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ESSAY

Economic Testimony in Mergers

BY TIMOTHY F. BRESNAHAN

ANTITRUST ANALYSIS IS A COLLABORATION between the disciplines of law and of economics. During a merger investigation at one of the agencies, the participants are the attorneys and economists working for the agency and the parties. These attorneys and economists work in an environment that is explicitly legal, but where the applicable economics is familiar to the attorneys; where the applicable law is familiar to the economists; and where interdisciplinary antitrust analysis is familiar to all. The discussions between the agency and parties revolve around an overarching economic question that is easy to state but hard to answer: will the proposed merger likely lessen competition substantially? All sides are aware of the partial codification of antitrust analysis in the Horizontal Merger Guidelines, which contains a long list of specific economic questions that break the analysis down into parts. The discussions between the agency and parties typically narrow the range of any disagreement and typically lead to either the abandonment or the completion of the merger (sometimes with an accompanying consent decree).

On rare occasions, however, potential mergers are contested in court, and court is a different world entirely. While the overarching economic question is the same, and many of the participants are the same, almost everything else is different. A new and very different participant has been added—the court. From the court's perspective, a case about a potential merger is often unfamiliar and is always a complex and fact-dense business litigation in an arcane and analytical corner of the law. And it is the court itself that must ultimately answer the overarching economic question that the agency and parties were wrestling with. From a world where antitrust analysis is familiar, the matter moves to a world where antitrust is often strange. Further, it is not the easy-to-decide mergers that go to court; rather, negotiations between two well-informed parties have broken down. Finally, the rules of adversary process come in to play.

Tim Bresnahan is Landau Professor of Technology in the Economy at Stanford University and a Senior Adviser to Cornerstone Research. He was head of the Economic Analysis Group and Deputy Assistant Attorney General at the Antitrust Division in 1999 and 2000. This essay is based partly on his presentation at the 2016 ABA Section of Antitrust Spring Meeting program, "Presenting Economic Evidence in Merger Trials," April 6, 2016. He thanks Ian Simmons for recruiting a panel with interesting and diverse viewpoints, including attorneys and economists who had worked on both sides of the FTC/Sysco-US Foods merger hearing.

An enormous scholarly literature in economics and another in law is devoted to the antitrust analysis of mergers. I am delighted to have the opportunity, in this short essay, to add to that literature by considering how the collaboration between law and economics changes when it moves to the courtroom. I shall emphasize the practical questions that come up when preparing for, deciding the scope of, and ultimately presenting and attacking expert economic testimony in a merger hearing. Most of my experience in these matters comes from my days in the Antitrust Division, though the same questions tend to arise (in my more limited experience) on the defense side.

Direct Examination/Testimony

The expert economist's first duty is to the truth and to rigorous and correct analysis. The team of economists and examining attorneys have to then make that rigorous and correct analysis accessible to the court. An analysis that the court does not understand and embrace will not matter, however rigorous and correct it may be.

Because merger matters so rarely come to trial, there often is a role for the expert economist to explain to the court how antitrust analysis works. The attorneys for both sides will have made some effort to educate the court during their opening statements. Nonetheless, the question the court must answer has a lot of economics in it, and the basic analytical framework of antitrust analysis will typically be unfamiliar. As a result, testimony from the expert economists about when mergers are harmful to competition, when they are not, and how to tell the difference will be welcomed by most courts. Such testimony can also lay the groundwork for the expert's own analysis of why the merger in this particular industry of these particular firms is (or is not) harmful to competition by explaining the links between analysis and conclusion.

It is at this point that the close relationship between testimony in the courtroom and classroom teaching becomes obvious. The expert is explaining a complex line of analysis. While the analysis will be familiar to those attorneys who do it every day, it is often not familiar to the court. Command of, even leadership in, the research literature in Economics on the causes and consequences of market power and of market concentration is helpful in deciding on and undertaking the right line of analysis in a merger matter. But of all the economics experiences I've had, the ones most immediately and directly relevant to clarity and conviction in the courtroom are the teaching experiences that led to my teaching award.

Another central role for the interdisciplinary team of attorneys and economists working on direct examination is preparing a narrative of the direct testimony. It is important that the direct testimony present a view of the way competition works in this industry and a view of how that will change with the merger (for better or for worse). This is not a last minute "trial preparation" task. It is essential to create a common understanding of the whole narrative between attorneys and economists, and especially between the particular attorney who will conduct the examination and the economist who will testify. This is harder than it

sounds, and calls for a great deal of effort in preparation.

Industries are different from one another, and the direct testimony should explain the unique facts about competition in the industry at hand and how the competition is likely to change as a result of the merger. This means that antitrust analysis is very fact-dense. Fortunately, much research in industrial organization economics in recent decades has been industry studies. An economist who has experience teaching or in research about the industry at hand or similar industries often has an easier time in preparation. A trial is often the clash between two different views of how competition works, with subsidiary clashes about the sources of information best relied upon, the appropriate techniques of analysis, and so on. Without a long time to prepare, prior knowledge is quite helpful. (I note that this way to classify economists is different than "has worked with me"/"has testified"/"tends to the defense side.")

When preparing testimony, tables, charts, analysis like upward pricing pressure indexes, diversion ratios and other quantitative matters deserve special attention, as do higher level questions like market definition. (Market definition ideally follows from a careful analysis of the competitive effects highlighted by the quantitative matters, though many attorneys seek to hide those foundations to make it "simpler.") The more junior members of the team of economists and attorneys have a great deal of work to do to ensure that the expert direct testimony on these matters serves its legal purpose, is well founded and defended, and is correct as a matter of economics. A terrific quantitative demonstrative can carry the narrative in court. Similarly, an attack on a quantitative demonstrative, even an attack that would be laughed off in an economics seminar, such as an error in a single data point, can destroy the narrative.

One reason that it is essential to involve the wider interdisciplinary team in the preparation of testimony is that the narrative must also explain the foundation for the opinion. A contested merger case is likely to have a large number of pieces of evidence, some of which favor one side's view and some the other's, and the wider team is essential for making sure that everything important has been examined and that the judgments about what to rely on are sound. The agency review process is not just effective at producing knowledge about the potential merger, it is stunningly effective at producing documents, emails, all kinds of records of the thinking of industry participants, and so on. The varied pieces of evidence have every different imaginable amount of probative weight, and there can be a wide gap between what they say and what they might be construed to say. The foundation for an opinion that there will be, or that there will not be, a material decline in competition from a merger almost always depends on paying more attention to some of these pieces of evidence than others. Explaining those decisions in a compelling way—even if the decision is actually trivial—is important in court.

Antitrust analysis, as practiced in the enforcement agencies, has done a terrific job of bringing in results from the relevant research fields in economics. Somewhat surprisingly, only some of this advance has been brought into antitrust law itself. I assume this is because so few merger cases are litigated, but the why does not much matter. What matters is that the economic framework of antitrust practiced in the courts is antiquated, while the economic framework practiced before the agencies and in academics has been evolving and improving. For example, the support in the industrial organization economics literature for a "structural presumption" collapsed before I entered the profession some 40 years ago, and not many active scholars could today tell you what that support was. (It comes up for a minute in the first lecture of some industrial organization economics courses as ancient history, but even that is disappearing as the body of teachers of those courses turns over). This adds another degree of difficulty to trial preparation. The discussions between the merging parties and the agency earlier on were within broadly the same analytical frame. Typically, the two sides will have narrowed their differences in the investigatory period. Now, in court we move to an adversary process and the two sides may present analyses that are not only different on the facts but very different on the relevant frame.

[T]he economic framework of antitrust practiced in the courts is antiquated, while the economic framework practiced before the agencies and in academics has been evolving and improving.

Cross-Examination

Cross-examination is an asymmetrical contest. The expert has a responsibility to the truth, and the attorney has a responsibility to the client. The expert typically knows the economics far better than the cross-examining attorney. The attorney, however, knows what matters legally, and has the added advantage of having weeks to write questions which must be answered in seconds.

From an expert's perspective, preparing for cross-examination involves some very obvious steps. Know your report. Know the other side's criticisms of your report. Know your deposition—attorneys are very risk-averse creatures and love to ask a question they have already asked. Know—and here at last is something that is just like getting ready for an economics seminar—what your most important conclusions are and what your foundation for them is. A challenge in preparing an economist for cross examination is that a telling criticism in court is radically different from a telling criticism in economics.

Although it is perhaps less obvious, it is also important in cross-examination for an expert to be able to address a number of border areas:

- The long list of things which are not part of the expert's opinion but which, to a non-economist, sound like they might be.
- The things in the testimony that are analytically precise in economics but which, if translated badly into plain English, sound

weird or mushy or otherwise bad. (It is essential for both economists and attorneys to work on this list.)
- The things that sound like they ought to be true as a matter of principle but which actually depend on facts.
- Ambiguous questions carefully crafted to sound like real questions.

Regarding the ambiguous questions—well, there can be deep water under thin ice. If the expert translates an ambiguous question into economic terms and answers it precisely in that language, which is likely foreign to the court, or if the expert calls for clarification, it can sound evasive or worse. If the expert swears to an ambiguous statement, the opposing side will invariably emphasize the other meaning of the statement—the one the expert never imagined. The wider team of attorneys and economists, perhaps including a "red team" to focus on weaknesses, has an important role in preparing for cross-examination in these border areas, and that work should be undertaken before the scope of direct testimony is finalized.

Preparing an attorney to depose or cross-examine an opposing expert economist is another difficult interdisciplinary task. Suppose there is a screaming error somewhere in the testimony, or that the opposing expert has taken a position contrary to what he is famous for in academic life, or that the expert's work involves an unstated and completely incredible assumption—all the kinds of things that would come out in seconds in an economics seminar. Certainly, it is an excellent practice for the economists on the team to explain these errors to the attorneys on the team, and to try to help design a set of questions that will bring the problem to the surface. But designing a set of questions is not the same as determining that they should be used in cross-examination. Sometimes establishing the simple fact of an error can take an enormous amount of time in court. Given the limited time allowed for cross-examination, the team must make both strategic and tactical decisions about what to pursue and what not to pursue.

At first glance, the simple cross examination goals of reining in the testimony—making clear what the expert merely assumed, what has a basis in fact, and what the factual basis actually is—appear mundane. When the opposing expert uses highly technical methods, these simple goals can be particularly difficult for an attorney to achieve in cross-examination. More complex strategies of having the expert on one side undertake simple-to-understand analyses that reveal the limitations of the opposing expert's strategy may be necessary.

Conclusion

I have emphasized some of the more difficult aspects of economic testimony in a merger hearing and proposed some practical ways to deal with them. I do not mean to imply that the process is problematic. Most proposed mergers arrive at a decision through the highly effective and efficient agency review process. Only the most difficult cases make it to court, and we should be sympathetic to the judges who have to hear them. Effective presentation of economic expert testimony from both sides increases the likelihood the court will find the right answer. ■

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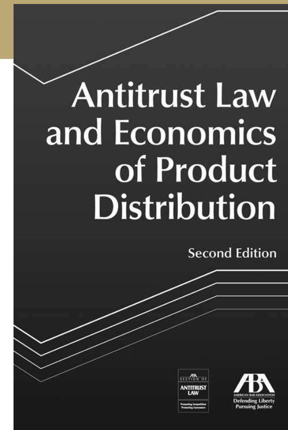

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