *not exist* — may be challenging, an economic expert's perspective on the actual economic evidence can offer a more nuanced or even a different perspective on the nature of the communications than the one offered by the prosecution.

First, economic analysis can provide context for certain facts. For example, in *Usher*, the defense argued that relying solely on the language in the chat transcripts could be misleading without a closer examination of the corresponding data. An exchange of information may be an attempt to fix prices, an attempt to complete a vertical trade, or bluffing unsupported by the underlying data. An economic expert's side-by-side analysis of chat transcripts and trading data can assist the finder of fact in distinguishing among communications that are designed to further an illegal scheme, communications that are expected or even necessary in the normal course of business, and communications that are meaningless and disconnected from any market reality. When combined with a thorough explanation of relevant economic concepts, including the functioning of foreign exchange markets, such an exercise can be useful in helping the trier of fact distinguish between per se illegal behavior and behavior unrelated to any illegal scheme. In another example, the economist in *Lischewski* analyzed the profit margins of the tuna brands during the alleged conspiracy and found the margins to be low and consistent with competitive market conditions. The court in that case found that the analysis was probative and relevant to the existence of the alleged conspiracy—and admissible under *Continental Baking Co. v. United States* — because it provided alternative explanations for pricing behavior unrelated to the alleged antitrust conduct.[17]

Second, an economic expert can present evidence of economic conduct that is directly inconsistent with the existence of an agreement,

12 *Archived Antitrust Resource Manual: Elements of the Offense*, DOJ (Nov. 2017), https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement.

13 See, for example, *In re: High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 656-57 (7th Cir. 2002) ("An agreement to fix list prices is […] a per se violation of the Sherman Act even if most or for that matter all transactions occur at a lower price").

14 *Archived Antitrust Resource Manual, supra* note 13.

15 *Id.* See also *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 632-33 (9th Cir. 1987).

16 In *Usher*, in which the defendants all lived and worked in London, the third element was also contested at trial.

17 *Continental Baking Company v. United States*, 281 F.2d 137, 145 (6th Cir. 1960).

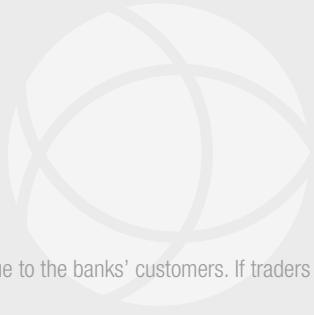
notwithstanding the intent that is alleged to be supported by the communications in evidence. In *Usher*, for instance, the defense argued that the accused traders had a propensity to claim to be trading in a particular way when, in fact, they were not — what one trader described as a form of bluffing, as if they were playing poker. In such instances, analysis of trading data revealed not only that the alleged communications were inconsistent with price-fixing but also that they were among the procompetitive tools used by traders to complete the transactions requested by their clients. Such an analysis, if permitted, can provide a powerful rebuttal to what would otherwise be seen as evidence of an agreement to rig bids.

Moreover, economic analysis can open the door to alternative (and procompetitive) explanations for evidence presented by the prosecution to support the existence of an agreement to coordinate on prices. In *Usher*, for example, economic experts for the defense highlighted the idea that although foreign exchange traders often compete with each other, they are also often counterparties — that is, they buy and sell currency from and to each other. When traders transact with one another, discussion of prices is essential. Hence, there can be a completely benign alternative explanation for discussions about pricing.[18] An expert in foreign exchange markets can assist the jury in understanding the context for the traders' interactions and communications and present trading data showing the regularity of buy-sell transactions between the at-issue traders, including during periods of alleged conspiracy.

Because traditional *per se* antitrust cases proceed on the assumption that the alleged conduct has anticompetitive effects, investigations into the actual effects of the alleged conduct, and even the intent of the individuals involved, are often contested by the DOJ as being irrelevant for the trier of fact. However, in recent criminal antitrust cases — including *DaVita*—the court admitted economic testimony on changes in prices and quantities (or compensation and hiring/turnover in the context of a no-poach case) as being relevant for the question of whether an agreement of the kind alleged by the DOJ existed in the first place. In *DaVita*, the economic testimony provided a data-based framework for evaluating whether the companies entered into a non-solicitation agreement with the intent and purpose of allocating a market for employees. The economic expert's analysis showed that changes in compensation and employee movements and turnover were unremarkable compared to benchmark periods and firms — empirical findings that did not support the DOJ's hypothesis that DaVita and its alleged co-conspirators entered into an agreement for purpose of market allocation.

IV. CONCLUSION

Economic analysis and testimony have increasingly become an important part of *per se* antitrust cases. Although similar types of economic analysis may be presented in both civil and criminal antitrust cases, there is in *per se* matters a particular challenge in ensuring that economic testimony stays well within the bounds of what the court has deemed to be admissible. Where permitted by the court, the addition of economic expert analysis and testimony can add powerful insights relevant to the finder of fact in criminal matters. Distinct features of the pretrial rulings and discovery rules in civil and criminal proceedings also raise interesting questions about the scope of expert disclosure prior to trial, although recent amendments to the Federal Rules of Criminal Procedure appear to have narrowed the gap between the requirements in civil and criminal matters.



18 An economist would expect that transactions between market makers at different banks would have procompetitive effects that accrue to the banks' customers. If traders can more easily offload a long or short position in the market, they are more likely to offer lower prices to their customers.

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