

2007

The "Proper" - And by That I Mean Limited - Role for Economists in Price-Fixing Litigation

David Marx Jr.
McDermott, Will & Emery LLP

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>

 Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

David Marx Jr., *The "Proper" - And by That I Mean Limited - Role for Economists in Price-Fixing Litigation*, 38 Loy. U. Chi. L. J. 491 (2007).
Available at: <http://lawcommons.luc.edu/lucj/vol38/iss3/7>

This Conference Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

The “Proper”—And By That I Mean Limited—Role for Economists in Price-Fixing Litigation

*David Marx, Jr.**

I. INTRODUCTION

I often have said that in my next life, I want to return as a testifying economist. There are two reasons I came to that conclusion. First, the hourly rates of testifying economists—which I have consistently found to be remarkably similar across the major economic consulting firms—are even *higher* than those of the lawyers who retain them! And, second, they are even *less accountable* than the lawyers for the results of their work product.

As you probably can discern, I hold some strong opinions about the role of economists in antitrust cases. Those opinions derive from my experience that in most cases the economic testimony presented by the opposing parties—and I am speaking of economic theory and the claimed application of that theory to the facts—tends to cancel itself out. Simply put, antitrust litigants spend a considerable amount of time, resources, and money on economic testimony that adds little net value to the case. Worse, that testimony may have the effect of distracting the fact-finder’s attention from the facts, disputed or not, which are what I believe should really matter in antitrust cases.

I have found that to be true in Sherman Act section 1,¹ Sherman Act section 2,² and Clayton Act section 7³ cases, as well as during different

* David Marx, Jr., is a partner in McDermott, Will & Emery LLP, where he heads the firm’s Chicago Antitrust & Competition Practice Group. Mr. Marx’s practice focuses on antitrust litigation and counseling, particularly relating to antitrust matters in the health care industry.

1. 15 U.S.C. § 1 (2000).

2. 15 U.S.C. § 2 (2000).

3. 15 U.S.C. § 18 (2000). Reflecting back on the preliminary injunction hearing (which ultimately was treated as a full trial on the merits pursuant to FED. R. CIV. P. 65(a)(2)) in *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3 (D.D.C. 1990), I believe that Judge Gerhard Gesell (a prominent antitrust lawyer before becoming a federal district court judge) limited the parties to two live witnesses each at the hearing in the hope that neither party would designate their economist as a witness. In fact, neither party did and the economic “testimony” was presented by affidavits submitted by each party in support of their respective positions on the government’s motion to enjoin Tampella’s acquisition of certain of Baker Hughes’ assets. Judge Gesell’s

phases of antitrust litigation—in the context of motions for class certification and for summary judgment on the merits. I seem to be encountering these problems with economic testimony most often today in the context of Sherman Act section 1 conspiracy cases where the issue is whether the defendants acted independently and unilaterally in their individual economic self interest or engaged in anticompetitive concerted action. Of course, economic testimony is not really necessary—except as to damages—if there is direct evidence of an agreement between the defendants.

And, as I usually represent a defendant that is alleged to have conspired, I am particularly troubled by the Seventh Circuit's ruling in *High Fructose Corn Syrup*,⁴ which has the potential, at least in this circuit, to make it almost impossible for defendants in oligopolistic markets to prevail on a motion for summary judgment in a conscious parallelism case. And that is what I want to address briefly with this article.

II. THE ROLE OF ECONOMIC TESTIMONY IN CONSCIOUS PARALLELISM CASES

The Introduction to Chapter 6 of the Sedona Conference Commentary on the Role of Economics in Antitrust Law—entitled *Economics and Proof of Concerted Action*⁵—frames the issues well:

It is therefore important to distinguish between coordination and agreement. Coordination, in which firms act with knowledge and expectations of what their rivals are doing, may properly be considered a prerequisite for agreement, and can be inferred from a multitude of factors on which an economic expert might appropriately opine. (For example, evidence as to concentration and entry barriers might be relevant, as might simulation modeling.) Agreement, however, under the present state of the law, requires more than mere coordination. In addition, the trier of fact must be able to conclude that it is more likely than not that the particular outcome could not have been reached absent negotiation through some form of communication, either verbal or nonverbal. This is what distinguishes mere price leadership and coordination from agreement.⁶

opinion dismissing the government's complaint does not refer to either economist's affidavit.

4. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002), *petition for rehearing en banc denied*, 2002 U.S. App. LEXIS 16149.

5. THE SEDONA CONFERENCE, WORKING GROUP ON THE ROLE OF ECONOMICS IN ANTITRUST, THE SEDONA CONFERENCE COMMENTARY ON THE ROLE OF ECONOMICS IN ANTITRUST LAW (Feb. 2006), *available at* <http://www.thesedonaconference.org>.

6. *Id.* at 75.

Coordination and agreement are different—factually and legally. But I do not agree with the Sedona Conference Commentary’s statement that an economist may be able to opine on the distinction between mere price leadership and coordination from agreement “by analyzing whether a particular outcome is too complex to have arisen plausibly through price leadership, but would instead have required greater communication than simple price signaling would permit.”⁷ It is just not clear to me that economists should have anything to say about that issue.

I feel the same way about expert testimony as to whether action is contrary to individual economic self-interest in the absence of agreement. Again, that is an issue about which economists should not be rendering opinions.

The appropriate witnesses to testify about these issues are the businesspeople who made the pricing decisions on behalf of their companies. They should be able to explain their decision-making process and the bases for their pricing decisions and, subject to cross-examination—into which the economists surely will have considerable input—those witnesses are much more probative on the issues than expert economic testimony.

Moreover, the expert testimony in these cases tends, unfortunately, to focus more on the conclusion—whether there was an agreement or not—than the issues which might be more useful or helpful to the fact-finder, such as whether a market or industry is conducive or susceptible to a price-fixing conspiracy. And that is what troubles me—when an economist testifies that the conduct could not have occurred or the prices could not have been set without an agreement (tacit or otherwise) between the parties. To be fair, I am no less troubled when an economist testifies to the opposite conclusion, as well; that is, that in his or her opinion there was no agreement. In either case, these conclusions are beyond the purview and expertise of a testifying economist.

III. *BAKER V. JEWEL FOOD STORES*

Let me provide just one example of why I am skeptical of economic testimony in conscious parallelism cases. If you live in or around Chicago, you probably have shopped at a Jewel or Dominick’s grocery store. A few years ago, Jewel and Dominick’s, the two leading (some would say dominant) retail grocery store chains in the Chicago area, were alleged to have fixed the price at which they sold milk in their

7. *Id.*

grocery stores in the metropolitan Chicago area. I won't bore you with all of the factual details of the case (which are public),⁸ but I will provide some factual context before discussing the economic testimony which illustrates why I want to be a testifying economist, not a lawyer, the next time around.

The underlying facts were not in dispute. They were that:

Jewel and Dominick's each sold two brands of milk—a premium brand and a “value” brand—and offered four different types of each—whole, skim, 2%, and 1%.

Both Jewel and Dominick's sold their premium brand at the same price in all of their stores. Their pricing of the value brand of milk varied depending on the level of competition among grocery stores locally, but there were between eight and ten different price points at which they sold their value brands of milk at their stores around the city.

Both Jewel and Dominick's ran promotions on milk, usually \$1 off the shelf price, though only on their premium brand, and at different times and with different frequencies (Dominick's promoted its milk more often than Jewel did).

Lots of milk was sold on promotion—about thirty percent of Jewel's milk and forty-eight percent of Dominick's milk was sold at prices below the shelf price.

The evidence showed that the shelf prices for premium milk at Jewel and Dominick's stores essentially “matched” over a two-year time period, and that if either changed the price, the other did, too, almost immediately.

There was no direct evidence of an agreement—no contacts or communications between those involved in either setting milk prices (the Dairy Products Manager) or determining when promotions would occur.

Also—and this is very important—there was no dispute as to how Jewel and Dominick's set their milk prices. The cost of milk—the price that Jewel and Dominick's paid for it—changed once a month. When that occurred, Jewel took that cost and determined what its retail price would have to be in order to achieve a target gross margin for milk. And that was the price Jewel set for its premium milk across the chain. Jewel used a simple, formulaic calculation based upon its cost and

8. See *Baker v. Jewel Food Stores, Inc.*, 2003-1 Trade Cas. (CCH) ¶ 73,964 (Ill. Cir. Ct. 2003), *aff'd*, 823 N.E.2d 93 (Ill. App. Ct. 2005) (holding that there was insufficient evidence to show price fixing).

desired gross margin. Jewel used the same process to set its milk price each month. If there was a nominal change in the cost, Jewel would not change its price, but if the cost moved much, Jewel would adjust its retail shelf price to achieve its targeted gross profit margin. Price changes usually took effect on the first Monday of a month (consistent with when the cost change was effective).

There also was no dispute as to how Dominick's set its milk prices. On the first Monday of each month (or after a change in cost was to be effective), Dominick's sent price checkers into every Jewel store to check Jewel's posted shelf price for milk, and Dominick's matched Jewel's price! One additional fact is relevant. There were rare occasions when the cost of milk decreased during the time period for which price data existed. Jewel and Dominick's did not always reduce their prices when that happened, usually because the cost reduction was nominal. There was one occasion, however, when Jewel did reduce its price and Dominick's immediately followed.

Against this factual background, what role could—should—economic testimony play?

Plaintiffs had *three* experts. First, there was an economist who testified that the posted retail shelf prices for the defendants' premium brands of milk were the same (a fact not really disputed). He did not take into consideration Jewel's or Dominick's \$1-off promotions—they were irrelevant for his analysis. This economist also speculated—testified—about damages.

Second, plaintiffs called a marketing expert to opine that the market was conducive to price-fixing: it was concentrated; the defendants' market shares were stable; the defendants were able to exchange their retail price information by engaging in regular price-checks of each other's stores; and barriers to entry into the grocery store market in Chicago were extremely high. Finally, this expert testified that Chicago's prices for milk were higher than most every other city in the country.

Finally, plaintiffs called an economist to discuss economic theory—the Bertrand model, if my memory serves me correctly. He testified that the retail shelf prices that Jewel and Dominick's posted for milk could only have been set as a result of a cartel and that any price greater than the parties' marginal cost was anticompetitive.

Defendants, of course, had three experts, too. First, defendants retained an expert for data analysis; to show, among other things, that *transaction* prices that consumers actually paid for milk differed

considerably between Jewel and Dominick's (due to the \$1-off promotions that plaintiffs' expert ignored as irrelevant).

Defendants' retained a second economic expert to address marketing, pricing, and promotion issues relevant to competition between grocery stores and between grocery stores and other sellers of milk (which was just about everyone who sells anything!). Those other sellers included, for example, convenience stores, pharmacies, and gas stations, to name but a few.

Finally, defendants had a third expert to testify about the economic theory—oligopoly versus cartel. He was prepared to opine that defendants' conduct was consistent with the operation of an oligopoly. The facts suggested that Jewel and Dominick's had engaged in unilateral, interdependent behavior that was not cooperative. In other words, their conduct and prices were not consistent with the existence of a cartel.

What was the end result? This was a bench trial (before a state court judge because the plaintiffs' complaint was based on the Illinois Antitrust Act,⁹ not the Sherman Act). At the conclusion of plaintiffs' case, the judge dismissed the complaint on the grounds that the plaintiffs had not met their burden of proving the existence of an unlawful agreement.

I fear, however, that had this case been heard in federal court and a district court judge granted summary judgment to the defendants, the Seventh Circuit might have reversed, based on its decision in *High Fructose Corn Syrup*, which, in my view, suggests that courts should arrogate economic theory over the facts.

I commend you to the article by David Meyers, entitled "The Seventh Circuit's *High Fructose Corn Syrup* Decision—Sweet for Plaintiffs, Sticky for Defendants," which appeared in the Fall 2002 issue of *Antitrust Magazine*, in which he discusses this issue in considerably more depth. As you might have guessed, I tend to agree with his characterization of the *HFCS* decision as "sufficiently outside the mainstream of most other courts' application of *Matsushita*."¹⁰

Which, I think, brings us back to where we started.

9. 740 ILL. COMP. STAT. 10/3 (2002).

10. David Meyers, *The Seventh Circuit's High Fructose Corn Syrup Decision—Sweet for Plaintiffs, Sticky for Defendants*, ANTITRUST, Fall 2002, at 67, 72.