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Economists Are Often Skilled Experts—But Not Mind Readers

As with any expert, courts should restrict economists to what they actually know, and limit their testimony to appropriate scientific studies based on reliable principles and data.

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In a 1983 article titled "What Does an Economist Know?" Nobel Prize-winning economist George Stigler acknowledged that economists have "no special skill in reading documents and relating them to actual behavior." Yet, since then, some economists have done exactly that repeatedly in antitrust litigation. This disincentivizes cooperation between competitors that can serve consumers because their collaboration could be misconstrued as unlawful collusion, presenting massive civil exposure and even criminal penalties. This is especially problematic today when competitor collaborations may be needed "to protect Americans' health and safety" during a global pandemic, as both the Department of Justice Antitrust Division and the Federal Trade Commission recently recognized.

A price-fixing conspiracy is an intentional act. Obviously, economists have no special ability to read the minds of those accused of conspiring and determine their intent or knowledge. Nevertheless, in price-fixing litigation, some economic experts declare behavior conspiratorial (or not) based on their own reading of documents. They characterize such opinions as "qualitative" analysis of the documents, as distinct from quantitative analysis of data. Not surprisingly, those economists retained by plaintiffs derive collusion from the documents while those retained by defendants do not. When courts admit such "qualitative" opinions as "expert" testimony, they do a disservice to the jury—and, frankly, to the field of economics. As Stigler rightly admitted, not only does an economist lack expertise in interpreting documents, "his skill in document interpretation is on average inferior to that of a lawyer." While lawyers may interpret documents for juries, a key distinction between counsel's interpretations and an expert's is that what lawyers say is not evidence.

Judges serve as critical gatekeepers for evidence at trial. This function is especially important with expert testimony. In its seminal 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals*, the U.S. Supreme Court recognized that judges need to "exercise more control over experts than over lay witnesses" since "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." There is much economists can offer in antitrust

cases within the parameters of the rules, such as reliable econometric modeling of appropriate data. But opinions on whether ordinary-course-of-business documents establish collusion do not cut it. Such testimony does not entail the reliable application of accepted scientific principles and methods. Rather, it is merely an economist's subjective reading of (often cherry-picked) documents in a manner that serves the party that is paying for that reading. As Stigler explained, "[t]he essential point to make is that all such deductions and inferences are exercises in economic logic or terminology, not valid economic analyses of the workings of real markets." Not only can these subjective "deductions and inferences" mislead the jury, but jurors are capable of interpreting documents for themselves based on the facts in evidence—and economists should not presume to tell jurors how to decide the ultimate issue before them. Stigler emphasized the unreliability of documents—as distinct from empirical data—for determining what actually occurred in the marketplace because "a large number describe only what someone hopes will take place."

A common tactic is for economists to opine that behavior reflected in selected documents is "consistent with conspiracy" and "inconsistent with competition." Courts, such as the Kansas federal district court in a Dec. 21, 2012, decision in *In re Urethane Antitrust Litigation*, have allowed such testimony on the logic that the expert is not opining on "whether a particular event actually occurred." But this misapprehends the practical impact of this testimony on the jury. Although an economist may not explicitly opine that the alleged conspiracy occurred, the implication to the jury is the same from the "consistent/inconsistent-with" formulation. There are only two possibilities: either the alleged conspiracy occurred or it didn't. And the economist is overtly directing the jury to one of those possibilities—not coincidentally, the one that serves the side that retained him. If a witness were to testify that a traffic light was consistent with green and inconsistent with red at the time of an accident, the implication would be the same as simply testifying that the light was green. More fundamentally, though, unlike the empirical observation of a traffic light, testimony that behavior reflected in documents is consistent or inconsistent with conspiracy is still just an economist's subjective interpretation of the documents, lacking the scientific rigor required for reliable expert testimony. It is an end run around the prohibition on opinions on whether an alleged conspiracy occurred.

Excluding expert testimony tends to be the exception rather than the rule. In *Daubert*, the Supreme Court emphasized the value of refuting "shaky but admissible" expert testimony with contrary evidence and vigorous cross-examination. But allowing well-paid economists to offer contrary subjective readings of selected documents based on which side retained them does not assist the jury—nor does it render either opinion admissible under the rules of evidence. Two wrongs don't make a right. Moreover, it is especially prejudicial when one side's economist is willing to offer such testimony but the other side's economist is not, instead adhering to the limits of her expertise. Parties should not suffer for doing what is right.

As with any expert, courts should restrict economists to what they actually know, limiting their testimony to appropriate scientific studies based on reliable principles and data. Document interpretation should be left to lawyers in closing arguments and juries in deliberations. And competing firms should be free to collaborate for the benefit of consumers—such as efficiently developing and providing valuable goods to those in need during a pandemic—without fear of well-paid economists reading unlawful collusion into their documents in bet-the-company litigation.

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