



## Merger Trials: Looking for the Third Dimension

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Vaughn Walker

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*Vaughn R. Walker\**

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## I. Introduction

In antitrust cases, *per se* rules and bright line prohibitions have receded in the past several decades in favor of statistical and econometric analyses of evidence.<sup>1</sup> Because judges typically lack training in, and experience with, these analytical tools, the ability of judges to comprehend such evidence has been drawn into question.<sup>2</sup> At least one imminent jurist has observed that econometrics is such a difficult subject that it is unrealistic to expect most judges to comprehend it.<sup>3</sup> The organized bar has been concerned enough about the issue to devote an important study to the problem.<sup>4</sup>

Of course, complexity of evidence is not confined to antitrust cases or to economic subject matter. Many other types of cases and kinds of evidence also present obstacles to lay comprehension. Merger cases, however, often involve the possible organization or reorganization of large economic enterprises. Therefore, adjudication in merger cases can have far reaching effects on consumers, communities, employees, shareholders, and other stakeholders in these enterprises. Ad hoc or random decision making in merger cases may, for that reason, impose particularly heavy social and economic costs.

Furthermore, in the United States, a merger case—whether initiated by either of the two federal competition agencies, the United States Department of Justice (“DOJ”) or the Federal Trade Commission (“FTC”), by private parties, or by state agencies—almost always seeks equitable or injunctive relief, either to stop an incipient merger or unwind a merger that has already been consummated.<sup>5</sup> This invests the judge alone, usually a federal district judge,<sup>6</sup> with the sole power to decide both the facts as well as the law.<sup>7</sup> Hence, unlike many other types of cases involving complex evidence but in which a constitutional right to a jury trial exists, questions about competence in the merger context focus primarily on the judge.

Commentators and others have proposed several remedies to enable judges to deal with complex economic evidence. These remedies usually involve some form of judicial education or re-education in economics. The study prepared by the American Bar Association suggested that judges employ court-appointed economic experts pursuant to Federal Rules of Evidence Rule 706.<sup>8</sup> Long ago, a group of distinguished judges recommended the use of special masters in antitrust cases.<sup>9</sup> Allowing competing experts to cross-examine one another, the so-called “expert witness hot tub,” is another approach.<sup>10</sup> Parties have often suggested and conducted tutorials for judges to educate them in the economic issues involved in such cases.<sup>11</sup> Yet another option is for judges to attend seminars and training pro-

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grams conducted by the Federal Judicial Center, law schools, and related institutions devoted to law and economics.<sup>12</sup>

All of these activities have their place and can be helpful to judges in dealing with the difficult issues that merger challenges present. But each of these remedies has distinct shortcomings. Judges historically have been reluctant to appoint court experts or special masters for a variety of reasons.<sup>13</sup> Some judges see the use of court-appointed experts or special masters as an abdication of the judge's judicial responsibility. Many judges are uncertain how to go about finding an expert or master. Still others are skeptical that truly impartial experts or masters can be found; after all, expertise implies knowledge and experience, factors that seldom leave one without views on the most controversial issues in any field. Because persons truly expert in a field are likely to have an opinion bearing on the subject matter of the case, or at least have voiced views suggesting an inclination one way or the other, selection of a court-appointed expert or special master

would seem to predestine the outcome of a case and judges are loathe to create any impression of doing so.

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The "expert witness hot tub" is just a different form of cross-examination which is, after all, the stock in trade of skilled and experienced trial lawyers. I have been told by an economist who often testifies that cross-examination at trial is far more challenging than defending one's dissertation in a PhD oral examination. Furthermore, a battle solely between experts might actually be more rather than less confusing to judges as the conversation may become an academic dialogue instead of the parry and thrust of lawyer-driven examination.

Tutorials are often interesting but, in my experience, usually not very useful. Out of fairness, judges almost always allow both sides to make tutorial presentations and these usually amount to little more than a dress rehearsal for the trial. And, in any event, whether the content of the tutorial should be deemed part of the record for purposes of appellate review is an open question that gives many judges pause.

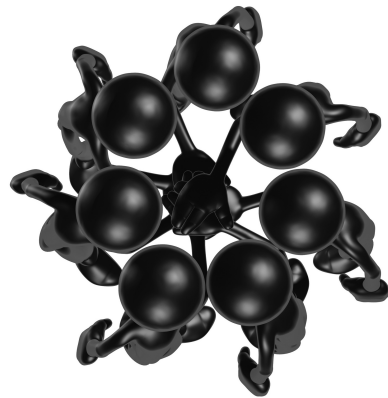
Finally, while the seminars and programs on economic issues presented by the Federal Judicial Center, universities, and private organizations are often wonderful learning experiences for the judges who attend, the connection to the issues that a judge sitting in a merger case must decide are usually so attenuated that these programs amount to a kind of liberal arts enrichment rather than a course that equips the judge to handle a specific merger case. In any event, these programs have not been without controversy which discourages many judges from attending them.<sup>14</sup>

Since 2000, I have presided over two merger cases that have proceeded through a full trial to final judgment.<sup>15</sup> This note largely reflects that experience along with nineteen years handling all manners of federal cases. While two

datums and a couple decades of experience by one judge would not ordinarily satisfy anybody's idea of a sufficient foundation for definitive conclusions, during this period the total number of merger cases that proceeded to final judgment after a full trial or a preliminary injunction proceeding in which witnesses were called appears to be very limited.<sup>16</sup> Only a handful of judges have had the privilege of trying one merger case all the way through; possibly none has tried more than two. Armed with this experience, I have the temerity to offer the observations and opinions herein. Moreover, for what it's worth, neither of the decisions in the two cases tried was appealed, a fact which at least two authors have posited is an indication of correctness,<sup>17</sup> an assertion I happily accept (but would not like to have to defend).

I do not argue here that concern about judicial competence is without substance. Nor do I contend that mergers are best committed in the final analysis to generalist judicial officers who lack expertise in issues of industrial organization although, as will be noted, this provides some check against complete capture of merger policy for purely political purposes. Rather, accepting that in the United States we have committed important decisions about mergers to generalist judges, I argue that a judge's task in a merger case does not entail recondite analysis. After all, in these cases witnesses whose credentials can be subject to no reasonable question and who, by their credentials, are presumed fully and completely to understand the economic analysis, nonetheless testify in complete opposition to one another. As those indisputably expert in the subject matter reach different conclusions, it cannot be that the judge's job is to understand the economic analysis in the same way and with the same facility as those expert in the field.

Rather, the judge's task is less one of economic learning than it is of achieving a perspective emanating from the evidence. The judge weighs the evidence in a merger case by using the standards of evidence that apply in every case; this enables the judge to bring the competing economic analyses offered by the parties into focus for the decision at hand. The judge seeks to discern, from both the evidence and the economic analysis, a perspective in somewhat the same way a viewer discerns in an autostereogram two similar but distinct images so that from a two-dimensional surface there emerges a third image having depth, shape, and relief. The impression drawn from the evidence must converge with the economic analysis so as to produce that third dimension which forms the basis of a decision. Drawing from the evidence and the econom-



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ic analysis together enables the judge to verify or discredit the parties' contentions and moves the judge to a decision.

## II. Evidence and the Economic Analysis Must Converge

The central issue in almost every merger case, of course, is the definition of the relevant market. Typically, parties seek to delineate the boundaries of their respective positions regarding the relevant market by enlisting the testimony of economic experts. These expert witnesses, usually eminent professors of economics who specialize in the study of industrial organization, employ methodologies

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that use concepts such as demand elasticity, concentration ratios, merger simulation, critical loss analysis, and the like. The persuasiveness of testimony based on these concepts to a generalist judge is open to question. This is not so much because judges do not or cannot understand such evidence (although one would be ill-advised to presume that all judges fully grasp these analyses with all their nuances) as it is that testimony of this type is not the sort of evidence that judges are accustomed to using to make decisions. In other words, judges are

reluctant to base credibility determinations and thus findings on evidence of a kind and nature that usually is not the grist from which they mill their decisions.

Most cases that federal district judges hear and decide involve evidence that takes a narrative form. Such narratives are the accounts of witnesses, prompted of course by a friendly lawyer on direct examination, and challenged by an opposing lawyer on cross-examination. These narratives in civil cases are typically laced together with documents authored or received by the witnesses. From this, the judge weaves a scenario of events that leads to some factual finding relevant to one of the elements of the claim or defense at issue. It is evidence of this type that judges are most familiar with and, therefore, by which they are most likely to be influenced. It may seem anomalous to attempt to delineate the metes and bounds of a product or geographic market by narrative rather than quantitative measures, but to a judge this seems not anomalous at all.

Judges have many guides for determining the persuasive value of evidence. Among the most familiar are the numerous exceptions to the hearsay rule.<sup>18</sup> These exceptions guide the evaluation of evidence in contexts other than ruling on hearsay objections. While the hearsay rule seeks to exclude out-of-court statements<sup>19</sup> as unreliable, the underlying rationale for these hearsay exceptions is that statements made under the specific circumstances of the exceptions are reli-

able enough to be introduced as evidence. Exceptions can serve as a starting point or analogue in evaluating whether particular items of evidence in a merger case will seem credible to the generalist judge.

For example, the evidence rules presume that statements in the ancient documents are reliable because the documents have not suffered from forces generating the litigation at hand.<sup>20</sup> In much the same way, a document not prepared under a threat of possible legal review carries greater persuasive weight than one prepared under the influence of the litigation. Accordingly, documents created before the merger had even been anticipated or for purposes demonstrably different from the litigation do not suffer from the ills of manipulation which can occur after a merger or a merger challenge is on the horizon.

Judge Thomas F. Hogan tried the *Staples*<sup>21</sup> case which was replete with valuable pre-merger documents that told the government's story. The key question in *Staples* was whether the government could establish that an "office supply superstore" submarket existed within the consumable office supplies market.<sup>22</sup> At first blush, the court admitted that it seemed odd that a seller of office supplies, by virtue of its physical store configuration, did not compete with another seller of office supplies.<sup>23</sup> But this is exactly what the government ended up proving by selecting the right evidence on which the court felt comfortable relying.

In one set of records, the government presented Staples' internal pricing documents from 1994-1996 which compared the prices between Staples and Office Depot and OfficeMax, the other two office supply superstores.<sup>24</sup> These price comparisons showed that where there were no office supply superstores nearby, Staples charged prices more than 5 percent higher than they charged in store locations that were close to an Office Depot or OfficeMax.<sup>25</sup> This pre-merger evidence assured the judge that Staples would raise prices by 5 percent or more if it merged with Office Depot. The evidence was persuasive because it was not prepared for litigation and because it gave dimension to the FTC's economic analysis. The fact that these records were also self-incriminating further helped the government's case.

Documents created in the ordinary course of business carry more persuasive force than those that are not so prepared. Business records carry an aura of reliability because regularly creating business records and the routine involvement of the record keepers suggest a consistency which reduces the risk of mistake. Again, this is a fundamental and well-worn exception to the restriction against hearsay evidence.<sup>26</sup> Furthermore, when records are for internal as opposed to external purposes, judges take assurance that the businesses rely on these same records and maintain their accuracy to fulfill the business mission.<sup>27</sup>

Two categories of records within the realm of business records are often presented to judges as economic evidence in merger cases.<sup>28</sup> The first category consists of factual records; the second consists of analytical records. Records factual

in nature tend to be relied on more heavily than records analytical in nature. Factual records include customer lists, sales and pricing information, geographic sales information, and the like. These records inform judges of the actual market conditions and how firms respond to competitive forces in the market place.

Analytical records are also useful but tend to be less persuasive as their conclusions are often evaluations and speculations of the factual record. Such records include strategy documents, business and marketing plans, and short- and long-term projections. These records tend to predict future behavior and reveal how market players assess the competitive landscape. But rather than demonstrating actual behavior, these analytical records demonstrate a player's perception of the market.

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When lawyers present pre-merger documents that are created in the ordinary course of business, such documents can carry significant persuasive force. In the *Staples*<sup>29</sup> case, the government presented a second set of compelling analytical documents which gave perspective to the economic analysis the government presented. The government offered strategic pricing documents which showed how Staples divided its geographic locations into “competitive” and “non-competitive” zones.<sup>30</sup> The competitive zones included those areas in which there was another office supply superstore, whereas non-competitive zones did not include such superstores.

Together, the pricing comparisons and the geographic strategy documents demonstrated the competitive landscape; superstores competed with one another but were less competitive with other sellers of office supplies. In addition, the documents disclosed Staples' actual behavior in the market—pricing 5 percent more in non-competitive zones than in competitive zones.

By contrast, post-merger records may distort the impression for the judge, due to added scrutiny and skepticism. This is what happened in the *Whole Foods*<sup>31</sup> case, albeit on appeal, and for one particular judge. Whole Foods presented pricing comparisons which were conducted after the merger announcement. Judge Tatel<sup>32</sup> criticized the pricing comparison as all-but-meaningless price evidence because the pricing comparison was conducted several months after Whole Foods announced its intent to acquire Wild Oats.<sup>33</sup> Judge Tatel specifically stated that the merger provided an incentive for Whole Foods to eliminate price differences which may have previously existed.<sup>34</sup> Here, while Whole Foods' lawyers chose the proper evidence to fit its economics, the dimension the lawyers sought to portray was not perceived by Judge Tatel. His skepticism grew out of a convention associated with the rules of evidence.<sup>35</sup>



Despite the generally informative and reliable nature of pre-merger documents prepared in the ordinary course of business, documents selected by counsel or expert witnesses for litigation purposes also provoke a certain skepticism. In *United States v Oracle Corporation*,<sup>36</sup> the government's expert witness used Oracle's discount approval forms to attempt to demonstrate that Oracle competed only with PeopleSoft and SAP in the "high function" financial management services and human resource management software market and did not compete with other software developers to a significant degree.<sup>37</sup> Financial management services and human resource management software are two "pillars" of an enterprise resource planning software suite which can encompass one or many pillars. The government's expert used the discount approval forms and considered software which sold for \$500,000 or more to be high function software.<sup>38</sup> But in using the discount approval forms, the expert failed to separate financial management services and human resource management software which sold for \$500,000 or more from the entire suite which sold for \$500,000 or more.<sup>39</sup>

The problem was that the entire suite contained multiple other pillars, such as customer relations management, supply chain management, or business intelligence software, thus preventing the isolation of the competitive impact of the proposed merger on financial management services and human relation management software which was the alleged product market. One example in the expert's set of examples showed bundled software which sold for \$500,000 or more, yet the human resource management software was discounted 100 percent in order to sell the supply chain management software.<sup>40</sup> Nonetheless, the government's expert considered the entire sale under human resource management software. The expert's selection of pre-merger documents suffered from the appearance of selection bias distorting the image the expert sought to portray.

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Another indicator of reliability is whether evidence is self-serving or not. A standard convention of evidence posits that most people will not make a statement contrary to pecuniary interest unless true or thought to be true.<sup>41</sup> Again, going back to Judge Tatel and the *Whole Foods*<sup>42</sup> decision, Judge Tatel paid close attention to the statements of Whole Foods and Wild Oats when asked if both operated in the natural and organic market.<sup>43</sup> Their historical statements found in emails and commentary that they operated in a distinct market were both a statement against interest but also a prior inconsistent statement as Whole Foods later asserted that there is no separate natural and organic market.<sup>44</sup>

Many other examples of how judges use conventional evidentiary principles to identify the evidence that they find persuasive could be cited. Suffice to say that it is evidence as measured and assessed by conventional principles for weighing

evidence that judges use to verify or discredit a party's economic analysis. An economic analysis that depends on evidence that fails to pass conventional evidentiary tests is unlikely to be persuasive, a point to which I now turn.

### III. Verifying the Economic Analysis

Because it is thought that markets with certain characteristics will cause firms to behave in certain ways, the relevant market is important in a merger case. And a merger that is anticompetitive in the relevant market is thought likely to have certain competitive effects. Industrial organization economists have come to label these as “coordinated effects” and “unilateral effects.” A judge untutored in the issues of industrial organization will likely draw parallels to concepts that he or she sees in other cases. And judges are thoroughly familiar with the underlying notions. The idea of “coordinated effects” is, of course, analogous to concerted action, conspiracy, and the like; features of many other case types. Similarly, “unilateral effects” are not unique to merger or competition cases; over-reaching, oppression, and the like are not dissimilar concepts found in myriad types of cases.

How does one tell in more or less narrative fashion through non-expert witnesses that a merger is more or less likely to result in the threat of coordinated or unilateral effects? Concerted action, conspiracy, over-reaching, and oppression in other types of cases are often proved by circumstantial rather than direct evidence. Key circumstances in proving such concepts are those facts which tend to show whether or not parties had the motive and opportunity to engage in such conduct. These circumstances can be demonstrated through the histories of companies and industries.

All companies and industries have a history and background. Companies and industries don't just happen; they originate, grow, and develop. The shape and habits of companies and industries are, at least in part, owed to their pasts. In most instances, these histories are rich in narratives. All companies of any size and certainly any industry of any scope will admit a past that is replete with sagas of accomplishment, success, and failure.

In the two merger cases I have tried to judgment, relatively little time or effort was devoted by the lawyers in painting this background. In a way this was surprising because the two cases involved the newspaper and business application software industries. Both industries are peopled by colorful and interesting personalities; newspapers, in particular, have a storied past, replete with myriad narrative possibilities. The lawyers—all of whom were among the most capable members of the bar in any field—devoted little time or attention to their histories and associated array of personalities.

To be sure, these histories and personalities might have little or no obvious bearing on the issues that must be decided in a merger case, but with lawyerly imagination a connection sufficient to sustain admissibility can usually be found. Admissibility of evidence, after all, is not solely the product of applying the rules of evidence; evidence promising an interesting tale can overcome many obstacles to admission. These histories may well touch upon past coordinated activities of competitors in the industry, trade association activities, common corporate ancestries or founders, movement of executives from one company to another, connections of the companies to the same investment bankers or venture capitalists; these are all facts that can suggest or negate the circumstances that make the actual or potential means and inclination to coordinate in anticompetitive ways more or less likely.

These same narrative histories may also suggest the potential for, or lack of capability of, overreaching, hard practices, and abusive negotiation tactics with suppliers or customers that similarly suggest or negate an ability and propensity to abuse a dominant position. Again, of course, the direct nexus between such evidence and the issues in the case at hand may be objected to as inadmissible character evidence,<sup>45</sup> but it is evidence of this kind that judges hear in other cases and from which they craft their decisions, so it is evidence not foreign to a judicial mind.

THE LARGER POINT HERE IS THAT A GENERALIST FEDERAL DISTRICT JUDGE HEARING A MERGER CASE IS UNLIKELY TO APPROACH THE CASE WITH THE SAME EMPHASIS ON QUANTITATIVE MEASURES OF MARKET CONCENTRATION AS WOULD AN ANTITRUST AGENCY.

The larger point here is that a generalist federal district judge hearing a merger case is unlikely to approach the case with the same emphasis on quantitative measures of market concentration as would an antitrust agency. These agencies consist of individuals with a special interest or background in competition issues. Generalist federal district judges for the most part lack this kind of specialist interest. Furthermore, competition agencies generally have a staff of expert economists and lawyers who are themselves specialists in competition issues. Federal district judges are aided by law clerks who generally have come right out of law school and whose service to the judge may well be substantially shorter in tenure than the period most cases remain on the judge's docket. In no stretch of the imagination can one of these law clerks be considered a specialist in competition related issues.

The result is that the judge and the individual that the judge may look to for research and drafting assistance will view the merger case through a lens that projects a different image from that of the agency or even, perhaps, lawyers who specialize in competition law. Thus, although much of the evidence in a merger case may be the handiwork of industrial organization specialists, it will be most effective if the evidence is presented by witnesses who relate a narrative based on first-hand experience which gives dimension to the party's market contention.

Judges are accustomed to evidence that casts an impression, not evidence which establishes a scientific truth. Witnesses all swear to tell the “truth, the whole truth, and nothing but the truth,” but witnesses seldom relate the same truths.

So trial evidence, like an autostereogram, is a collection of dots in which a hidden image emerges after the viewer stares at it for some time. The image is not apparent initially, and it may take several minutes for the eyes to focus and adjust and for the image to appear. Many viewers are unable to see the image at all. Some viewers may see it differently. As in an autostereogram, while there may be a scientific truth in the evidence of a merger case, a judge may not readily see that truth and may miss it altogether unless it converges with the impression cast by evidence that is consistent with their backgrounds and qualifications not the product of economic analysis.

Let me give examples from the two merger cases that I tried to judgment. In *United States v Oracle Corporation*,<sup>46</sup> the government seeking to enjoin the merger of Oracle with another producer of business application software, PeopleSoft, relied almost exclusively on a series of customer witnesses<sup>47</sup>—I’ll have more to say about such testimony presently. The government neglected, however, to paint a convincing picture that a merged company of these two producers would, by itself, be able to dominate the line of software involved in the case.<sup>48</sup> The government’s customer witnesses were certainly consistent, all telling the same story: A merged Oracle and PeopleSoft would be the only source of the “high function” business application software required by the customer witnesses’ enterprises or institutions.<sup>49</sup> A special brand of judicial skepticism is reserved for a parade of witnesses beating the same drum.

Apart from the rehearsed character and monotony of these witnesses’ testimony, the most striking feature or image the testimony conveyed was that it was at odds with the basic premise of the government’s case. That premise was that a merged Oracle and PeopleSoft would dominate the supply of high function software and be able to exert monopolist pressures on its consumers.<sup>50</sup>

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Each of these government witnesses was sophisticated and knowledgeable in the field of information technology. The witnesses all had notable backgrounds in their field, demonstrated capabilities, and the substantial resources of the enterprises with which they were associated. These facts made the witnesses and their employers seem unlikely victims for oppression or abuse of a dominant position by a supplier in the market. The witnesses thus projected an impression that was inconsistent with the impression that the government needed to establish, namely that a merged Oracle and PeopleSoft would be able to extract monopoly profits from these customers over a period of time significant enough to warrant the costs of the merger transaction.<sup>51</sup> Of course, skill and

experience are no guarantees against becoming the victim of oppression. Yet, by their backgrounds and qualifications, the witnesses the government relied on to tell its story projected an impression that tended to negate the fundamental showing that the government needed to make in order to carry its burden in the case. There was a disconnect between the economic analysis the government sought to relate and the storytellers it brought to court.

In the other merger case, *Reilly v Hearst Corporation*,<sup>52</sup> tried to judgment, the industry was newspaper publishing and one of the parties was the Hearst Corporation. One is hard pressed to think of an industry with a more colorful past or a corporation identified with a larger figure in the public imagination. This was not entirely overlooked by the plaintiff's counsel, himself an advocate with a penchant for color. But the pertinent history here was the development and acceptance for antitrust purposes of joint operating agreements among formerly competing general circulation daily newspapers.<sup>53</sup> The issue in the case involved dissolution of such an agreement.

The problem for the plaintiff with this history was that it cut against the economic analysis that the plaintiff tried to establish, namely that separately owned and operated general circulation newspapers could survive as separate entities in the same market.<sup>54</sup> The long history of joint operating agreements in the newspaper industry suggested just the opposite, namely that joint operating agreements were necessary in order for editorially separate general circulation newspapers to survive in the same market.<sup>55</sup> Indeed, history suggested that the viability of the newspaper industry was such that a joint operating agreement simply staved off the inevitable collapse of the weaker newspaper in that agreement and that metropolitan daily general circulation newspapers were a kind of "natural" monopoly.<sup>56</sup> This history was replete with numerous supporting examples which defendants' witnesses repeatedly presented and emphasized.

In this case, it was defendants that capably painted the historical picture. No doubt recognizing the difficulty this history presented, plaintiff's able counsel began his case with another theme: There must be something wrong with the transaction because of the tactics employed by the defendants in attempting to consummate the transaction.<sup>57</sup> Plaintiff's counsel called as his first witness<sup>58</sup> the publisher of the Hearst newspaper, who admitted that he attempted to influence the mayor of San Francisco to support Hearst's position in the case by blandishing favorable coverage of the mayor in the Hearst newspaper.<sup>59</sup> Needless to say, this was explosive and entertaining testimony. It passed the admissibility test more because the testimony was interesting than relevant to the merits of the case.<sup>60</sup> But it did little to advance the plaintiff's fundamental theme: Two separately owned and operated newspapers were viable in the market. Plaintiff's most memorable evidence and its economic analysis failed to converge into a single impression.

There is a certain irony in this failure as subsequent developments have shown. A later purchaser of the Hearst newspaper brand, by following a different business model from that of the traditional general paid circulation newspaper, has preserved some editorial, circulation, and advertising competition in the market through a free distribution tabloid. But no serious evidence of such a plan was apparent in plaintiff's evidence in *Reilly*. Indeed, the plaintiff's evidence suggested that his willingness to produce a competing newspaper depended on certain concessions from Hearst that were entirely inconsistent with the premise that the market could support more than one general circulation daily. The evidence and the economic analysis needed to establish viability did not converge, dictating a decision against the plaintiff.

## IV. Conclusion

Evidence produced by economic analysis is an essential ingredient in a merger case. But no matter how effectively compiled, no matter the imminence and credentials of the expert witness whose testimony presents such evidence, such evidence takes its place along with other evidence. Economic analysis is unlikely to prove decisive in a case in which the non-economic evidence points to an opposite result. Economic analysis is neither the most nor the least important source of evidence in a merger case. If consistent with other evidence, the economic analysis will project a convincing image for one side or the other. If not consistent, no amount of sophisticated econometrics will rescue the analyses or the witnesses who present it. No one analysis, no one item of evidence makes or breaks the case; it is the evidence and the economic analysis together from which an impression or image emerges—or does not emerge—and leads to an outcome. ▼

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- 1 The decline of *per se* rules has been ascribed to many influences: the advent of the Merger Guidelines in 1968 with their emphasis on statistical measures of competition; the publication in 1978 of Judge Bork's classic, *The Antitrust Paradox*; and the scholarship in law and economics associated initially with the University of Chicago, but now a universal feature of legal education. No doubt an intellectual revolution of this magnitude and importance has many sources; it is sufficient for present purposes simply to recognize the pervasive effect economic analysis has exerted in competition issues during the past forty years or so.
  - 2 MICHAEL R. BAYE & JOSHUA D. WRIGHT, IS ANTITRUST TOO COMPLICATED FOR GENERALIST JUDGES? THE IMPACT OF ECONOMIC COMPLEXITY & JUDICIAL TRAINING ON APPEALS (George Mason Law & Economics Research Paper No 09-07, January 27, 2009), available at <http://ssrn.com/abstract=1319888>.
  - 3 Richard A. Posner, *The Law and Economics of Expert Witnesses*, 13 J. ECON. PERSPECTIVES 91, 96 (Spring 1999).
  - 4 Economic Evidence Task Force, American Bar Association, Final Report of Economic Evidence Task Force 8-10 (2006), available at <http://www.abanet.org/antitrust/at-reports/01-c-ii.pdf>.
  - 5 See Antitrust Division, United States Department of Justice, Antitrust Division Policy Guide to Merger Remedies (2004), available at <http://www.usdoj.gov/atr/public/guidelines/205108.htm> (stating structural remedies are preferred); Bureau of Competition, Federal Trade Commission, Statement of the

- Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies (April 2, 2003), available at <http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm> (demonstrating FTC's strong preference for structural remedies).
- 6 See 15 USC §§18, 25 and 45 (granting federal district court jurisdiction in restraint of trade and unfair methods of competition cases). See also 28 USC §§1331, 1337(a) and 1345 (granting federal district court jurisdiction in federal question, commerce and antitrust cases, and cases commenced by the United States).
  - 7 Since the merger of law and equity effective in 1938, 48 Stat 1064 §2 (June 19, 1934), federal district judges serve as the finders of fact in cases seeking equitable remedies and thus decide both the law and facts.
  - 8 Economic Evidence Task Force, *supra* note 5, at 8-10.
  - 9 Leon R. Yankwich, et al, '*Short Cuts' in Long Cases*, 13 FRD 41, 80 (1951).
  - 10 Lisa C. Wood, *Experts in the Tub*, 21 ANTITRUST 95 (Summer 2007).
  - 11 Economic Evidence Task Force, *supra* note 5, at 6.
  - 12 Economic Evidence Task Force, *supra* note 5, at 6.
  - 13 See Economic Evidence Task Force, *supra* note 5, at 9; Lisa C. Wood, *Court-Appointed Independent Experts: A Litigator's Critique*, 21 ANTITRUST 91 (Spring 2007); 4 Jack B Weinstein & Margaret A Berger, Weinstein's Federal Evidence §706.02[2] (2d ed 2005) (court appointment of experts is "a rarity").
  - 14 See the Community Rights Counsel's comments on judicial junkets, available at <http://www.communityrights.org/>.
  - 15 United States v Oracle Corporation, 331 F Supp 2d 1098 (N D Cal 2004); Reilly v Hearst Corporation, 107 F Supp 2d 1192 (N D Cal 2000).
  - 16 Although the following list may not be exhaustive, it appears that in addition to *Oracle* and *Reilly*, full scale trials or preliminary injunction hearings with witnesses in federal district court merger cases since January 1, 2000 have been conducted in: *FTC v Whole Foods Market, Incorporated*, 502 F Supp 2d 1 (D DC 2007), *rev'd*, 548 F3d 1028 (DC Cir 2008); *FTC v Foster*, 2007-1 Trade Cases (CCH) ¶175,725 (D NM 2007); *FTC v Arch Coal, Incorporated*, 329 F Supp 2d 109 (D DC 2004); *Atlantic Coast Airlines Holdings, Incorporated v Mesa Air Group, Incorporated*, 295 F Supp 2d 75 (D DC 2003); *United States v UPM-Kymmene Oyj*, 2003-2 Trade Cases (CCH) ¶74,101 (N D Ill 2003); *FTC v Libbey, Incorporated*, 211 F Supp 2d 34 (D DC 2002); *United States v SunGard Data Systems, Incorporated*, 172 F Supp 2d 172 (D DC 2001); *FTC v Swedish Match*, 131 F Supp 2d 151 (D DC 2000); *United States v Franklin Electric Company, Incorporated*, 130 F Supp 2d 1025 (W D Wisc 2000); *FTC v H J Heinz Company*, 116 F Supp 2d 190 (D DC 2000), *rev'd*, 246 F3d 708 (DC Cir 2001); *California v Sutter Health System*, 84 F Supp 2d 1057 (N D Cal 2001), *amended*, 130 F Supp 2d 1109 (N D Cal 2001).
  - 17 Baye & Wright, *supra* note 3, at 13.
  - 18 Federal Rules of Evidence Rules 801, 803-04. Hearsay exceptions encompass hearsay exemptions in this article.
  - 19 A "statement" is: (1) an oral or written assertion or (2) nonverbal conduct of a person, if intended by the person as an assertion. Federal Rules of Evidence Rule 801(a).
  - 20 Federal Rules of Evidence Rule 803(16).

- 21 *FTC v Staples, Incorporated*, 970 F Supp 1066 (D DC 1997).
- 22 *Id.* at 1073.
- 23 *Id.* at 1075.
- 24 *Id.* at 1075-76.
- 25 *Id.*
- 26 Federal Rules of Evidence Rule 803(6).
- 27 Federal Rules of Evidence Rule 803(6).
- 28 Merger Working Group, International Competition Network, Developing Reliable Evidence in Merger Cases (2003), available at [http://www.internationalcompetitionnetwork.org/media/library/conference\\_2nd\\_merida\\_2003/Reliable.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_2nd_merida_2003/Reliable.pdf).
- 29 *FTC v Staples, Incorporated*, 970 F Supp 1066 (D DC 1997).
- 30 *Id.* at 1079-80.
- 31 *FTC v Whole Foods Markets, Incorporated*, 548 F3d 1028 (DC Cir 2008).
- 32 *Id.* at 1041. Judge Tatel concurred with Judge Brown's judgment but filed a separate opinion. *FTC v Whole Foods Market, Incorporated*, 548 F3d 1028 (DC Cir 2008) has no majority opinion.
- 33 *Id.* at 1047. *But see* Judge Kavanaugh's dissenting opinion which relied upon Whole Foods' pricing comparison. *Id.* at 1051.
- 34 *Id.* at 1047.
- 35 *FTC v Whole Foods Market, Incorporated*, 548 F3d 1028, 1047 (DC Cir 2008).
- 36 *United States v Oracle*, 331 F Supp 2d 1098 (ND Cal 2004).
- 37 *Id.* at 1145-46.
- 38 *Id.*
- 39 *Id.* at 1158-59.
- 40 *Id.*
- 41 Federal Rules of Evidence Rule 804(b)(3).
- 42 *FTC v Whole Foods Market, Incorporated*, 548 F3d 1028, 1041 (DC Cir 2008).
- 43 *Id.* at 1045.
- 44 *Id.* at 1045.
- 45 Federal Rules of Evidence Rule 404(b).



46 United States v Oracle Corporation, 331 F Supp 2d 1098, (N D Cal 2004).

47 *Id.* at 1125-33.

48 *Id.* at 1158-61.

49 *Id.* at 1125-33.

50 *Id.* at 1130-33.

51 *Id.* at 1158.

52 Reilly v Hearst Corporation, 107 F Supp 2d 1192 (N D Cal 2000).

53 *Id.* at 1200-05.

54 *Id.*

55 *Id.* at 1201.

56 *Id.*

57 *Id.* at 1206-11.

58 Calling a defendant as the first witness is almost always a good idea for plaintiffs.

59 *Id.* at 1209-11.

60 This and other evidence in the case made inexplicable the refusal of the antitrust authorities to approve dissolution of the joint operating agreement without conditions that served the political interests associated with the Clinton administration and some of its allies. Reilly v Hearst Corporation, 107 F Supp 2d 1192, 1210-11 (2000). The ability of a generalist judges to point out these facts without fear of reprimand serves as at least one virtue of committing merger decisions to such judges.