You Too Can Win Antitrust Cases: The Myths and Realities of Trying an Antitrust Case to a Jury

John M. Majoras

Trying any type of case to a jury carries an inherent risk that the result may not line up with the weight of the evidence, whether from the jury's inability to understand key concepts or from lack of interest in technical presentations. Antitrust cases, in particular, can often seem ill-suited for jury trials. Indeed, some have argued that antitrust cases should be tried only to judges who have a background in economic issues because of the challenging combination of legal and economic principles presented in most antitrust matters.[1]

A jury adds a host of uncontrollable variables, only some of which can be managed through effective voir dire. Not surprisingly, litigants are often reluctant to jump into that unknown, particularly when additional risk factors such as treble damages and attorney's fees are added to the mix.[2] Combined, these concerns typically lead to decisions to settle that are probably even more frequent than the already high percentage of civil cases that are resolved out of court. Nothing can be done to lessen the possible impact of treble damages and fees, but the potential vagaries of jury decisions can be minimized by recognizing some of the unique aspects of trying an antitrust case and by setting aside some of the myths that can make that prospect seem so daunting.

Any number of successful trial strategies applies equally to antitrust cases. Keeping it simple, telling a story, and putting a human face on business entities are a few examples. In fact, lawyers who convince themselves that an antitrust case is so different from other types of civil litigation often run into problems when they stray from those basic principles. Perhaps the most common mistake is taking an approach that assumes an antitrust case is well outside a typical juror's capacity to understand. That path can easily lead a lawyer to engage in mind-numbing repetition and an overly complicated presentation that tries to explain every little business or economic point, regardless of whether a juror's understanding of that point will actually sway the ultimate decision. Similarly, lawyers probably spend too much time trying to make every point understandable to every member of the jury. The pitfalls are, again, repetition and elongation, which can turn off the more perceptive jurors, who are left to wonder why the lawyer thinks they are incapable of analyzing basic business and economic concepts.

Without a doubt, antitrust cases *do* present unique challenges. The cases can often be document-intensive and almost always require some understanding of how businesses would be expected to operate in the absence of the claimed illegal conduct. Plaintiffs are often faced with

■

***John M. Majoras** is a Partner in Jones Day's Washington, D.C. and Columbus offices and coordinates the firm's global antitrust and competition law litigation. The views expressed in this article are solely those of the author.*

[1] Indeed, some courts have held that there is a "complexity exception" to the right to a jury trial. *See* ABA Section of Antitrust Law, Antitrust Law Developments 975–76 (6th ed. 2007).

[2] The fundamental issues addressed are equally applicable to both sides of a case, but I acknowledge that my practice has primarily been focused on the defense side.

the prospect of presenting their case through hostile witnesses, because the only observers of the relevant conduct are defendants' own personnel. On the other hand, defendants can lose access to key witnesses who are unwilling to testify when there are potential criminal ramifications. And both sides often face a task of knitting together various parts of the case without a witness who is able to unify the story.

All of these issues are manageable if you can avoid buying into some of the myths that seem to accompany antitrust cases and make them appear too risky to take to trial. Many of these relate to the capacity of jurors to understand the case, biases that jurors may have, and the appropriate role of expert witnesses.

Having successfully tried two antitrust jury trials in the last two years, including one class action, I will offer my thoughts on some of the myths and the realities of antitrust jury trials.

[T]oo many lawyers get caught up in trying to "educate" the jury, rather than tell a story. Issues such as antitrust theory and the development of antitrust jurisprudence are unlikely to be of any serious interest to most jurors . . .

MYTH NO. 1: Jurors cannot understand antitrust cases.

The Reality: Juries probably will not understand the antitrust issues as well as you do, but that should not prevent jurors from understanding enough to find for your client.

Every jury is of course different and will have a particular capacity to understand complicated issues, but it is a mistake to assume a severely limited intellectual capacity. That is especially true when we are concerned about the *collective* capacity. I do not want to try my case to the brightest juror, but I also do not want to spend my time catering to the least common denominator. I also need to be careful not to get caught up in theoretical issues about what the antitrust laws are designed to prevent and protect.

Take for example two possible approaches to a defendant's opening statement:

> This is an antitrust case. The antitrust laws were designed to protect competition. Our economic system is based on competition, which ultimately provides consumers the widest range of product choices and pricing. So when plaintiff says that they are going to prove an antitrust violation, they will have to demonstrate that an agreement was made to restrain competition.
>
> * * * * * * *
>
> This is a case about competition. The witnesses you will hear and the documents you will see will make clear that my client was constantly looking for ways to attract customers to its products. We offered a large variety of options, while charging prices that allowed the business to prosper and provided opportunities to develop new technology that our customers want. There is no evidence that shows any kind of agreement or understanding with our competitors about how we would run our business.

Hopefully, the second option will seem like the better approach, but too many lawyers get caught up in trying to "educate" the jury, rather than tell a story. Issues such as antitrust theory and the development of antitrust jurisprudence are unlikely to be of any serious interest to most jurors, and even if you can educate them, it may do little to help you prove the actual elements of the case. Jurors comprehend concepts such as competition, agreements, and understandings. The more we stray from those fundamentals, the less likely that the jury will understand the basic concepts needed to find for your client. Save the theory and high-brow antitrust philosophy for a bar association meeting.

MYTH NO. 2: Jurors do not understand economics.

The Reality: Most jurors are unable to spout economic theory, but they intuitively understand many of the fundamentals of economic theory from everyday experiences.

This myth is akin to the first one, and like most myths, there is often a grain of truth to them. Most jurors have the capacity to understand basic principles of supply and demand, as well as what it means to have the power to impose pricing. Indeed, some jurors will arrive with these understandings, not because they took a class in economics but because they see them applied in common situations. For example, most jurors understand that the local cable monopoly can seemingly set prices at its own whim, and there is little recourse because there is no competitor. Likewise, grocery shoppers in the Midwest recognize that the prices of fresh vegetables go down in the summer when local farms can increase the supply. Volume discounts are another common experience. People seem to understand that if you use more minutes on your cell phone plan, the provider is more willing to offer a lower per-minute price. Even if all jurors cannot fully articulate the economic theory, they recognize it when applied to their everyday life.

We need to recognize jurors' ability to understand basic economic concepts when presenting a case, particularly through expert testimony. It is not important for me to enable a juror to argue economic theory in the deliberation room if he can just as easily make the point by saying, "It's just like when I buy vegetables in the summer rather than the winter . . . ."

Like most cases, antitrust trials can be distilled into a limited number of key points and findings that are necessary for success. We take on a difficult and pointless burden if we try to teach an advanced-level economics class during the trial. A common example is the so-called small but significant non-transitory increase in price (SSNIP) test for determining market definition. Explaining the purpose and use of the SSNIP test when conducting merger analysis will be of absolutely no consequence to a vast percentage of jurors, especially when the case at hand does not concern a merger. And if you actually have your expert explain why the test is relevant and what one must consider when conducting it, you will just convince the one or two jurors still listening that it is complete hocus pocus. Of course, the performance of the SSNIP test may indeed be important to your expert's conclusions, but the better approach is through testimony providing a generalized and interesting description that may never include the term "SSNIP."

Jurors are more likely interested in the "why" of the geographic market than the "what." An economist who reaches conclusions about market boundaries should be able to explain why these markets conform to common sense as well as the SSNIP test. For example, although two markets may be next to each other, certain topographic features like a ridge line or a river may be an effective dividing line, although it does not impose an actual barrier. In many cities, inhabitants define themselves as an "east-sider" or a "west-sider," despite having ready access across both sides of town. In some cases, those self-defining differences can result in separate geographic markets. An economist who can talk about those differences will resonate with the jury, which intuitively already sees the distinction. The bottom line is that economic theory should be doled out in limited doses and only when it is an important building block that the jury needs to understand in order to find for your client.

MYTH NO. 3: A good expert can bamboozle the jury.

The Reality: While an effective expert is important in articulating difficult concepts to jurors, do not be mesmerized by your own witness's expertise.

If you are bedazzled by your economist's ability to articulate economic theory and applicability to the facts and data in your case, do not assume that a juror will be similarly taken. Just as with fact witnesses, likeability and credibility are critical factors for expert witnesses. And if the other side's expert is as likeable and credible as yours, do not expect the jury to roll up its sleeves and try to

understand the differences between the two, even though you firmly believe that a roomful of economists would conclude that your expert is right.

As antitrust lawyers, we spend a considerable amount of time with our consulting and testifying economists, exchanging and debating theories and obtaining necessary clarifications. Many of us already have a background, or at least an interest, in antitrust economics, and we are certainly motivated by the task at hand to understand the economics as they relate to our case. Now compare that to average jurors. They may spend a couple of hours with the economist, but they are not permitted to ask any questions to aid in their understanding. Very seldom will you have a trained economist on the jury because at least one side will find that to be worthy of a peremptory challenge. Jurors have no particular motivation to understand the economist. Neither compensation nor a test grade hangs in the balance. And even those jurors who try their hardest to follow and understand an expert witness have myriad opportunities to get distracted, lose interest, or fall asleep.

Jurors may not appreciate a carefully crafted regression analysis, but they can sure see an expert hemming and hawing when an incorrect one is thrown back in her face.

So how do we deal with this problem? Start by recognizing that it is not the economist's problem. Those variables and coefficients are important, and the economist's credentials are as well (sort of). If the economic analysis is done poorly or the economist lacks adequate credentials, she will be subject to attack on cross-examination. Jurors may not like or understand economic principals, but they do like effective attacks on cross-examinations. After all, *Law and Order* and other lawyer dramas have conditioned our jurors to take notice if a witness cannot withstand a withering attack. Jurors may not appreciate a carefully crafted regression analysis, but they can sure see an expert hemming and hawing when an incorrect one is thrown back in her face.

Effectively using expert economic testimony requires counsel and the witness to be in tune with the jury by understanding what has already resonated in the case and what still needs to be explained. Ignoring the former leads to repetition that will lose jurors' attention, and a failure to consider the latter results in a huge lost opportunity to use a witness who is permitted to analyze and give conclusions about the facts that the jury has not even thought to marshal. This means that the lawyer is going to have to stray from the comfort zone of a typical expert examination.

The do-it-in-your-sleep direct exam outline of an economist goes something like this:

Q: *Who are you?*
A: *I'm an economist, and I'm really smart.*

Q: *What did you do in this case?*
A: *I considered everything.*

Q: *Then what?*
A: *I fed it into a big computer.*

Q: *What did you conclude?*
A: *Damages were huge (plaintiff)/non-existent (defendant).*

Q: *Are you sure?*
A: *Absolutely.*

Q: *How do you know?*
A: *I considered everything, I'm really smart, and I have a really big computer.*

That outline can be rendered quite readily into four or more hours of testimony, allowing the witness to talk about all of the awards she won, the books and articles she wrote, what "peer review" means, her theories on econometrics, the data sets she compiled, and so on. But how much of

that really matters to most jurors? I make no claims that I have arrived at the new paradigm for expert exams, because the outline (stripped of some of its acerbic nature) really does encompass the main points that most economic experts must make. The problem lies more in the application.

The only person who tends to be more fascinated than the expert herself in the subject matter of the testimony is the lawyer conducting the exam. This can lead to a conversation that, although technically brilliant, is of little interest to the jury, which is relegated to a bystander role. The expert must engage the jury, and the only way to do it is to anticipate and respond to what the jurors will find interesting or at least informative. By the time many experts conclude their discussion of their credentials, many jurors are long gone.

The easy part of the expert exam should be providing the substance. The lawyer should know with some precision what the expert will be saying, and the expert will be fully briefed on where the exam will go. On top of that, the expert is typically a seasoned witness and is not likely to succumb to a case of nerves the way fact witnesses can. Those factors should free the lawyer to pay more attention to the jury than to the expert. The lawyer should be the first to know when juror interest is waning or when concepts are not registering. If those points can be recognized early, the exam can be guided to address the concern.

Creativity is important in an expert examination, far more so than during most fact examinations. Jurors can often identify with fact witnesses. They seem more like the typical juror, and often already speak the same language. If experts and their lawyer get caught up in their own private conversation about complicated topics that they have been discussing among themselves for the last year and a half, the jury will feel like an outsider.

The problem is pretty easy to identify, but what is the solution? After all, at some point the regression analysis has to be explained. There are a variety of useful techniques: humor, the use of analogies that reference common experiences, and pointing out unique facts or circumstances are a few. Take the expert qualifications, for example. Education, experience, and scholarship are all important attributes that need to be discussed, but it does not mean that the expert has to recite her resume. I once had an expert metallurgist on the stand (not in an antitrust case), and his role was to discuss metallurgy as it applies to welding electrodes. I think it is safe to say that most jurors would not find the topic scintillating. Instead of starting the exam by asking him to describe his education and experience, my first question started by showing him and the jury a picture. It was a Tennessee license plate (he taught at the University of Tennessee), and it simply said “Dr. Weld.” It was a gift from his students, and it was a perfect lead-in to the examination, especially since he was able to discuss it without any apparent arrogance. By the time that trial was over, I doubt the jurors could identify my expert by name, but you can be sure they remembered “Dr. Weld.”

Though tempted, I have never asked one of my economists to get a license plate that reads “Dr. Econ,” but experts always have some unique attributes or experiences that can be used to keep jurors interested as you qualify the expert, and the added benefit is that it can humanize her and make her memorable. We also need to resist the urge to go to great lengths to prove that our expert is “better” than theirs. I don’t believe that jurors spend much time distinguishing between which side’s expert has the greater qualifications or resume value. And even if they did, I am not sure we should care. If, as I believe, most jurors look at competing expert qualifications as a wash absent extraordinary differences, then I am much more concerned about my expert being memorable. So even if the jury may not comprehend everything in the context of the examination, I can more easily emphasize the relevant points on closing by being able to refer to “Dr. Weld.” The presentation that might impress a roomful of economists with the witness’s and lawyer’s mastery of the subject is unlikely to be the one that will win the day for the jury.

MYTH NO. 4: Once a class is certified in an antitrust case, it is headed for settlement.

The Reality: There is no question that a class case will carry greater financial risks to a defendant, but a successful defense of a class action carries a substantial reward by extinguishing the potential liability across the full range of the class. Antitrust class actions do get tried.

I can speak directly to this myth because of my experience in successfully defending an antitrust class action in November 2008 in *Louisiana Wholesale Drug Co. v. Sanofi-Aventis U.S. LLC*.[3] There are other antitrust class actions that have gone to trial.[4] Nonetheless, they are infrequent.

There is a litany of reasons to settle antitrust cases from both the defendant's and plaintiff's perspective. The most obvious one is the potential scope of damages after trebling and fees. Joint and several liability also plays an important role if there are multiple defendants. Generally speaking, those defendants who settle early get the better result.

But it is not the class aspect of the case that is the most important factor in whether a settlement is reached. Certainly, avoiding class certification can often lead to the end of the case, but even then, there is now a very strong plaintiffs' bar that represents individual claimants who will either opt out of the class if it is certified or will carry on the litigation in combination with other individual claimants by design or as a consequence of the multi-district litigation process. Understanding the size, capabilities, and motivations of the individual members of the class may even lead to a decision by defendants not to challenge certification. If none of the individuals opt out, then the resolution or trial of the matter will cover all claimants. If there are opt-outs, the complexion of the case can be changed dramatically if the opt-outs become the real drivers of the litigation.

In the *Sanofi-Aventis* trial, the defendant decided not to challenge class certification, despite anticipating that the case would proceed to trial. There were a number of issues that ultimately led to the decision, but because there were no opt-outs from the class, our defense verdict applied across the board.

Even if a class is not certified, the attraction of trying individual cases may not be so great because of collateral estoppel issues. If a defendant loses an individual case, the damages would not be as significant as losing a class case, but it could open the floodgate to additional claims that may no longer even be triable on critical issues.

Plaintiffs also have to be careful not to take a class certification decision as the precursor to an ultimate victory. I am not convinced that jurors adequately understand the significance of a class without careful attention from counsel. If the class distinction is not adequately explained and emphasized, jurors may be skeptical about awarding large amounts of damages, particularly when the class representative is a very small member of the class. For this reason, the class representatives should be carefully vetted, and it is probably helpful to have more than one. If the representatives cover a wide range of the class members, the jury can more easily understand why a substantial award might be warranted.

Although class actions are usually settled, I do not think the class nature of the claims is what drives the decision. The substantive issues in the case are the same for class and non-class cases alleging the same conduct. The damages analyses and presentations are markedly different, but few cases go to trial just on damages issues. If the substantive defenses are strong, the class nature of the case should not keep it from a jury trial.

---

[3] No. 07 CV 7343 (HB) (S.D.N.Y. 2008).

[4] *See, e.g.*, Morelock Enters. v. Weyerhaeuser Co., No. 3:04-cv-00583-PA (D. Or. 2008); *In re* Tableware Antitrust Litig., No. C-04-3514 (VRW) (N.D. Cal. 2007).

MYTH NO. 5: Jurors are looking for ways to punish greedy corporations.

The Reality: Jurors will certainly punish corporations when wrongdoing has been proven, but the greed theme can easily be overplayed.

Many corporate defendants are concerned that they will not get a fair shot from a jury because it will be biased, or at a minimum, susceptible to an argument that corporate greed will lead companies to do anything to maintain profits, including illegal activity. That concern is augmented by populist approaches on the political front that often attempt to deflect blame for policy decisions onto everybody's favorite villain: faceless corporations. Plaintiffs, of course, are happy to take up that mantle, and from a tactical standpoint, rightly so. But even though that theme may resonate, it can be diminished.

Many corporate defendants are concerned that they will not get a fair shot from a jury because it will be biased, or at a minimum, susceptible to an argument that corporate greed will lead companies to do anything to maintain profits, including illegal activity.

The first way to do it is by acknowledging that the company is indeed trying to earn as much money as it can. In fact, it owes that obligation to its employees and their families, who rely on the company to support them, and to its shareholders (in the case of a public company). Most jurors similarly work (or rely on someone) for enterprises that they hope are trying to make as much money as possible. The corollary though, is to further demonstrate that your client is guided by ethics and legitimate competition.

From a plaintiff's perspective, it is generally a pretty good tactic to play the "greed" card, particularly because most studies have shown that the majority of jurors have some predisposition to believing it. But it obviously needs more. In fact, if too much emphasis is placed on the label without sufficient underlying facts to prove anticompetitive conduct, some jurors can be left feeling like the lawyer is trying to manipulate their feelings and make an award based only on that motivation. It is possible that some jurors will nonetheless be inclined to do that, but others in the jury room will bring them into line, particularly if you arm them for the argument.

MYTH NO. 6: A per se case faces a far greater risk to defendants than does a rule of reason case.

The Reality: It all depends. Some per se cases can actually be easier to try because the issues tend to be narrower and are often easier for a jury to understand.

Per se and rule of reason cases come in a wide variety of types. For example, a per se price-fixing case that follows on the heels of a criminal plea for the same conduct is a much different animal than a case with similar allegations but no related criminal plea. If the principal liability issue is the existence and scope of an agreement, the case may actually be presented quite readily to a jury. Indeed, many of the issues discussed in this article about a juror's capacity to understand economics and antitrust legal principles may not be that critical if the issues can be distilled into whether an agreement on prices had been reached.

It is probably safe to say that a criminal plea is almost always followed by settlements in the related civil cases, but even then, significant triable issues can remain. Civil plaintiffs may allege a conspiracy that is broader in scope than what has been admitted in the plea. Often there is a question about whether a criminal conspiracy can be shown to have been longer in duration than what is established in the plea, or plaintiffs may allege that it affected geographic areas that are wider than what the plea specifies. And, of course, damages are always an issue that would not be addressed in the plea.

Even though significant triable issues may remain for the civil case, defendants who have already pled guilty face some daunting challenges that make settlement the more palatable option. For example, although there may be a significant gap in the damages position of each

side, plaintiffs will be sure that a trial on damages includes all of the bad conduct issues cemented in the plea. Having to try issues, such as damages or the scope of a conspiracy, relegates defendants to fighting with a hand tied behind their back because plaintiffs will always have the argument of "Are you really going to believe what they're saying when they've already admitted to fixing prices?"

Rule of reason cases would seem to present better opportunities to defendants because they are not accompanied by guilty pleas, but they can present difficult analytical questions. Jurors will be asked to balance competitive versus anticompetitive effects of the alleged conduct. The successful litigant will be the side that is best able to simplify the case for the jury, so that when it collectively asks why certain conduct occurred, it is put in the correct context. If one side does not effectively resolve those "why" questions during the course of the trial, it will face an unpleasant outcome.

So, is the per se or the rule of reason case the better one to take to a jury? It depends on a range of issues. Neither is a clear winner or loser for either side. As with any litigation, it comes down to the specific facts and the ability to present them effectively and efficiently.

MYTH NO. 7: Every company has bad documents that can be used to demonstrate anti-competitive behavior.

The Reality: This "myth" is frequently true, but jurors are willing to put documents into context and recognize that authors do not write documents from the perspective of how they might later look if examined at a trial.

While it is often true that defendants will have to explain conduct and communications that on their face can look conspiratorial or anticompetitive, the damage can be limited when the documents are put into context. For example, businesses invariably have documents that appear to have an "insider's" understanding of a competitor's pricing. Often, these communications have long been forgotten such that the individual who received or sent them cannot specifically recall their origin. Or even if that information can be presented through a witness, similar situations cannot, leaving the implication that the unexplained ones are problematic. Running down each and every communication becomes a game of "whack-a-mole."

An alternative, and likely better, approach is to present the broader context. Juries will understand the basic concepts of competitive intelligence (especially if you do not focus exclusively on those particular buzzwords). It is intuitive that any business wants to take note of its competitors' activities, and it is simple enough to demonstrate that there are less than perfect flows of information in most industries. Few businesses operate in a world like the corner gas stations in which competitive intelligence requires little more than glancing at the large price signs across the street. Often, the implication plaintiffs are trying to paint from unsourced price information can be adequately rebutted with a single witness who can effectively describe the company's different methods of gathering information, including the fact that customers, distributors, and agents often provide the information when they learn of it.

Plaintiffs have to be careful that if they are going to present a case in which implications from corporate documents must be drawn, the implications are either intuitive or made obvious by subsequent events. Unless a document is prima facie evidence of anticompetitive conduct, the jury is going to give defendants a chance to explain why the document or communication took place. If the explanations are reasonable, I think that the jury will want to see more from the plaintiffs and may be reluctant to make inferential leaps to finding illegal conduct. Documents that may have

supported an inference of illegality sufficient to survive summary judgment often face a more difficult task at trial when you have to convince the jury to actually arrive at those inferences.

Conclusion

Even the most complicated antitrust cases can be presented effectively to a jury. Almost any jury can reach the right conclusion if counsel provides a clear roadmap and avoids cluttering the case with unnecessary and repetitive information or concepts. The stakes are usually high, but that makes success all the sweeter. ●