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Global Antitrust Economics

Current Issues in Antitrust and Law & Economics

Pierre-Yves CREMIEUX

John D. HARKRIDER

Keith N. HYLTON

Francine LAFONTAINE

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Lawrence J. WHITE

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Editors' Note

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Concurrences Review in partnership with George Mason University School of Law, Law and Economics Center held The Global Antitrust Economics Conference in Arlington, Virginia on May 29, 2015. The conference featured keynote speech from Maureen Ohlhausen, Commissioner of the US Federal Trade Commission and five panels of prominent speakers that engaged in a heated debate about the different aspects of Antitrust Law and Economics.

Antitrust law has become increasingly important in recent years, especially as the number of antitrust related disputes increases. It becomes crucial to analyze how courts and agencies currently deal with these cases; how they assess the concepts of market definition and market power; how they evaluate coordination issues, such as information exchange and price signaling, and what conduct can be considered as violations of antitrust laws; how they determine remedies and settlements; and how they establish who should be punished in cases of antitrust violation (the violating firm, its agents or both). The Global Antitrust Economics Conference brought together lawyers, enforcers, economists, and academics to animate the discussion on those topics.

In this book, 13 prominent authors offer 11 contributions that tackle some of the most stimulating topics debated during this one-day event in Global Antitrust Economics. Thus, **Pierre-Yves Cremieux** and **Aaron Yeater**, while they underline that convergence in antitrust economics is recent and remarkable, they also point out the still existing conflicts in economic evidence presented by competition experts; **John Harkrider** explains his point of view according to which the US Federal Trade Commission and Department of Justice are both law enforcers and regulators, enforcing laws that are regulatory in nature, relying more on economists than eyewitnesses, reacting more to what may happen, than what has already occurred; **Keith Hylton** discusses why monetary fines, to be a more effective deterrent threat, should focus on the firm rather than on its agents; **Francine Lafontaine** offers an analysis of the use of economics in support of the competition mission at the US Federal Trade Commission; **Carlos Mena-Labarthe** discusses the Mexican experience to show how remedies and their negotiation are valuable tools for emerging competition authorities; **Maureen Ohlhausen** tackles the “Brother, May I?” problem or the

challenge of competitor control over market entry; **William Page** tries to identify those signals that solicit cooperation to achieve noncompetitive equilibria, thus bringing about agreements under Section 1 of the Sherman Act; **Dan Rubinfeld** explains why, in his point of view, our current systems of private and public enforcement can be improved if more attention is given toward increasing individual incentives; **Loren Smith** and **Maria Stoyadinova** highlight the prominence of market definition in antitrust evaluation and litigation; **Gregory Werden** addresses the concept of the relevant market by highlighting that it is a device for separating active competitive forces that directly and immediately affect economic performance (e.g., prices) from forces that are passive or have indirect, delayed, or highly uncertain effects on economic performance; finally, **Lawrence White** shows why the US Merger Guidelines and its guidance on market definition continue to provide a robust and powerful analytical framework for defining markets for the purpose of merger analysis.

This volume guides readers through some of the most important and cutting-edge issues in global antitrust economics.

The editors would like to give their sincere thanks to the 13 authors for their hours of labor dedicated to this unique collection of articles.

Foreword

DOUGLAS H. GINSBURG

JOSHUA D. WRIGHT

During the Global Antitrust Economics conference that took place last May, we heard from panels on a variety of topics, including the use of economic evidence in antitrust cases, the role of market definition in modern antitrust analysis, the mechanisms through which competitors coordinate with each other, the process of negotiating settlements and remedies, and the relative merits of punishing corporations and individuals. Many panelists submitted papers for inclusion in this volume; in this Foreword we briefly describe each of their contributions.

Commissioner Maureen Ohlhausen of the US Federal Trade Commission led off the event with a trenchant analysis of the challenge to competition when incumbent firms have control over market entry. Like restrictions that require innovators to obtain permission from government gatekeepers before entering a market – which she likened to the childrens’ game “Mother, May I?” – competitor-imposed restrictions upon entry may also undermine free-market principles and economic liberty, and may do so to an even greater extent. This particular problem, which Ohlhausen aptly coins the “Brother, May I?” problem, may manifest itself as a law or regulation, a decision of a financially-interested state board, or exclusionary conduct by a monopolist. The paper examines the problem through the lens of three recent cases: North Carolina State Board of Dental Examiners v. Federal Trade Commission (state licensing boards), Federal Trade Commission v. Phoebe Putney Health Systems, Inc. (certificate-of-need laws), and *McWane, Inc. v. Federal Trade Commission* (exclusionary conduct). In addition to its sound analysis, the paper contributes to antitrust scholarship a simple expression to describe a widespread problem that may take varied forms. We predict the term “Brother, May I?” will, in short order, be ubiquitous in the vernacular of the antitrust bar.

Pierre-Yves Cremieux of the Analysis Group in Boston proceeded from the observation that, though economists rarely disagree regarding fundamental principles, such as gains from trade or the importance of incentives, highly qualified economists appear on opposite sides of litigation in virtually every case. *Use and Abuse: The Myth of Divided Antitrust Economics*, which Cremieux co-authored with his colleague Aaron Yeater, posits that the reason for such divergent conclusions is not attributable to theoretical or

methodological disagreement and only rarely is attributable to unprofessional arguments; rather, economists reasonably may make different underlying assumptions about the characteristics of the market in question. As an example, the authors explain that in the highly publicized LCD price-fixing case, one economist found a 20% overcharge while the other found none. The authors explain that this wide variation in overcharge estimates is attributable to the economists' disagreement over whether the Producer Price Index for microprocessors was an appropriate proxy for costs.

John Harkrider, a partner at Axinn, Veltrop & Harkrider in New York City, writes that the U.S. Department of Justice and Federal Trade Commission straddle a fine line between law enforcement and regulation. Harkrider defines the regulatory role as one that aims to address firms' future conduct, seeks remedies that require affirmative conduct, and involves interpretation of the agency's own rules, while a law enforcement role usually addresses conduct that has already occurred, seeks only cessation of the challenged conduct, and is governed by court decisions. Although the agencies insist that they are engaged in law enforcement simpliciter and forswear the title of regulator, Harkrider argues that many of their activities indeed seem to fit the regulatory role. For example, with respect to mergers, the agencies require pre-notification, assess future effects, often require affirmative commitments such as guarantees of nondiscriminatory access to facilities, and are governed not only by court decisions but by the Merger Guidelines, which the agencies wrote themselves. Because of their twin roles, Harkrider argues, the agencies must exercise their power carefully and transparently, and should solicit input from market participants regarding their rules and practices.

Francine Lafontaine, a professor at the University of Michigan and, at the time of the conference, Director of the Bureau of Economics at the Federal Trade Commission, offers heretofore unavailable insights into the Bureau's role in the agency. Lafontaine describes, for example, its participation in investigations and policy formation and its more general research and outreach objectives. The Bureau's economic analyses – both theoretical and empirical – allow the Bureau of Competition to make better informed enforcement decisions. Meanwhile, its outreach efforts take the form not only of public comments but also of informal discussions with lawmakers, participation in workshops, and contributions to US submissions to the OECD. The economists cannot do it alone, however; the economic analysis is “greatly enriched by the interaction and cooperation between the FTC's economists and attorneys during the course of the investigations, as they work together to gather relevant information, meet with parties, carry out investigational hearings, and so on.”

A trio of submissions address the persistent role of market definition in antitrust litigation and agency analyses despite recent calls to reduce its influence. Greg Werden, Senior Economic Counsel at the Antitrust Division and a prolific author on antitrust economics, maintains in *The Relevant Market Concept in Antitrust Law* that, despite the advent of powerful economic tools that permit economists to examine competitive effects directly, the concept of the relevant market “is not the relic of a bygone era;” it properly remains the foundation for all modern competition analysis in antitrust cases. In support of his claim, Werden discusses the role of the relevant market in coordinated effects merger cases, in unilateral effects merger cases, and in Sherman Act conduct cases.

Lawrence White, a professor of economics at the Stern School of Business, New York University, likewise discusses the importance of defining a market. White explains that the first step in merger analysis should be to establish the boundaries of a market, and then to determine whether the proposed merger might allow the merging firms to exercise market power, as measured by the hypothetical monopolist or “SSNIP” test. White argues, however, that the SSNIP test is less useful when applied to unilateral effects cases and to monopolization cases.

Loren Smith, Senior Vice President of Compass Lexecon and former Federal Trade Commission staff economist, explores the difference between agency analysis and evaluation of mergers and analysis prepared for trial. Smith argues that agencies and practitioners place more emphasis on competitive effects until they prepare for trial, when the focus turns to market definition and other forms of evidence. In *The Prominence of Market Definition in Antitrust Evaluation and Litigation*, Mr. Smith describes the steps agencies take to analyze mergers, steps that often allow agency economists to avoid market definition altogether, as well as the shift in analytical focus when preparing to persuade a judge that the merger will substantially lessen competition.

The contributions by Professor Keith Hylton of the Boston University School of Law, *Should Antitrust Fines Target Firms of Agents?*, and by Professor Daniel Rubinfeld, of the New York University School of Law, *Improving Antitrust Sanctions*, deal with the issue of optimal deterrence of cartel behavior. In particular, they focus on the structure of antitrust sanctions most likely to deter cartels efficiently. A critical question for antitrust policy is whether sanctions for cartel behavior should be borne both by the individuals perpetrating the illegal conduct as well as by their corporate employers and if so, how exactly individuals should be sanctioned. In *Antitrust Sanctions*, a previously published article by the authors of this Foreword, we argued that the optimal mix of antitrust sanctions requires a significant shift in focus toward individuals, that ever-increasing corporate fines are unlikely to increase deterrence, and that competition agencies ought to embrace debarment as a useful tool to increase the efficiency of cartel sanctions. Each contribution addresses those proposals in the course of developing new economic arguments aimed at improving the efficiency of antitrust penalties for collusion.

Professor Hylton argues that monetary fines levied against firms are always the most efficient deterrent against price-fixing. Hylton's analysis challenges our call in *Antitrust Sanctions* for a shift in the allocation of overall "sanction capital" from the corporation to the individual. Hylton argues that if a firm has an incentive to fix prices, and only the firm's agents are punished, then the firm can always reward its agents enough to induce antitrust law violations. The key assumption of Hylton's analysis is that agency costs within the firm are sufficiently low that this form of contracting is efficient. In Hylton's model, because a firm can always contract with its agent to compensate it for the cost of any antitrust sanction imposed on the individual, the individual sanction cannot improve deterrence. Ultimately, he argues, rather than targeting agents, eliminating price-fixing incentives for firms remains the most efficient method for preventing violations of antitrust laws.

Professor Rubinfeld takes the opposite position. He argues that efficient cartel deterrence requires improving the incentives for individuals in the firm to avoid cartel behavior. Exploring different proposals to improve both public and private antitrust sanctions, Rubinfeld argues that the heterogeneity in the sensitivity of different cultures to different forms of sanctions requires competition regimes to think of criminal fines and private actions as playing complementary roles in deterring anticompetitive conduct—with private enforcement emphasizing compensation and public enforcement focused on penalizing anticompetitive behavior. Professor Rubinfeld also offers suggestions for improving both public and private enforcement in antitrust through appropriate and targeted prison sentences along with expanded and increased rewards for whistleblowers.

Enforcement agencies seek to reach effective settlements and implement sound remedies for both merger and non-merger antitrust cases. In *Negotiation of Settlements and Remedies by Young Competition Agencies: The Mexican Experience*, Carlos Mena-Labarthe, who heads the Investigative Authority in the Federal Economic Competition Commission of Mexico, explores the difficulties young competition agencies face when evaluating the effectiveness of remedies. Labarthe assesses the institutional concerns that young agencies must consider when implementing a settlement policy. Legitimacy, credibility, and

deterrence are all factors that must be weighed on account of the agencies' limited experience in relation to other jurisdictions. More specifically, the author addresses the challenges faced by the Mexican authority, such as cultivating a comprehensive discourse for addressing competition concerns and setting consistent standards to generate predictability.

Identifying anticompetitive information exchanges and price signaling is necessary for effective antitrust enforcement. Panelists discussed price and behavior signaling as it relates to coordinated conduct. William Page, a Professor in the Levin College of Law at the University of Florida, provides a legal framework for distinguishing lawful from unlawful information exchanges in his paper, *Signaling and Agreement under Section 1 of the Sherman Act*. Professor Page concludes that prearranged signals are clearly unlawful. He argues that private exchanges between rivals should be viewed skeptically and that implicit signals and public comments made to the market should generally be lawful. By employing this framework, courts, practitioners, and agencies can navigate the differences between tacit and express collusion.

The Global Antitrust Economics conference provides a forum for antitrust economists, practitioners, regulators, and legal scholars to explore the most critical issues, both substantive and procedural, arising in competition law around the world. The papers submitted by panelists and selected for this volume are representative of the careful and insightful perspectives presented at the conference, the wide range of topics discussed, and the power of economic analysis in providing a common language to facilitate communication about issues facing competition agencies and courts around the world.

Table of Contents

Editors' Note.....	v
<i>DOUGLAS H. GINSBURG, JOSHUA D. WRIGHT, NICOLAS CHARBIT, ELISA RAMUNDO & DUY D. PHAM</i>	
Foreword.....	vii
<i>DOUGLAS H. GINSBURG & JOSHUA D. WRIGHT</i>	
Use and Abuse: The Myth of Divided Antitrust Economics	15
<i>PIERRE-YVES CREMIEUX & AARON C. YEATER</i>	
Betwixt and Between: The FTC and DOJ as Regulators and Law Enforcers	23
<i>JOHN D. HARKRIDER</i>	
Should Antitrust Fines Target Firms or Agents?.....	35
<i>KEITH N. HYLTON</i>	
On the Use of Economics in Support of the Competition Mission at the FTC	43
<i>FRANCINE LAFONTAINE</i>	
Negotiation of Settlements and Remedies by Young Competition Agencies: The Mexican Experience	51
<i>CARLOS MENA-LABARTHE</i>	
Brother, May I?: The Challenge of Competitor Control over Market Entry	67
<i>MAUREEN K. OHLHAUSEN</i>	
Signaling and Agreement under Section 1 of the Sherman Act	81
<i>WILLIAM H. PAGE</i>	
Improving Antitrust Sanctions	97
<i>DANIEL L. RUBINFELD</i>	
The Prominence of Market Definition in Antitrust Evaluation and Litigation	103
<i>LOREN SMITH & MARIA STOYADINOVA</i>	
The Relevant Market Concept in Antitrust Law	117
<i>GREGORY J. WERDEN</i>	
The Merger Guidelines and Market Definition: A Powerful Tool for Merger Analysis.....	129
<i>LAWRENCE J. WHITE</i>	

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Use and Abuse: The Myth of Divided Antitrust Economics

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Abstract

The new pattern of global antitrust regulation established by government authorities shows that, despite much being made about economists' inability to agree on anything, convergence in antitrust economics is both recent and remarkable. Economists today near-unanimously believe that antitrust enforcement is beneficial to both consumers and economic growth and that it is a necessary component of any modern free-market economy. Despite this agreement, conflicting economic evidence presented by experts in competition disputes remains. While economists, lawyers, and triers of fact may interpret opposing positions as reflecting a misuse of economics, in the vast majority of instances, disagreement among experts reflects differing underlying beliefs about the interactions of firms and consumers, as well as differences in their understanding of what constitutes competition in the market at issue. This discussion explores a series of questions to consider—What do economists believe? What methods do economists rely on? Where do the differences lie?—to help focus on the root cause of common disagreements among economic experts in antitrust litigation. These questions are then considered in the context of litigation surrounding Best Buy in the matter of alleged cartel activity among thin-film-transistor liquid-crystal display (“TFT-LCD”) manufacturers.

I. Introduction

The new pattern of global antitrust regulation established by government authorities shows that, despite much being made about economists' inability to agree on anything, convergence in antitrust economics is both recent and remarkable. Economists today near-unanimously believe that antitrust enforcement is beneficial to both consumers and economic growth and that it is a necessary component of any modern free-market economy. Testimony based on antitrust economics on topics including monopolization, horizontal agreements, and mergers reflect this uniform agreement among economists that competition is welfare enhancing.

The Act for the Prevention and Suppression of Combination formed in the Restraint of Trade, voted by the Canadian Parliament in May 1889, is widely seen as the first competition statute in the world. It was followed promptly by the well-known Sherman Act, approved by the US Congress on July 2, 1890, which still left more than 80 percent of the world economy devoid of antitrust regulation. It was only in 1957, with the signing of the Treaty of Rome, that more than 50 percent of world Gross Domestic Product ("GDP") was brought under an antitrust statute. The former Soviet republics enacted their own antitrust laws in the early 1990s, bringing nearly 70 percent of world GDP under antitrust scrutiny. With the enactment by China of its Anti-Monopoly Law on August 1, 2008, more than 95 percent of world GDP is now under antitrust scrutiny.

However, economists have not always agreed with this now-accepted belief. For example, in his 1932 book *Cartels, Concerns and Trusts*, the well-known (at the time) German economist Robert Liefmann stated that: "The possibilities of a rise in price resulting from monopolistic organization—and in particular from a merely contractual organization such as is a cartel—are generally greatly over-estimated.¹ The cartels are quite unable to influence the prices of consumers' goods, especially of goods in general use, to such an extent as might be expected having regard to the great number of monopolistic organization."² On the issue of consumer welfare, he states that: "In particular, we called attention to the greater stability shown by the coal syndicate's prices since 1900, and showed that this is generally more beneficial to the consumer than violent price fluctuations on the scale of earlier years."³ Finally, on the role of the state, he explains that: "Once the value of cartels as a means of regulating economic life came to be realized, the State ceased merely to obstruct their development and to eliminate the resulting abuses; it frequently went so far as to *encourage them*" (emphasis in original).⁴

Similarly, on the industry side, cartels were considered beneficial to stability and a standard mode of operation potentially superior to competition. In a 1935 article from the French periodical *L'Illustration*, the director of the Toa cement factory in Japan was quoted as saying:

By common agreement, we have reduced our production by 57%. The quantity we are allowed to produce is fixed every three months by our industrial union created 11 years ago. During the first five years, the period anticipated by the agreement that all industrialists had signed at the time, everything was fine. But during the second period, a certain number of industrialists wanted

1 Robert Liefmann, a German economist born in 1874, was an internationally recognized expert on "business associations and cartels," the field in which he obtained his Doctorate. He had toured the United States extensively in 1907, 17 years after the Sherman Act was enacted. Deported to the Gurs concentration/internment camp in France in 1940 for being Jewish, he died in 1941.

2 ROBERT LIEFMANN, *CARTELS, CONCERNS AND TRUSTS* 108 (1932).

3 *Id.* at 141.

4 *Id.* at 215.

to get their freedom back and, because of the fall in price resulting from this renewed competition, we found ourselves in an inextricable situation. We then asked the government to intervene and force all the cement manufacturers to abide by the orders of the industrial union. The law voted in December 1934, therefore very recent, has finally reestablished this obligation.⁵

Despite the near-uniform agreement on the merits of antitrust enforcement today, conflicting views on what constitutes competition and appropriate economic evidence in competition disputes remain. While economists, lawyers, and triers of fact may interpret opposing positions as reflecting a misuse of economics, in the vast majority of instances, disagreement among experts reflects differing underlying beliefs about the interactions of firms and consumers, as well as differences in their understanding of competition in the market at issue. These may result from differing information or underlying assumptions provided by counsel or other experts. These differences translate into subtle methodological differences, some of which may affect the expert's conclusion dramatically. For counsel, judges, and jurors, appreciating where and how economists agree, as well as the roots of their remaining disagreement, is often difficult. In this discussion, we propose a series of questions to consider to help focus on the root cause of common disagreements among economic experts in antitrust litigation.

II. Question 1: Establishing Common Ground: What Do Economists Believe?

Economists tasked with evaluating market dynamics and firm behavior to assess allegations related to collusion and monopolization offer analysis to clarify whether collusive conduct or abusive monopolistic conduct best explains pricing and production decisions. They may provide expert insight into how a market would have evolved but-for particular behavior by a group of firms or a single dominant firm. While their conclusions may diverge, a first useful step is to establish what economists on opposing sides of a case agree on. As a general matter, the drivers of economic activity—human behavior, organizational activities, and market operations—are widely agreed upon by economists across the discipline. Indeed, the underlying principles that shape economic analysis seem as natural to the vast majority of economists as the laws of physics:

- » We all agree that incentives matter.
- » We agree that firms generally maximize their profits while consumers maximize their utility, although we may disagree on how profits and utility should be measured.
- » We acknowledge, through our use of discount rates, the importance of immediacy (i.e., something today is better than something tomorrow).
- » We recognize that opportunity costs are an important driver of economic behavior, in that every choice results in the loss of the alternative choice. This means that individuals and firms make decisions at the margin.
- » We view trade, when entered into freely, as making both sides better off.

5 Emile Schreiber, *Enquête au pays du soleil levant*, L'ILLUSTRATION, July 6, 1935, at 355-358.

III. Question 2: What Methods Do Economists Rely On?

Beyond our shared underlying understanding of economic reality, economists typically rely on very similar methods to identify anticompetitive behavior. They can be divided into two categories. First, we all rely on economic theory, which is nothing more than the mathematical or graphical expression of our underlying beliefs about economic interactions. Second, we generally rely on statistical analysis, which provides a powerful set of tools to analyze data and construct alternative (“but-for”) scenarios. There is general agreement on the use of these tools. For example, on the theory side, our models typically recognize that because individuals make decisions at the margins, the concept of marginal cost as a determinant of price under competitive conditions is a good starting point for economic analysis. Similarly, we view the use of statistics to draw inferences about populations from a sample of observations as a good starting point. Notwithstanding disagreement about the application of statistical averages and the correct level of aggregation in the context of class-wide analysis, our set of statistical tools is common across experts, who generally rely on similar distributional assumptions and count on appropriate parameterization to ensure accurate results. We all rely on theory and/or econometrics (the application of statistics to economic data) as tools in antitrust litigation to evaluate a coherent set of issues, including:

- » Market dynamics and organizational behavior;
- » The role of collusive or unilateral conduct on pricing and production decisions; and
- » The nature of any number of “but-for” worlds absent the behavior at issue.

IV. Question 3: Where Do the Differences Lie?

Despite this remarkable agreement around behavioral assumptions and methodologies, attorneys, judges, and juries are often confronted by dueling economic opinions that can result in polar-opposite conclusions. This is only rarely related to the application of “unprofessional” economic arguments. More often, it is the result of different views of what constitutes competition or subtle differences in the application of generally shared economic theories and statistical tools, the choice of data, or the consideration of external factors.

That the outcomes of these analyses can vary so drastically is a source of significant dismay by triers of fact and is a direct manifestation of minor discrepancies in economists’ understanding of the basic building blocks of the economic world. These subtle differences of opinion about the nature of competition or the determinants of production or demand can have significant consequences because they result in differences in the interpretation of empirical facts or the specification of statistical modeling.

V. Case Example: TFT-LCD (Flat Panel) Antitrust Litigation

Consider the litigation surrounding Best Buy in the matter of alleged cartel activity among thin-film-transistor liquid-crystal display (“TFT-LCD”) manufacturers.⁶ This lawsuit stemmed from a long-running US investigation of a conspiracy to set artificially high prices for, and restrict the supply of, various sizes of TFT-LCD panels. The plaintiffs claimed that the defendants had engaged in price-fixing since 1998, resulting in overcharges to direct purchasers of TFT-LCD panels and to indirect purchasers of finished products containing those panels (such as televisions and computer monitors).

In this litigation, two top economic experts presented opposing models to measure the alleged overcharges. Both experts are affiliated with respected universities and are widely recognized as highly qualified in their fields, having published numerous articles on the subject in highly ranked scholarly journals and having received numerous awards. Yet, they reached remarkably different conclusions in their economic analyses, particularly with respect to how to measure input costs:

- » The plaintiffs’ expert modeled TFT-LCD panel prices as a function of several variables, including the price of microprocessors, which was used as a proxy for input costs, to demonstrate an overcharge of roughly 20 percent.
- » The defendants’ expert found that by altering the specification used by the plaintiffs’ expert in a very minor way, namely by replacing the price of microprocessors with any number of alternative input price indexes, the overcharge was close to zero.

After a six-week trial and a day of deliberation, a California federal jury found the defendant Toshiba Corporation not liable for conspiracy to fix the prices of TFT-LCD panels. Defendant HannStar Display Corporation had previously acknowledged its participation in a conspiracy to fix the prices of certain TFT-LCD panels; however, the same jury awarded only \$7.4 million in direct damages, based on figures calculated and presented by the testifying expert. The Best Buy plaintiffs had asked for \$770 million in damages based on their economic experts’ analysis and overcharge estimate.

VI. Assessing Opposing Economic Arguments in the TFT-LCD Case

Given the complexity and sophistication of the economic analyses on both sides, what is counsel—or a jury—to do in circumstances such as this? A typical response has been to raise the Daubert standard: Is the analysis scientifically rigorous? For economic experts, the standard is sometimes thought of as a determination of whether the work done meets academic levels of rigor. While this strategy sometimes works, I purposely selected an example where the statistical analyses were standard and differed only in subtle ways between the two parties. It has also become increasingly apparent that economic analyses published in scholarly journals without the submission of data and without the testing of alternative

6 *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827 (N.D. Cal. 2012).

specifications by referees cannot be as thoroughly examined as similar analyses presented in a litigation context where the opposing side has complete access to the underlying data and programs.⁷

Absent gross errors or the exclusion of one of the experts through a Daubert motion, what is the trier of fact to do? The TFT-LCD matter provides a concrete example of how to assess opposing economic arguments. Both experts proposed a statistical analysis to explain the price of TFT-LCD panels in order to isolate the effect of the conspiracy. Both agreed that various measures of costs and demand would be important determinants of prices with or without a conspiracy. In fact, they seemed to disagree principally on only one issue. Namely, they disagreed on whether the Producer Price Index (“PPI”) for microprocessors is an appropriate proxy for costs.⁸ The plaintiffs’ expert included the PPI for microprocessors in his analysis and found an overcharge resulting in damages of more than \$700 million for all purchases and more than \$230 million for direct purchases alone. The defendants’ expert took the identical model but replaced the PPI for microprocessors with any number of other PPIs for TFT-LCD panel inputs and showed that the overcharge became indistinguishable from zero, thereby suggesting *de minimis* damages. What is the jury to do in a situation like this? Ultimately, the right answer is a matter of belief rather than statistical modeling or theoretical equations.

“Is the PPI for microprocessors a good proxy for the cost of building TFT-LCD panels?”⁹ This is a perfect example of a fundamental disagreement between economists that does not involve the use or misuse of the tools of economics but rather a matter of disagreement in underlying beliefs. The question may be relatively easy to grasp for the trier of fact. Jurors may agree with the plaintiffs’ expert that the PPI for microprocessors is a necessary component of any good analysis of the determinants of TFT-LCD panel prices because, for example, they heard testimony that microprocessors represent a significant cost factor. Alternatively, they may believe that if substituting any number of alternative PPI into the analysis makes the overcharge go away, then the results are not robust and ultimately suspect since they may be the result of a fishing expedition. This, of course, would reflect a failure of methods as much as a disagreement between the experts.

Uncovering the fundamental disagreements in beliefs that underlie econometric or theoretical analyses are likely to be much more effective than trying to explain the relative merits of one statistical specification over another. Statistics and theory are only as good as the underlying assumptions, data, and phenomena that they translate. An alternative approach is to call in a third expert who can stress test the opinion of the two disagreeing experts based, for example, on the nature of the industry, the workings of the cartel, and the likelihood that it would result in successful price-fixing. Notably, a jury in Washington state reached a different conclusion regarding the same analyses when presented with a separate but similar litigation by the retailer Costco; that jury “split the difference” between the experts’ opinions and awarded higher damages.

7 Based on recent instances of lapses in scholarly review, the academic standards that have served as a rubric in Daubert hearings may themselves become insufficient benchmarks of quality.

8 The defendants’ expert analysis was completed in the context of the broader observation that the modelling of TFT-LCD panel prices more generally was much more difficult and likely to result in error than the plaintiffs’ expert believed.

9 Although the issue is not relevant to this discussion, the plaintiffs’ expert argued that the PPI for microprocessors was appropriate because it was a good proxy for demand, since monitors and computers are complements.

VII. Conclusion

Over the last few decades, economists have reached a degree of consensus in antitrust unprecedented in recent history. Nevertheless, economic experts working in good faith can and do reach vastly different conclusions when applying similar economic theory and econometrics to the same set of facts and data. In practice, this means that strongly conflicting opinions do not automatically indicate that economic evidence is being misused. Instead, it reflects more subtle tensions in economists' beliefs about human behavior, organizational activities, firm characteristics, and market dynamics, which all influence their development of models that describe their economic reality and that help define but-for worlds. Counsel play an important role by uncovering these underlying beliefs, understanding how they are translated into the economist's theoretical or empirical construct, and assisting the trier of fact in evaluating the relative merits of the two positions.

Editors' Bios

Douglas H. Ginsburg was appointed to the United States Court of Appeals for the District of Columbia in 1986 by President Ronald Reagan. He served as Chief Judge from 2001 to 2008. In addition to remaining with the Court as senior status circuit judge, Judge Ginsburg is a full-time faculty member at the George Mason University School of Law. Prior to his appointment to the DC Circuit, Judge Ginsburg was a professor of law at Harvard University, served as Assistant Attorney General of the Justice Department's Antitrust Division, and was Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget.

Joshua D. Wright is the Director of the Global Antitrust Institute and holds a courtesy appointment in the Department of Economics. On January 1, 2013, the US Senate unanimously confirmed Professor Wright as a member of the Federal Trade Commission (FTC), following his nomination by President Obama to that position. He rejoined George Mason University School of Law as a full-time member of the faculty in Fall 2015. Professor Wright is a leading scholar in antitrust law, economics, intellectual property, and consumer protection, and has published more than 70 articles and book chapters, co-authored a leading antitrust casebook, and edited several book volumes focusing on these issues. Professor Wright also served as Co-Editor of the Supreme Court Economic Review, a Senior Editor of the Antitrust Law Journal, and an Editor of the International Review of Law and Economics. Professor Wright's teaching and interests include Antitrust, Contracts, Law and Economics, the intersection of Intellectual Property and Antitrust, and Quantitative Methods. Wright previously served the Commission in the Bureau of Competition as its inaugural Scholar-in-Residence from 2007 to 2008, where he focused on enforcement matters and competition policy. Wright's return to the FTC as a Commissioner marked his fourth stint at the agency, after having served as an intern in both the Bureau of Economics and Bureau of Competition in 1997 and 1998, respectively. Wright received his JD from UCLA in 2002, his PhD in economics from UCLA in 2003, and graduated with honors from the University of California, San Diego in 1998. He is a member of the California Bar.

Nicolas Charbit, PhD, LLM, was admitted to the Paris Bar in 1994. He had been practicing from 1994 to 2005 in the field of competition law with strong emphasis on cartels and network industries. Nicolas wrote for French and international legal journals and taught these subjects at university and business schools. He has published several books and papers on EC and French competition law. He has completed a PhD thesis at Paris Sorbonne University on antitrust law and the public sector. He is the founding partner of the Institute of Competition Law and has been the Editor of *Concurrences Review* since 2004.

Elisa Ramundo graduated cum laude from the University of Bologna Law School. She holds an LLM at the University of Chicago Law School. Over the years, Elisa has gained professional experience in European, US, and International antitrust law. She worked at the US FTC (Washington, DC) as an international antitrust consultant, and in a tier-one Italian law firm as an associate in the competition practice (Rome/Milan). She also served as a legal intern at the European Commission (Brussels). Elisa is currently the Managing Editor of *Concurrences Review* and is based in New York City.

Duy D. Pham obtained his JD from the University of Ottawa, graduating cum laude, and his LLM from the Georgetown University Law Center, graduating with Distinction and on the Dean's List. He was previously a Summer and Articling Student at a top Canadian law firm. He is currently an Associate Editor with *Concurrences Review* and an International Antitrust and Trade Consultant with the World Bank.

Contributors' Bios

Pierre-Yves Cremieux, Analysis Group Managing Principal, specializes in antitrust, industrial organization, and econometrics. He has consulted to law firms, corporations, and government agencies and has testified in jury and bench trials as well as arbitrations and administrative proceedings on behalf of clients in the United States and abroad. He has worked on some of the largest US cartel and monopolization cases of the last decade on issues ranging from liability to damages and class certification. Dr. Cremieux has published a number of academic articles on antitrust issues including global enforcement, regression analysis in antitrust litigation, and class certification. His research has also been cited in leading media outlets including *The Wall Street Journal* and *Forbes*. Dr. Cremieux is an adjunct professor at the University of Quebec at Montreal and lectures on global antitrust at the Yale School of Management.

John D. Harkrider has worked on some of the largest and most significant antitrust matters over the last 20 years including Ball's \$6.8 billion offer to acquire Rexam, PLC, Thermo Fisher Scientific's \$13.6 billion pending acquisition of Life Technologies Corporation, Google's \$12.5 billion acquisition of Motorola Mobility, Google's Standard Essential Patent decree, MasterCard's IPO, AT&T's \$67 billion acquisition of Bell South and AT&T Wireless' \$41 billion acquisition of Cingular. An accomplished litigator, he has litigated four DOJ/FTC merger challenges, two private merger challenges, and was retained by the DOJ in its investigation and suit to prevent WorldCom's acquisition of Sprint, the largest merger ever challenged by the DOJ. He also litigated a number of Sherman One and Two matters in District Courts throughout the United States as well as the Second, Seventh, Ninth, and Tenth Circuits. He has won a number of awards, including in 2013, American Lawyer Litigator of the Week and Global Competition Review Matter of the Year, and in 2012, Global Competition Review Lawyer of the Year and Global Competition Review Merger Control Matter of the Year. He is ranked by Chambers, who has called him "an extremely intelligent attorney with formidable understanding of business and finance" as well as a lawyer who "has the best understanding of not only how to build a case, but also how to break it."

Keith N. Hylton, a William Fairfield Warren Professor of Boston University and Professor of Law at Boston University School of Law, joined the BU Law faculty in 1995 after teaching for six years and receiving tenure at Northwestern University School of Law. He is a prolific scholar who is widely recognized for his work across a broad spectrum of topics in law and economics, including tort law, antitrust, labor law, intellectual property, civil procedure, and empirical legal analysis. He has published four books and more than 100 articles in numerous law and economics journals, and serves as a contributing editor of the *Antitrust Law Journal*, co-editor of *Competition Policy International*, and editor of the Social Science Research Network's *Torts and Products Liability Law Abstracts*. He is a former chair of the Section on Torts and Compensation Systems of the American Association of Law Schools, a former chair of the Section on Antitrust and Economic Regulation of the American Association of Law Schools, a former director of the American Law and Economics Association, a former Secretary of the American Bar Association Labor and Employment Law Section, a former member of the editorial board of the *Journal of Legal Education*, current chair of the Law and Economics section of the American Association of Law Schools, and a current member of the American Law Institute.

Francine Lafontaine is the William Davidson Professor of Business Economics and Public Policy at the Ross School of Business, and Professor, Department of Economics, both at the University of Michigan. She served as Director of the Bureau of Economics at the US Federal Trade Commission from Fall of 2014 to December 2015. She returned to the University in January 2016 to take on the role of Associate Dean for Faculty and Research at the Ross School of Business. Her research focuses on contracting, especially contracts used in distribution, and the study of vertical restraints and vertical integration decisions. She also conducts research on the effect of contracting practices on firm performance, and examines issues surrounding business creation and survival in retail and small-scale service industries. Her research (with various co-authors) has been published in, among others, the *American Economic Journal – Applied*, the *American Economic Journal – Micro*, the *Journal of Industrial Economics*, the *Journal of Law and Economics*, the *Journal of Law, Economics and Organization*, the *Journal of Political Economy*, and the *RAND Journal of Economics*. She co-authored *The Economics of Franchising* with Roger D. Blair, published by Cambridge University Press, and edited *Franchise Contracting and Organization* for Edward Elgar. She was the President of the Industrial Organization Society from 2010 to 2012, having served as its Vice-President from 2008 to 2010. From 1997 until joining the FTC, she was a co-editor at the *Journal of Economics & Management Strategy*. She was also co-editor at the *Journal of Law, Economics, & Organization* from 2006 to 2012, and served as Associate Editor at the *RAND Journal of Economics* from 1997 to 2007. In addition to her PhD in economics from the University of British Columbia in Canada, Prof. Lafontaine holds an honorary Doctorate from the Université de Rennes 1, in Rennes, France. Prof. Lafontaine also has worked as an expert witness in legal disputes and antitrust cases relating to franchising and contracting.

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Gregory J. Werden has worked in the Antitrust Division of the US Department of Justice since 1977 on a wide array of cases and policy matters. Among the policy matters were enforcement guidelines relating to collaboration among competitors, intellectual property, international operations, and mergers. He assisted in the preparation of over 70 amicus briefs filed with the Supreme Court, and since 1985 worked on all appeals in Department of Justice civil antitrust cases. Werden has also authored more than 150 scholarly publications on antitrust policy and related topics, including approximately 30 on the relevant market and how it is delineated.

Lawrence J. White has been with New York University Leonard N. Stern School of Business for more than 35 years. His primary research areas of interest include financial regulation, antitrust, network industries, international banking, and applied microeconomics. Professor White has published numerous articles in the *Journal of Business*, *Journal of Economic Perspectives*, *Journal of Economic Literature*, *Journal of Political Economy*, *American Economic Review*, *Review of Economics and Statistics*, *Quarterly Journal of Economics*, and other leading journals in economics, finance, and law. He is the author of *The S&L Debacle: Public Policy Lessons for Bank and Thrift Regulation*, among other books, and he is the co-editor (with John Kwoka) of the 6th edition of *The Antitrust Revolution*. He contributed chapters to both of the NYU Stern books on the financial crisis—*Restoring Financial Stability and Regulating Wall Street*. He is the co-author (with Stern’s Viral Acharya, Matthew Richardson, and Stijn Van Nieuwerburgh) of *Guaranteed to Fail: Fannie Mae, Freddie Mac, and the Debacle of Mortgage Finance*.

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Concurrences is a print and online quarterly peer reviewed journal dedicated to EU and national competitions laws. It has been launched in 2004 as the flagship of the Institute of Competition Law in order to provide a forum for academics, practitioners and enforcers. The Institute's influence and expertise has garnered interviews with such figures as Christine Lagarde, Bill Kovacic, François Hollande and Margarethe Vestager.

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Global Antitrust Economics

Current Issues in Antitrust and Law & Economics

Concurrences Review in partnership with the Global Antitrust Institute of the Law & Economics Center held the Global Antitrust Economics Conference at George Mason University School of Law on May 29, 2015. The conference featured keynote speech from Maureen Ohlhausen, Commissioner of the US Federal Trade Commission, and five panels of prominent speakers that engaged in a heated debate about the different aspects of Antitrust Law and Economics. This book presents contributions on five current issues in Antitrust and Law & Economics:

- **Use and abuse of economic evidence in antitrust cases**
- **Market definition v. Market power: Can they be reconciled?**
- **Coordination issues: Information exchange and price signaling**
- **Negotiating settlements & remedies: Do you really need to consent?**
- **Corporate liability & individual liability: Double-paying?**

