Editor's Note
Thoughts on Experts—From a Non-Expert Perspective

BY DEBORAH L. FEINSTEIN

WHAT IS AN EXPERT? Merriam-Webster defines "expert" as "having, involving, or displaying special skill or knowledge derived from training or experience."[1] In a more expansive definition, Wikipedia defines an expert as "someone widely recognized as a reliable source of technique or skill whose faculty for judging or deciding rightly, justly, or wisely is accorded authority and status by their peers or the public in a specific well-distinguished domain."[2] In analyzing what makes an elite performer, an often-cited study considers the implications of 10,000 hours of deliberative practice over more than a decade.[3] This study suggests that practice, more so than training, may be essential to defining expertise. In other words, we all think we know what makes an expert, but there is not even agreed-upon criteria for what makes one an expert. Critically, however, being an expert does not mean others agree with any opinion of that expert. Indeed, experts disagree all the time. And therein lies the issue that makes dealing with experts so complicated.

Experts in Litigation

The widely recognized *Daubert* test sets forth the standards for the admissibility of expert testimony in litigation.[4] A trial judge must determine whether expert testimony is admissible by finding that such testimony is relevant and based on a reliable foundation, i.e., "'whether the reasoning or methodology underlying the testimony is scientifically valid and . . . properly can be applied to the facts in issue.'"[5] A conclusion will qualify as *scientific knowledge* if the proponent can demonstrate that it is the product of sound "scientific methodology" or derived from the scientific method.[6] As James Langenfeld and Christopher Alexander note in their article in this issue assessing the impact of *Daubert* on the admissibility of expert testimony, the *Daubert* test was extended from the "hard" sciences to other sciences in *Kumho*.[7] Then, the Federal Rules of Evidence were amended in response to these decisions to require the court to evaluate whether: (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.[8] And now China's draft rules on litigation of civil antitrust cases would allow parties to request that expert opinions be put before the court if those opinions are from "qualified" independent experts.[9]

Of course, the *Daubert* requirements (and likely the China litigation requirements) generate no end of controversy. It has become a standard litigation tactic to bring a *Daubert* challenge to an expert witness. Langenfeld and Alexander analyzed the likelihood that the expert testimony of an economist, particularly in antitrust litigation, would be excluded. Their study found that a substantial portion of such challenges were to plaintiffs' experts and that exclusion was more common for plaintiffs' experts than for defendants' experts. Drawing implications may be difficult; as the authors note, for instance, the burden on plaintiffs to prove their case is higher. But the successful challenges to plaintiffs' economic experts may also reflect the courts' increasing skepticism toward a number of challenges under the antitrust laws, as reflected in the continued shift in the law to make fewer actions per se unlawful.

The role of an expert economist in an antitrust case is significant. If a *Daubert* challenge to a party's economist is successful, that party's case is likely considerably weakened. Similarly, an expert can impact whether a case is likely to proceed by helping support or defeat class certification. Absent the court's certification of the plaintiff class, there may be little appetite for pursuing a plaintiff's antitrust case. As Hal Singer notes in *Economic Evidence of Common Impact for Class Certification in Antitrust Cases: A Two-Step Analysis*, because proof of a violation is often based on evidence common to the class, "proof of common impact is almost always the bone of contention in antitrust cases at class certification stage." He explains that "common impact for class certification purposes can be demonstrated with evidence that (step 1) links the challenged conduct to anticompetitive effects generally, and then (step 2) supplies an economically valid and reliable methodology to connect those general anticompetitive effects to members of the class without having to assess their individual circumstances."

Of course, it is one thing to have a coherent explanation of harm; it is another to be able to convey that expertise such that a court will admit that testimony. And that is where lawyers come in. Lawyers play a critical role in ensuring that their experts are prepared to withstand the scrutiny they will face from the court and the questioning they will receive from the opponent's counsel. The first thing an expert needs to be prepared for regardless of the credentials or expertise of

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the economist, in a litigation, no one will accept that expertise at face value. As Christopher Yates and Belinda Lee explain in *Getting the Best—and Admissible—Testimony from Your Experts*, choosing the right expert based on a thorough knowledge of their past work, deciding what facts to expose to your expert, and preparing your expert to explain clearly his assumptions are all critical to putting your expert in the best light. Of course, there is always an opposing lawyer ready to show that your expert has made incorrect assumptions or engaged in faulty logic. As Ian Simmons explains in *Everyone Is Entitled to His Own Opinion . . . Reflections on the Cross Examination of Expert Witnesses*, the key to a successful cross-examination is a focus on the facts—facts the expert did not consider, facts which give rise to more logical inferences than those made by the expert, or facts that the expert overstates, understates, or states incorrectly.

Of course, to prepare or cross-examine an expert economist properly, a lawyer has to become an expert in the art of working with experts—and have enough familiarity with the subject matter to do so. In his *An Econometrics Primer for Lawyers*, Roy Epstein makes clear that being an antitrust lawyer today requires knowing enough about econometrics to be able to ask good questions of your own economist and knowing how to challenge the other side's economist. We antitrust lawyers will never spend 10,000 hours practicing econometrics to become experts, but we have to know enough to converse with those who do.

Experts Before the Agencies

An antitrust lawyer must also know how best to make economic arguments before the agencies. Fedral Trade Commission Chief Economist Joseph Farrell recently gave a talk setting forth the ways in which he believes such arguments can miss their mark. He pointed to the inconsistency in simultaneously arguing that entry is easy and the merged firms must combine to achieve the growth necessary for scale. He also noted that a commonly made argument—that customers will "punish" suppliers in another market for bad behavior in the market at issue—may not hold up as a credible threat given that the suppliers may not want to go to a lesser alternative in a different market.

But this is where expertise collides. Antitrust economists are typically experts in industrial organization: "the study of the structure of firms and markets and of their interactions."[10] Business people have expertise in selling their products and interacting with their customers through years, or even decades, of experience. And business people routinely say customers threaten to stop buying a range of goods if suppliers do not price competitively on any one good. Whether or not these threats are real, suppliers believe them. Even if economic experts are aligned on this subject, this significant and often-encountered disconnect between different types of experts—economic and business—suggests more work needs to be done in this area to get to the right answer.

The FTC as Expert Agency

The FTC is widely described as an "expert agency." To some, that means merely that it is an agency devoted to a specific area of the law. But the FTC's role as an independent agency, expert or not, means that it operates under statutes that provide significant deference to the agency. In merger injunction proceedings, the FTC has its own statute under which it brings an injunction challenge. Section 13(b) of the FTC Act allows a district court to block a transaction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[11] The FTC has made a concerted effort in recent years to ensure that its role as the expert decision-maker in merger cases was recognized by the courts. It has sought to persuade the courts that preliminary injunction hearings were not to decide the merits, but to determine whether "the FTC has raised questions that are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and determination by the FTC.'"[12]

As part of its strategy to maintain its jurisdiction as the expert in merger matters, the FTC has argued against live witnesses in merger injunction proceedings in recent federal court injunction cases. The FTC made clear its view that the "real trial" would be before the FTC administrative law judge.[13] The Commission's practice, in cases like *Whole Foods*, has been to proceed with the administrative litigation even if it lost the preliminary injunction proceeding.[14]

Yet the FTC's role as an expert agency does not immunize it from different views—from outside or even within the agency. The *Labcorp* case is a perfect example. The FTC voted 4 to 1 to challenge Labcorp's acquisition of Westcliff, alleging it would harm competition in the sale of clinical laboratory testing services.[15] Commissioner J. Thomas Rosch dissented on the grounds that he disagreed with one of the market definitions pled in the complaint. He said: "Although I think that there is reason to believe that the transaction will have anticompetitive effects, I cannot support a complaint that alleges an erroneous definition of the relevant product market."[16] The district court, in contrast to any of the Commissioners, did not find a likelihood that the FTC would succeed on the merits in proving that antitrust harm would arise from the transaction.[17] Of course, as the expert agency, the FTC could have continued to try the matter in an administrative proceeding. However, it declined to do so, stating that a remedy would be too hard to achieve.[18]

Doesn't the DOJ's Many Years of Experience Make It an Expert Too?

If experience were the basis for expertise, the DOJ would trump the FTC as an expert law enforcement body. It has been enforcing antitrust laws since the 1890s; the FTC was not created until 1914. Yet, as between the agencies, there is no deference to the other as expert. On an individual case level, clearance battles between the agencies to determine which is best positioned to investigate the matter are frequent—and highly frustrating to the merging parties. A recent *New York Times* article described Commissioner Rosch as writing letters advocating that the FTC be responsible for enforcing the antitrust laws with respect to accountable care organizations to "avoid time-consuming turf battles" with the DOJ.[19]

On a more fundamental issue, two Commissioners have stated publicly that they question the need for two agencies. Commissioner William Kovacic has complained of the inefficiencies and lack of cooperation between the FTC and DOJ. Similarly, Commissioner Rosch has said that if he were rewriting history, he would put all civil antitrust enforcement in the FTC.[20] His reasons were: (i) the framework of the Commission forces bipartisanship and avoids significant political swings; (ii) the FTC's administrative structure provides it with "the unique and important ability to opine on hard questions of law"; and (iii) the FTC is a better competition agency because of its consumer protection mission. While Commissioner Rosch says his issue is not with the DOJ but with the fact that it must prosecute cases in generalist federal courts, the Department would disagree that the FTC is better suited to enforce the antitrust laws. Indeed, the DOJ might well argue that its dual role as the enforcer of the criminal antitrust laws gives it special expertise in enforcing civil antitrust laws. Assistant Attorney General Varney has said Congress "may well want" to look at the overlapping responsibilities of the DOJ and the FTC, with others noting as one option the FTC handling consumer protection and the DOJ handling competition issues.[21]

There was a time when "battle of the experts" was merely a litigation concept, not a commentary on the interaction between the Federal Trade Commission and the Antitrust Division of the DOJ. And there is some irony in the competition authorities arguing that a single "monopolist" antitrust agency would be preferable to two agencies competing to best protect consumers. But perhaps federal antitrust enforcement is a natural monopoly. The inefficiencies that arise with two agencies are significant. And while differences can sometimes be bridged, as was the case with the joint issuance of the 2010 Horizontal Merger Guidelines, often they cannot. Commissioner Kovacic has been quoted as saying that the relationships between the FTC and the European Union are better than those with its sister agency two blocks away.[22] There are some differences that will remain—such as different standards for preliminary injunctions in merger actions. Nevertheless, in these difficult economic times, efficient and clear rules for businesses are critically important. That's why it seems to me that the agencies could do more to continue their efforts to cooperate with each other. But I'm no expert. ■

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1 Merriam-Webster Dictionary, *Expert*, http://www.merriam-webster.com/dictionary/expert.

2 Wikipedia, *Expert*, http://en.wikipedia.org/wiki/Expert.

3 K. Anders Ericsson, Ralph Krampe & Clemens Tesch-Romer, *The Role of Deliberate Practice in the Acquisition of Expert Performance*, 100 PSYCHOL. REV. 393–94 (1993).

4 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993).

5 *Id.* at 592–93.

6 *Id.* at 590.

7 Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

8 FED. R. EVID. 702.

9 *See* Press Release, NERA, Draft Rules of China's Supreme People's Court Explicitly Allow for the Use of Economic Analysis and Economic Experts in Private Antitrust Litigation (May 3, 2011), *available at* http://www.nera.com/83_7284.htm.

10 DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 2 (4th ed. 2005).

11 15 U.S.C. § 53(b).

12 FTC v. CCC Holdings, Inc., 605 F. Supp 2d. 26, 67 (D.D.C. 2009) (quoting FTC v. Heinz, 246 F.3d 708, 714–15 (D.C. Cir. 2001)).

13 *See, e.g.*, Plaintiffs' Mem. of P. & A. in Opp'n to Defs' Mot. for a Scheduling Order & an Expedited Status Conference at 3, FTC v. Inova Health Sys. Found., No. 1:08-cv-460 (E.D. Va. May 20, 2008) ("[A] preliminary injunction would be in the public interest . . . . As the Fourth Circuit has held, the district court is *not* called upon to reach a final determination on the antitrust issues . . . . ").

14 A recent exception is the *Labcorp* matter, discussed below.

15 Press Release, Fed. Trade Comm'n, FTC Challenges LabCorp's Acquisition of Rival Clinical Laboratory Testing Company (Dec. 1, 2010), *available at* http://www.ftc.gov/opa/2010/12/labcorp.shtm.

16 Dissenting Statement of Commissioner J. Thomas Rosch, Lab. Corp. of Am., FTC Docket No. 9345, at 2 (Nov. 30, 2010), *available at* http://www.ftc.gov/os/adjpro/d9345/101201lapcorpdisstatement.pdf.

17 FTC v. Lab. Corp. of Am., No. SACV 10-1873 AG (MLGx) (C.D. Cal. Feb. 22, 2011), *available at* http://www.ftc.gov/os/caselist/1010152/110222labcorporder.pdf.

18 Statement of Commissioners Leibowitz, Kovacic, and Ramirez, Lab. Corp. of Am., FTC Docket No. 9345 (Apr. 21, 2011), *available at* http://www.ftc.gov/os/adjpro/d9345/110422labcorpcommstmt.pdf.

19 Robert Pear, *Health Law Provision Raises Antitrust Concerns*, N.Y. TIMES, Feb. 8, 2011, at A19, *available at* http://www.nytimes.com/2011/02/09/health/policy/09health.html.

20 J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Rewriting History: Antitrust Not as We Know It . . . Yet, Remarks Before the ABA Antitrust Section 2010 Spring Meeting 2 (Apr. 23, 2010), *available at* http://www.ftc.gov/speeches/rosch/100423rewritinghistory.pdf.

21 Jeff Bliss & Sara Forden, *Varney Says Congress "May Want" to Study Antitrust Overlap*, BLOOMBERG BUSINESSWEEK, Apr. 16, 2011, http://www.businessweek.com/news/2011-04-16/varney-says-congress-may-want-to-study-antitrust-overlap.html.

22 Thomas Catan, *This Takeover Battle Pits Bureaucrat vs. Bureaucrat*, WALL ST. J., Apr. 12, 2011, at A1, *available at* http://online.wsj.com/article/SB10001424052748703784004576221100894386950.html.