



Square Pegs in Round Holes: The Interaction between Judges and Economic Evidence

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Competition law is not the only area in which it is essential that decision-makers understand economic evidence, but it is surely one of the most important. After all, the concept of competition itself conjures up images of rivalry for some sort of prize, and in the area of competition law, that prize is success in the market. Through the magic of microeconomic analysis, it has become well accepted that the competitive process between or among producers yields not only a winner from the producer standpoint, but more importantly yields benefits to consumers. The latter benefits, which normally take the form of lower prices, better quality, superior ancillary services, or some combination of those features, involve a transfer of wealth from the producer to the consumer, and thus would not necessarily exist in a world without competition. All of that may be relatively easy to say, but when it comes to the real world, matters quickly become more complex. The judge has no choice but to study the economic evidence that is presented by the parties and to come to a conclusion that is consistent with that evidence. This paper considers whether judges have been up to that task.

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Competition law is not the only area in which it is essential that decision-makers understand economic evidence, but it is surely one of the most important. After all, the concept of competition itself conjures up images of rivalry for some sort of prize, and in the area of competition law, that prize is success in the market. Through the magic of microeconomic analysis, it has become well accepted that the competitive process between or among producers yields not only a winner from the producer standpoint, but more importantly yields benefits to consumers. The latter benefits, which normally take the form of lower prices, better quality, superior ancillary services, or some combination of those features, involve a transfer of wealth from the producer to the consumer, and thus would not necessarily exist in a world without competition.

All of that may be relatively easy to say, but when it comes to the real world, matters quickly become more complex. How is a judge to know whether the proposed merger between General Electric and Honeywell represented a threat to competition (as the European authorities believed) or was at worst competitively neutral and possibly even competitively desirable (as the U.S. authorities believed)?¹ How can a judge say whether Microsoft should be permitted to integrate its internet browser, Internet Explorer, into its Windows operating system, or if it should be compelled to use an open architecture that permits users to choose more effectively among browsers offered by competitors?² And what wisdom does a judge bring to the question whether a proposed joint venture between General Motors and Toyota would (a) yield important competitive benefits to both companies, or (b) be tantamount to a cartel between important competitors in the market for personal automobiles?³ The short answer is that the judge has no choice but to study the economic evidence that is presented by the parties and to come to a conclusion that is consistent with that evidence. This paper considers whether judges have been up to that task.

The first question is how much economics the judge, personally, really needs to know. Put differently, if the judge sitting in a competition case of any consequence had spent his or her entire career before becoming a judge as a chemical engineer, or as a Shakespearian scholar, or as an advertising executive, is it inevitable that this judge would botch the case? This is another way of asking the question whether competition law must be the province of a specialized judiciary, or if it can be entrusted to generalist judges. Both systems exist in the world today, and so if specialization were clearly superior, it should be possible to document that proposition. No evidence of which I am aware, however, would support such a strong conclusion. To the contrary, the United States—by far the largest jurisdiction to rely on generalist judges for the adjudication of competition cases—stands up well in any comparative study. As economic learning has advanced, the federal judiciary has absorbed its lessons and applied them competently.

This may be counter-intuitive, when one considers the sophistication of the economic analysis that is often necessary in competition cases. But perhaps that

takes too narrow a view of the judge's role. A federal district court judge—who sits as the court of first instance in cases brought by the U.S. Department of Justice's Antitrust Division, as well as in cases brought by private parties and state attorneys general—has many responsibilities. Above all, the judge is

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charged with ensuring that the case goes forward in a procedurally regular manner, allowing each side the opportunity to develop the facts, to put forth legal theories, and to have their positions tested by a neutral decisionmaker. In an antitrust case, the court will almost certainly convene a number of pretrial conferences. It will establish a scheduling order for the case;

that order will address such things as the timing of mandatory disclosures under the discovery rules, the extent of discovery that will be permitted, rules for handling electronic information, agreements relating to privileged materials, and a presumptive date for the trial itself.⁴ One topic singled out for attention is expert testimony.⁵

If the case cannot be resolved during the pretrial process (which is when many antitrust cases are⁶), then, assuming that the plaintiff may be entitled to damages and that it has filed a proper request for a jury, the court will preside over a jury trial. (There is no entitlement to a jury in cases for purely equitable relief.⁷) If the parties do not want a jury, then the district judge will sit as the trier of fact.⁸ In that case, the litigants need have no fear of lay jurors being overwhelmed with economic evidence. Even if there is a jury, the court is entitled to guide the jury's consideration of the evidence by submitting specific questions for the jurors to answer, rather than simply asking for a bottom-line conclusion.⁹ Influential sources such as the *Federal Judicial Center's Manual for Complex Litigation* encourage the use of this procedure in complex trials.¹⁰ The court's ability to structure the pretrial process and its role in focusing the parties and the trier of fact on the relevant questions both help to make the evidence offered by economic experts understandable for the generalist.

Judges in American courts bear a heavy responsibility for screening any expert testimony that is proffered by the parties. With rare exceptions, experts in the United States are engaged by one party or the other, not by the court. Given the risk of both partisanship and sheer lack of scientific rigor, the court must function as a gate-keeper, letting in the worthwhile evidence and keeping out the so-called junk science.¹¹ Federal Rule of Evidence 702 gives the judge her marching orders:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education,

may testify thereto in the form of an opinion or otherwise, if (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.”

The Advisory Committee Notes on the 2000 Amendments to Rule 702 explain how the rule was derived from the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹² and later decisions elaborating on *Daubert*. Rather than deciding by some kind of seat-of-the-pants system whether an economist (or for that matter, a chemical engineer, a physician, an accountant, or any other expert) is qualified to offer expert testimony and has done the necessary work on the case before the court, *Daubert* set forth a non-exclusive checklist for trial courts to use. That list includes the following considerations:

1. Whether the expert’s technique or theory can be or has been tested—that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
2. Whether the technique or theory has been subjected to peer review and publication;
3. The known or potential rate of error of the technique or theory when applied;
4. The existence and maintenance of standards and controls; and
5. Whether the technique or theory has been generally accepted in the scientific community.

The *Daubert* factors were explicitly recognized as non-exclusive at the time the Court announced them. Since that time, which was more than fifteen years ago, courts have built upon the *Daubert* foundation and identified additional issues that normally should be addressed before admitting expert testimony:

6. Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;
7. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, and, in connection with this, how much of an extrapolation is justified under the circumstances;
8. Whether the expert has adequately accounted for obvious alternative explanations;

9. Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting; and
10. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give, or if, in contrast, it is seen to be less reliable or more fanciful (like astrology or phrenology).

Courts have become accustomed to their role as gatekeeper, and they take it very seriously. One of the more famous, and perhaps slightly chilling, examples of this diligence comes from the field of antitrust and the pen of Judge Richard A. Posner, of the Seventh Circuit Court of Appeals. The case was called *In re Brand Name Prescription Drugs Antitrust Litigation*, and the year was 1999.¹³ The district court had excluded certain testimony offering an economic analysis of the case that had been proffered by Nobel Prize-winning economist Robert Lucas. Judge Posner, reviewing that decision, had this to say:

“The plaintiff’s principal economic evidence was that brand name prescription drugs are indeed priced discriminatorily, to the detriment of the pharmacies; that discrimination requires (and thus demonstrates the existence of) market power; and that the chargeback system facilitates discrimination. The defendants spent days cross-examining the plaintiff’s principal economic witness, Professor Robert Lucas, and ultimately persuaded the district court to exclude most of his testimony under the rule of Daubert But what was objectionable about his evidence actually had nothing to do with Daubert; it was that the evidence mainly concerned a matter not in issue—that the manufacturers of brand name prescription drugs engage in price discrimination, showing that they have market power. Everyone knows this. The question is whether that market power owes anything to collusion. . . . On that, Lucas had virtually nothing to say. . . . His opinion that there is price discrimination in the prescription drug industry is one that an economist of Lucas’ distinction should have been able to reach in even less time [than the 40 hours he spent working on the case].”

Frightening words, for those who hope to win their cases by snowing the judges with the reputation of their expert economists. No one doubted that Professor Lucas would have been capable of examining evidence that might have proven or disproven collusion, and if he had done so, it is very likely that his evidence would have been admitted. The problem was that he apparently had not been asked the right questions by the plaintiffs’ lawyers, and thus the evidence he was willing to present was simply not useful for purposes of the case. Perhaps another way of put-

ting the point is just that experts must be willing and able to put in the time to analyze the particular case before them; broad generalities will not do.

Courts also have other devices, in addition to Evidence Rule 702, to help them deal with expert evidence. One of the most important of these relates to transparency among experts. (This aspect of U.S. practice does not quite reach the openness of the Australian “hot tub” system, in which the experts interrogate one another directly, but it is quite useful for both sides’ trial preparation, as well as for the court’s ability to evaluate the case.) The primary mechanism is found in one of the discovery rules, Federal Rule of Civil Procedure 26(b)(4)(A), which calls for prediscovery of all expert opinions that are expected to be presented as testimony in the case. Both sides must submit reports from their experts to the other side, and both sides are entitled to take the depositions of the opponent’s experts. The Rule requires detailed disclosures, as this excerpt illustrates:

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The report must contain:

1. A complete statement of all opinions the witness will express and the basis and reasons for them;
2. The data or other information considered by the witness in forming them;
3. Any exhibits that will be used to summarize or support them;
4. The witness’s qualifications, including a list of all publications authored in the previous 10 years;
5. A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
6. A statement of the compensation to be paid for the study and testimony in the case.¹⁴

Nontestifying experts—that is, the experts that the parties may wish to consult on a confidential basis in order to evaluate the strength of their own case, or any other expert that they would rather not use publicly—are subject to different rules. The work of these experts falls under the work product privilege recognized in the discovery rules, and thus disclosure can be ordered only if there are compelling reasons.¹⁵

The *FJC’s Manual for Complex Litigation, Fourth*, has an entire section devoted to the best way to handle expert economic testimony. Although it is rather long, it is worth reproducing here, as this is the source to which virtually any federal

district court judge, experienced or not in antitrust, is likely to turn if and when he or she is confronted with a significant antitrust case:

“30.2 Transactional and Economic Data, and Expert Opinions

Antitrust cases often involve the collection, assimilation, and evaluation of vast amounts of evidence regarding numerous transactions and other economic data. Some of this material may be entitled to protection as trade secrets or confidential commercial information. Effective management of such cases depends on pretrial procedures that facilitate the production and utilization of this material and its efficient presentation at trial as well as the early resolution of privilege claims. The following are among the measures that may be useful:

- Limiting scope of discovery. Early attention to the issues may make feasible reasonable limits on the scope of discovery. Limits may be fixed with reference to the transactions alleged to be the subject matter of the case, to the relevant products or services, or to geographical areas and time periods. Limits should be subject to modification if a need for broader discovery later arises. . . .
- Confidentiality orders. Protective orders may facilitate the expeditious discovery of materials entitled to protection as trade secrets or other confidential commercial information. . . . Especially if the parties are competitors, provisions may preclude or restrict disclosure by the attorneys to their clients. Particularly sensitive information, such as customer names and pricing instructions, may be masked by excision, codes, or summaries without impairing the utility of the information in the litigation.
- Summaries and computerized data. The court should encourage the parties to work out arrangements for the efficient and economical exchange of voluminous data. Where feasible, data in computerized form should be produced in computer-readable format. Identification of computerized data may lead to agreement on a single database on which all expert and other witnesses will rely in their testimony. Other voluminous data can be produced by way of summaries or tabulations—subject to appropriate verification procedures to minimize and quickly resolve disputes about accuracy—obviating extensive discovery of source documents. Counsel should produce such exhibits well in advance of trial. . . .
- Other sources. Relevant economic data may be available from government or industry sources more quickly and cheaply than through discovery from the litigants. Accordingly, consider making an early determination regarding the admissibility of such evidence under Federal Rule of Evidence 803(8), (17), and (18) [referring to various

exceptions to the rule prohibiting hearsay evidence].

- Expert opinions. Parties may plan to retain economists to study such topics as relevant markets, the concentration of economic power, pricing structures, elasticity of demand, barriers to entry, marginal costs, and the effect of the challenged practices on competition and the claimants. Early in the litigation, it is advisable to call for an identification of the subjects on which expert testimony will likely be offered, determine whether such testimony is necessary, rule at least preliminarily on the appropriate scope of expert testimony, and establish a schedule for disclosure of experts' reports, recognizing that some studies may require considerable time to prepare and review. Agreement on a common database for all experts to use is desirable, and the court can require the parties to agree on methodology and form before conducting surveys or polls. . . . Under Federal Rule of Evidence 104(a) [governing certain preliminary matters], the judge must hear and decide, before trial, objections to the admissibility of experts' opinions. If significant conflicts exist between the parties' experts on matters of theory, an expert may be appointed by the court under Federal Rule of Evidence 706. . . ."¹⁶

The last of those suggestions—a court-appointed expert—is worth a closer look. As the *Manual* indicates, the Federal Rules of Evidence expressly provide for a court-appointed expert:

“The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.”¹⁷

This is somewhat different from the court's ability to appoint a master to assist it in processing a case, although an expert master can be useful if the court

wants someone to sift through specialized materials and help to create a record for the case.¹⁸

As the excerpt from the *Manual* indicates, it is not always necessary to delve into the economic evidence in order to resolve an antitrust case. The generalist judge should have no trouble deciding such basic issues as the court's subject-matter jurisdiction over the case, whether the complaint states a claim at all under the antitrust laws, whether the particular plaintiff before the court has standing to sue, whether the statute of limitations has run, whether the defendant (especially if it is a state entity or affiliated with a foreign government) is entitled to immunity from suit, and whether the court will be able to bring all necessary defendants before it (*i.e.* does the court have personal, or adjudicatory, jurisdiction over the defendants). It is not at all uncommon for a case to be resolved on one of these preliminary grounds, and so the district court has no need to plunge into the field of economics. Even if it does become necessary to allow the parties to begin reach-

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ing the merits, it is often possible for the court to bifurcate the case so that liability issues will be resolved first. This would allow postponement of economic evidence relating solely to damages until the time (if ever) after the plaintiffs have prevailed on liability and are ready to prove damages issues.

Procedural tools are not the only things that assist the court in managing an antitrust case. A number of substantive rules have evolved that also have the effect, taken together, of

making antitrust understandable not only to the generalist judge, but also to the generalist businessperson. The most well-known of these is the classic *per se* rule that developed in American law from the early 1940s onward. The Supreme Court consciously tried to achieve some level of clarity and simplification in antitrust rules for the set of cases in which the Court thought that competitive harm would almost always be present and justifications would almost never succeed. Interestingly, as time has gone on, the Court has progressively been narrowing the scope of the *per se* rule. While it once covered both maximum and minimum resale price maintenance, for example, it now covers neither one, thanks to the Court's decisions in *State Oil Co. v. Khan*,¹⁹ rejecting the *per se* rule against maximum resale price fixing that had been announced in *Albrecht v. The Herald Co.*²⁰ and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,²¹ overruling the 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*²² and thus abolishing the *per se* rule against minimum resale price maintenance. Perhaps this is a sign of the Court's greater confidence not only in economic learning, but also in the ability of judges to understand and apply that learning competently. Or perhaps it reflects the Court's concern that the cost of false positives (that is, findings of antitrust violations where in fact there is no harm

to competition) is higher than the mid-twentieth century Court had appreciated, and thus there is no responsible alternative to looking carefully at every case. Whatever the reason, the trend is unmistakable, and so district court judges at present are not as often able to rely on a *per se* rule to resolve an otherwise complex case.

Another common judicial device that helps the judge resolve close questions is the allocation of the burden of persuasion (as well as the lesser burden of coming forward with evidence on a point). If the evidence, including the expert evidence, is in equipoise, then the plaintiff will lose. Allocating the burden of proof in this way makes sense, if one accepts the proposition that judges will make mistakes from time to time, and thus the real task is to ensure that both the number of mistakes will be minimized, and the consequences of whatever mistakes remain will also be contained. Chief Judge Frank Easterbrook, of the Seventh Circuit Court of Appeals, wrote about this phenomenon ten years ago.²³ He began by setting forth two key concepts:

“Expressing the extent of the law’s comparative advantage over rivalry in undercutting monopoly requires the use of the social scientist’s terms “false positive” and “false negative.” If a judge wrongly condemns as monopolistic a business practice that is efficient and beneficial to consumers, that is a false positive. Consumers would be better off if the judge had decided the case the other way. If the judge wrongly excuses conduct that is harmful to consumers, that is a false negative. Litigation produces both false positives and false negatives. The more complex or unusual the conduct, the more false positives and false negatives there will be. And of course the more complex the conduct and the scarcer our knowledge of its consequences, the longer the case will take to conclude, and the more it is apt to cost along the way. All the while competitors will be trying to undercut monopolists.”²⁴

He argues that courts should refrain from condemning practices that are likely to be corrected by the market in a shorter time than the litigation process would take. Even for long-lived practices, Judge Easterbrook argues that

“courts have a comparative advantage only when false positives are few and false negatives will survive competitive pressure. Unless there is a strong reason to suspect that a monopoly or monopolistic practice can survive the attempts of other firms to undermine it, then the costs of inaction (excusing

harmful conduct) are low. Unless there is strong reason to suspect that we can identify harmful conduct accurately, then the costs of action (condemning beneficial conduct) are high.”²⁵

If the standards of proof required by the substantive law demand a compelling showing from a plaintiff before a court is authorized to intervene in a market, one need have less concern about the lack of specialization in the judiciary. Even the generalist judge should be able to evaluate expert economic testimony and understand the broad picture it is painting. Expert administrative agencies are better able to handle the sophisticated judgments that might be necessary when the matter hangs more closely in the balance (although even then, under virtually every system of competition law, the agency must show that it is more likely than not that harm will occur before it may enter an order prohibiting the conduct).

Lastly, there are areas in which the balance between the need to assure competition and the need to achieve a different public policy goal is one that is drawn by the legislature, not by courts or administrative agencies. Exemptions from the U.S. antitrust laws are not common, but they exist. At a general level, there is the exemption for activities regulated by the states, usually known by the name of the Supreme Court decision that established it, *Parker v. Brown*.²⁶ Antitrust liability is also excluded for activities associated with petitioning the government.²⁷ There is also something called the “filed rate doctrine,” under which a private party cannot recover treble damages against regulated companies based on rates that they filed with (and for which they received approval from) an administrative agency.²⁸ Finally, there are a host of special antitrust exemptions in specific industries, such as the immunity for agricultural cooperatives,²⁹ certain forms of sports broadcasting,³⁰ the business of insurance,³¹ and (notoriously) the common-law exemption for the business of baseball.³² Keeping antitrust law entirely out of an area may seem like an extreme way to handle the risk that judges might fail to assess economic evidence accurately, but one suspects that more than a concern about the economic sophistication of judges lies behind these rules.

Returning to the central concern of this paper, the last serious question to ask is how judges become educated in economics, or in any other specialty they must know in order to understand a case fully. The most important way has already been mentioned: by the parties, through the adversarial process. In addition, there is a wealth of continuing education programs available for judges. Some of these are offered by public entities such as the Federal Judicial Center and the National Center for State Courts. Others are offered by sections of the bar devoted to the judiciary, such as the American Bar Association’s Judicial Division and the Judges’ Forum within the Public and Professional Interest Division of the International

Bar Association. Finally, a number of privately sponsored seminars offer judicial education programs. Federal judges must disclose their attendance at many such seminars (for example, those offered by universities), in accordance with a policy adopted by the Judicial Conference of the United States. Assuming that the seminar organizers have made the proper disclosures on the judiciary's website, however, and that the judge properly follows through after attending the seminar, this is another potential source of education on specialized topics like economics.

In the final analysis, therefore, there is reason to be optimistic about the ability of judges to handle expert economic evidence in antitrust cases. Through devices as varied as the *Daubert* inquiries, the availability of the written expert reports filed in the case, and straightforward judicial education programs, judges can and do learn enough to glean the important messages that the experts are trying to convey. Substantive legal standards also help to reduce the risk of error. The act of ensuring that economic evidence is comprehensible to the judge comes with a great side benefit: It ensures that antitrust law itself remains comprehensible to the lay business people who must comply with it and to the public that must support it. So, even if at first blush it seems that asking judges to handle economic evidence is something like pushing a square peg into a round hole, on closer examination the fit is much better. Antitrust law depends more than ever on accurate assessments of the likely competitive effects of different practices, and the judges will be there to ensure that this takes place. ▼

THE ACT OF ENSURING THAT ECONOMIC EVIDENCE IS COMPREHENSIBLE TO THE JUDGE COMES WITH A GREAT SIDE BENEFIT: IT ENSURES THAT ANTITRUST LAW ITSELF REMAINS COMPREHENSIBLE TO THE LAY BUSINESS PEOPLE WHO MUST COMPLY WITH IT AND TO THE PUBLIC THAT MUST SUPPORT IT.

- 1 See *General Electric v. Commission*, OJ C48 25.2.2006; see also Stefan Schmitz, *The European Commission's Decision in GE/Honeywell and the Goals of Antitrust Law*, 23 U. PA. J. INT'L ECON. L. 539 (2002).
- 2 See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).
- 3 See *General Motors Corp.*, 103 F.T.C. 374 (1984).
- 4 See Fed. R. Civ. P. 16(b)(3).
- 5 See Fed. R. Civ. P. 16(c)(2)(D).
- 6 Two recent prominent examples are *Pacific Bell Tel. Co. v. linkLine Communications, Inc.*, 07-512, 2009 WL 454286 (U.S. Feb. 25, 2009), holding on the basis of the pleadings alone that a complaint failed to present a valid antitrust claim, and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), holding that allegations of a conspiracy in violation of the antitrust laws failed on the basis of the pleadings.
- 7 The right to trial by jury in civil actions in federal courts is governed by the Seventh Amendment to the United States Constitution. It preserves that right for "suits at common law" where the value

exceeds \$20. As the Supreme Court most recently explained at length in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707-22 (1999), this is understood to mean that the right to a jury exists only for suits that would have fallen on the “law” side of the English courts in 1791; it does not exist for proceedings in equity, such as a request for an injunction or other equitable relief. The Court has also recognized other exceptions to the constitutional right, most notably the fact that the Seventh Amendment does not apply to suits against the United States, which are all non-jury. See *Osborn v. Haley*, 549 U.S. 225, 252 (2007). Suits against foreign sovereigns, to the extent they are permitted at all by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11, are also expressly stated to be “nonjury” actions. 28 U.S.C. § 1330(a).

- 8 See Fed. R. Civ. P. 52(a).
- 9 A verdict reached through answers to specific questions is called a “special verdict.” See Fed. R. Civ. P. 49(a). The court may ask the jury to furnish “a special written finding on each issue of fact,” by giving the jury “written questions susceptible of a categorical or other brief answer,” or through any other method that the court considers appropriate.
- 10 See Manual for Complex Litigation, Fourth, at sec. 12.451 (FJC 2004).
- 11 The leading case describing this process is *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
- 12 509 U.S. 579 (1993).
- 13 186 F.3d 781, 787 (7th Cir. 1999).
- 14 Fed. R. Civ. P. 26(b)(2)(B)(i).
- 15 Fed. R. Civ. P. 26(b)(3).
- 16 FJC Manual for Complex Litigation, Fourth, § 30.2, at 522-24.
- 17 Fed. R. Evid. 706(a).
- 18 See Fed. R. Civ. P. 53. The Supreme Court frequently appoints masters to assist it when it is called upon to resolve boundary disputes between two or more states (a subject matter that falls within the Court’s original jurisdiction).
- 19 522 U.S. 3 (1997).
- 20 390 U.S. 145 (1968).
- 21 127 S.Ct. 2705 (2007).
- 22 220 U.S. 373 (1911).
- 23 Frank H. Easterbrook, *Does Antitrust Have a Comparative Advantage?* 23 HARV. J. L. & PUB. POL. 5 (1999).
- 24 *Id.* at 7-8.
- 25 *Id.* at 8.
- 26 317 U.S. 341 (1943).

27 See *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961).

28 See *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922).

29 See the Capper-Volstead Act, 7 U.S.C. §§ 291-92.

30 See the Sports Broadcasting Act, 15 U.S.C. § 1291-95.

31 See the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15.

32 See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972).