Why Economics Matters in Criminal Antitrust Cases

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ON JULY 9, 2021, PRESIDENT BIDEN signed an executive order calling for more aggressive antitrust enforcement.[1] Federal agencies quickly followed suit, filing new civil complaints and actions against Big Tech. They also increased criminal prosecutions against individuals. The Department of Justice Antitrust Division (the "Division") increased its rate of new antitrust indictments by 55% from 2020 to 2021, and continued bringing new cases through 2022.[2] At the same time, Assistant Attorney General Jonathan Kanter vowed that the Division will continue to bring more "tough cases,"[3] including those built on novel theories such as no-poach and wage-fixing agreements. The Division also stated that it may resurrect criminal monopolization cases under Section 2 of the Sherman Act after 50 years of dormancy.[4]

As more criminal cases have reached trial, a parallel trend has developed. Parties are turning increasingly to economic expert evidence to bolster their cases. This is a new frontier in the criminal realm. While economic evidence is common—and even expected—in civil cases, it has been almost non-existent in criminal ones. In civil cases economic analysis will be relevant at minimum to calculating damages, and will also be often used to show liability or, in certain rule of reason cases, the justifications for and benefits of an agreement. However, criminal antitrust cases require a jury to decide only whether an illegal agreement existed, regardless of any economic effect. Traditionally, it has been assumed that economics has nothing to do with this factual question of whether two competitors actually met together and agreed to fix prices, rig bids, or allocate a market, and, through 2022 the Division continued to oppose defendants' use of economic testimony on that basis. We are aware of no examples of economists testifying in criminal antitrust trials prior to 2019. Nonetheless, as more of these cases reach trial, more parties are experimenting with the introduction of economic testimony anyway—including in three of the most significant criminal antitrust trials in recent years.

Here, we consider the legal and practical issues surrounding the use of economic evidence in criminal antitrust cases. First, we summarize the legal background. Then, we discuss three recent jury trials in which economists testified: *United States v. Lischewski* (2019), *United States v. Penn* (2021-22), and *United States v. DaVita* (2022).[5] Finally, we conclude with practical advice for practitioners.

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Legal Background

The evolution of economics in criminal antitrust cases takes place against several well-established principles. First, Section 1 of the Sherman Act criminalizes anticompetitive agreements using very spare language: "Every . . . conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."[6] Supreme Court precedent holds that certain agreements to restrain trade unreasonably are unlawful *per se*, meaning that no justification of the agreement is a defense.[7] Traditionally, three types of agreements—price fixing, bid rigging, and market allocation—are considered *per se* unlawful.

The Division has long argued that because the crime in a *per se* antitrust case is the agreement or understanding itself, economic evidence is inadmissible because it is irrelevant and misleading under the Federal Rules of Evidence. In antitrust cases, experts are generally highly qualified in their fields and use well-established methodologies. So in the criminal context, the typical *Daubert* challenge attacking an expert's qualifications is rare. Instead, challenges focus primarily on relevance. In other words, they argue that if the crime itself is only whether an agreement or understanding occurred, then the economist has nothing relevant to add.

The courts in *Lischewski*, *Penn*, and *DaVita* grappled with this issue. The *Penn* case gives the fullest record. There, the Division moved to prevent defense expert Professor Edward Snyder from offering his analysis and opinion that certain

features of the relevant industry and available pricing data were inconsistent with alleged price-fixing or bid-rigging. The Division argued that because those offenses are *per se* illegal, any testimony that the conduct or pricing were consistent with competition—or were not consistent with price-fixing or bid rigging—would be irrelevant and risk misleading the jury.[8] While the trial court agreed that testimony *justifying* illegal restraints would be irrelevant, it ruled that "the defendants' theory of the case is not that there was a justifiable agreement among the suppliers to fix prices. Rather, the defendants seek to introduce Professor Snyder's opinion as part of their theory that there was no agreement among them to fix prices in the first place."[9] It found his testimony "admissible for that purpose."[10]

The *Penn* decision reflects sound judgment about the practical realities of these cases—and the other courts to address the issue have generally agreed. Economic evidence may not affirmatively prove or disprove criminal charges, but it will often meet Rule 401's standard of making bid-rigging, price-fixing, or market allocation *less likely* than it would be in the absence of the evidence. Although it is technically true that an illegal agreement could occur without any economic impact, in practice, economic evidence that is properly designed and presented is likely to be relevant and helpful to the jury. For one reason, many cases will rely in whole or in part on circumstantial evidence. In the *Penn* prosecution, the government's case rested heavily on disputed interpretations of competitor call patterns, emails, and text messages. But even in cases with more direct evidence, economics may be helpful to the factfinder. For instance, in *Lischewski*, several cooperating witnesses testified that the defendant directed them to enter a price-fixing agreement. But the defendant denied this, and attempted to admit economic evidence of market characteristics to show that the alleged agreements could not have been reached. Even here, the economic evidence is helpful, because it gives the jury another perspective and additional context for the direct evidence.

Economic Evidence in Recent Criminal Antitrust Cases

The three recent cases involving economics in criminal antitrust cases are different in many ways. But they all illustrate the new trend toward the increased use of economic testimony. All three involved allegations of conspiracy under Section 1 of the Sherman Act, were tried to a jury, and went to verdict. Of these, only the earliest, *Lischewski*, ended in a guilty verdict. The other two resulted in acquittals and dismissals. All three cases featured economists who testified for the defense.

United States v. Lischewski (2019). The Division indicted the CEO of Bumble Bee Foods, Christopher Lischewski, in 2018 for conspiring with Bumble Bee's competitors to fix the price of packaged tuna. The criminal case went to trial in late 2019 in federal court in San Francisco, with Lischewski as the sole defendant.[11] Two of his former subordinates pleaded guilty and testified against him. The former CEO of Bumble Bee's competitor Chicken of the Sea also testified that Lischewski had prodded him to eliminate certain discounts. Bumble Bee and a third competitor, StarKist, pleaded guilty to price-fixing while Chicken of the Sea admitted to the illegal conduct as part of the Division's criminal leniency program. Evidence of those individual and corporate pleas was admitted into evidence at trial.

Lischewski countered with testimony from Professor James Levinsohn, a Yale economist. Professor Levinsohn had originally planned to testify that the actual prices and market conditions were consistent with competition, not conspiracy. He planned to opine that "the tuna industry has attributes that make it difficult to fix" prices and that the net prices that the tuna companies charged are related to their costs and consistent with competition.[12]

The court barred the most significant parts of the testimony. It did not find that such testimony is inadmissible as a matter of law, noting that "economic evidence that explains the pricing behavior for another reason [other than a conspiracy] is admissible," citing in support a sixty-year old case from the Sixth Circuit.[13] The court noted also that a defendant may "introduce explanatory economic evidence in relation to his defense that there was no illegal agreement" and that testimony such as "low margins during the charged conspiracy may be relevant to disprove the existence of an agreement to fix prices."[14] Nonetheless, the court struck most of Professor Levinsohn's opinions because it found that he did not adequately describe his methodology. His expert disclosure described the bases of his economic opinions only as "his training, experience, research, studies and research of relevant economic materials included on the joint Exhibit List and Defendant's Supplemental Exhibit list," which the court believed was "not a description of methodology."[15]

This ruling essentially limited Professor Levinsohn's role to that of a summary witness. His trial testimony consisted primarily of describing data related to issues such as tuna prices, income, margins, and volume. He could explain what certain charts summarizing this data *said*, but could not opine on what the charts *meant.* Because he was only permitted to describe the data, on cross-examination the Division heavily focused on the attacking the formatting of the charts. While Professor Levinsohn was significantly curtailed from offering testimony similar to what the experts in the later *Penn* and *DaVita* cases were permitted to do, he nonetheless put before the jury some evidence that was inconsistent with the government's theory.

Ultimately, the court's decision may be incorrect; Ninth Circuit precedent holds that when an expert disclosure is not properly supported, the remedy is to order additional disclosure, not to exclude the opinions altogether.[16] But even so, it reflects some of the risks inherent in crafting an expert disclosure. Until December 2022, the Federal Rules of Criminal Procedure required much less disclosure than expert disclosures in civil cases, such that the natural inclination was to give opposing counsel as little information

as possible. But as *Lischewski* shows, this practice contained its own dangers and efforts to play too close to the line can backfire, even under the old rules.

United States v. Penn (2021-2022). The *Penn* case involved similar allegations to *Lischewski*. In 2020, the Division indicted four executives from the major poultry supplier Pilgrim's Pride and from a small, regional competitor Claxton Poultry, alleging a conspiracy to rig bids and fix prices. It later indicted six additional individuals from Tyson Foods, Koch Foods, and George's, Inc. Pilgrim's Pride Corporation pleaded guilty, and Tyson Foods entered the Division's criminal leniency program. But unlike in *Lischewski*, no individuals pleaded guilty. The two "cooperating witnesses," unlike the cooperators in *Lischewski*, did not claim to be directly involved in conspiring with any defendant, but only to have observed such behavior directly or indirectly. The court also excluded evidence of the corporate guilty plea and cooperation under Rule 403. The essence of the government's case thus came down to disputed interpretations of patterns of telephone calls, text messages, and emails.

The case first went to trial in October 2021 in Denver against all ten individuals. It ended in a mistrial with the jury unable to reach a verdict on any of the ten defendants. The government retried the case in February 2022 with the same result. The government then dismissed five defendants and proceeded with an unprecedented third trial in June 2022 against the remaining five defendants, from Pilgrim's Pride and Claxton. That time, all five defendants were acquitted.

Edward Snyder, a Yale professor, testified as an economic expert for the defense in the second and third trials. The defense acknowledged that certain defendants from competitor companies did, in fact, communicate with each other frequently and had shared information about prices and other things, such as statements by the buyers in the bidding processes. Professor Snyder's testimony helped put those facts in context by explaining why an economist would expect such behavior to occur in competitive markets.

This analysis included both quantitative *and* qualitative aspects. In addition to analyzing prices related to the alleged conspiracy period in a strictly mathematical way, Professor Snyder explained how as an economist he could form reasoned opinions about the general structure of the broiler chicken market to show whether the evidence tended to show bid-rigging or price-fixing. The government argued that, by definition, the exchange of pricing information among competitors was proof of a conspiracy, because rational competitors would not disclose their pricing absent a bid-rigging agreement since competitors would use that information to undercut each other. But Professor Snyder testified that, in fact, the defendants could have independent, self-interested reasons to exchange pricing information, such as verifying the accuracy of price data received from customers who might be mischaracterizing their competitors' prices in order to play competitors against each other and bluff them into dropping prices.

Professor Snyder's more "mathematical" analysis compared the competitors' prices to see if they were close enough to suggest a conspiracy and found that they were not. He also ran a "benchmark" analysis that compared the defendants' prices to prices from suppliers that DOJ did not allege were part of the conspiracy to see if the two data sets differed materially. He found that the non-defendant companies often charged higher prices than the companies accused of price-fixing. He also compared price movements in related industries, such as pork and beef, which are substitute products to chicken and thus influence its prices.

The government filed five separate motions to exclude Professor Snyder's testimony—all based on grounds similar to its motion to exclude Professor Levinsohn's testimony in *Lischewski*. Unlike that case, the *Penn* court denied the motions, permitting Professor Snyder to testify fully about all of his analyses and opinions. The court placed only one limitation on his testimony: that "any opinion . . . that agreements among suppliers to fix prices for chicken products are rational, beneficial, or promote competition will be excluded as irrelevant given that the government has charged a *per se* violation of the Sherman Act."[17] But the defendants did not offer such testimony; rather, they argued that Professor Snyder's opinions were evidence that no agreement existed at all and that all of the behavior at issue was the result of proper, self-interested business dealings, not a conspiracy.

United States v. DaVita (2022). The *DaVita* trial occurred in April 2022, between the second and third *Penn* trials (in the same Denver courthouse before a different judge). The case was a historic test of the government's ability to prosecute so-called "no-poach agreements" in labor markets. In 2016, the Division announced that it would start treating these agreements, by which employers agree to not solicit or hire each other's employees, as a *per se* violation of Section 1 of the Sherman Act, because, as buyers of labor, these employers' agreement constitute unlawful market allocation between competitors in the labor market.

The government charged the healthcare company DaVita, Inc. and its former CEO Kent Thiry with entering into no-poach agreements with competitors for labor. The defendants challenged the decision to treat no-poach cases as criminal matters, but in an early ruling, the court decided that the prosecution could legally proceed. Nonetheless, after this early government victory, the jury ultimately acquitted both DaVita and Thiry in the first ever no-poach jury verdict.

Economics played a bigger role in the *DaVita* defense than in either *Penn* or *Lischewski*. While the defendants in those cases offered both fact and expert witness testimony, the *DaVita* defendants relied solely on expert testimony. Their sole witness was economist Pierre Cremieux, Ph.D., president of the global economics consulting firm Analysis Group. Similar to Professor Snyder's benchmark analysis that compared price levels between alleged conspirators and non-conspirators, Dr. Cremieux compared the number of employee movements between DaVita and its alleged

conspirators to employee movements between DaVita and non-conspirator companies. The analysis showed that the differences were unremarkable. He also considered whether employee turnover or compensation at DaVita was lower during the alleged conspiracy period as compared to similar companies—either one of which would be likely if a conspiracy to suppress employee movement occurred. Here too, he found no significant differences in how the turnover and compensation changed over time compared to changes observed for industry benchmarks. On cross-examination, the Division attempted to counter Dr. Cremieux's testimony by asking questions about the data used in his analyses and to form opinions in his reports. For example, the Division questioned him on the accuracy of data he used, which were largely collected from individual LinkedIn profiles.

Like Professor Snyder, Dr. Cremieux also conducted a more qualitative, historical analysis. He observed that DaVita's alleged co-conspirator SCA had hired a relatively high number of DaVita employees prior to the alleged conspiracy. He opined that this could be caused by alternative, non-conspiratorial factors. In particular, the former CEO of SCA had testified that SCA had hired *too many* DaVita employees, such that it risked becoming "known as DaVita part two." This then was a reasonable business justification to explain why SCA "returned to the norm" by hiring fewer DaVita employees during the alleged conspiracy period.

Here too, the government tried to exclude Dr. Cremieux's opinions on the grounds that they were irrelevant to a *per se* case and did not aid the trier of fact, because they did not go to the existence of an agreement.[18] The defendants' opposition relied in part on the *Penn* court's ruling permitting economic testimony.[19] In an oral ruling from the bench, the court allowed most of Dr. Cremieux's opinions comparing the movements of employees and compensation inside and outside the conspiracy period compared to benchmarks. In particular, it held that Dr. Cremieux's opinion that the change in compensation to DaVita employees during the alleged conspiracy period were not lower than the change observed in industry benchmarks, and that this was inconsistent with an agreement to allocate labor, fell within his economic expertise and was admissible under the Federal Rules. The court did not permit him to directly offer opinions about the defendants' intent in entering any agreements, noting that such opinions were beyond his expertise and that only individual defendants could testify about their own intent. Nor did it allow him to testify about movements among executives in a *national* market or in other fields beyond healthcare, based on a previous ruling that the agreement in this case involved a smaller subset of healthcare companies.[20] Dr. Cremieux gave extensive testimony nonetheless and answered dozens of questions from the jury across two days on the stand.[21]

The Current State of the Law

As these cases show, a clear trend is developing in criminal antitrust trials where more parties are more willing to bring expert economic witnesses to testify and courts are continuing to allow them. In *Lischewski*, the economist was mostly excluded, but based on unique concerns with the disclosure, rather than a principled objection to economics itself. The *Penn* decision opened the door much wider, and found that large amounts of economic testimony was relevant as circumstantial evidence rebutting an implication of a price-fixing conspiracy. *DaVita* continued the *Penn* precedent of permitting most economic testimony, albeit in the different context of employee movements, which is necessarily less conducive to economic analysis than the traditional price-fixing case involving dollars and cents.

Perhaps the clearest evidence that the ground has shifted came later, in October 2022. In *United States v. McGuire*, a follow-on to the *Penn* case, the Division indicted four additional broiler chicken executives. The defendants named economist Dr. Ishita Rajani as a testifying expert. While the government did seek to exclude Dr. Rajani (as it had done against similar economists in the past), it also named its own expert, Professor Carl Shapiro, to offer rebuttal testimony. The defendants moved to exclude Professor Shapiro as well and the government's response to the exclusion motion contains interesting insight into a newfound willingness to use economics to advance its own theories. The government argued that its expert would testify about the distinction between information-sharing regarding "forward-looking, competitively sensitive information about bid prices" and other types of information sharing, and why innocent economic incentives cannot explain the former.[22] Ultimately, the case was dismissed before trial and the court never ruled on either motion. But it represents the clearest evidence yet that the *Penn-DaVita* precedent is here to stay. The ground may be shifting away from fights on whether expert economic testimony is permitted at all, and towards civil-style "battles of the experts" in criminal antitrust cases.

Practical Considerations for Practitioners

Criminal discovery is very different from civil discovery. It presents its own unique concerns, especially when involving expert witnesses. This final section provides some practical advice, based on the authors' recent experience in this area.

Disclosure Obligations. Historically, the Federal Rules of Criminal Procedure have presented fewer discovery obligations on all parties than the civil rules. A defendant is obligated to produce discovery only if the defendant first requests the same type of information from the government.[23] Until very recently, that disclosure must include "a written summary of any [expert] testimony that the defendant intends to use," and is required only if the government requests it and if the government has provided a reciprocal disclosure to the defendant.[24] Even when required, the disclosure needed to only "describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications."[25]

This disclosure, controlled by Rule 16, was typically understood as being succinct and high-level. In *Penn*, for instance,

the disclosure of Professor Snyder's expected testimony contained only a letter to government counsel, a few pages long, summarizing opinions, reasons, and qualifications. The court found that disclosure sufficient, ruling that "Rule 16 disclosures are not required to include extensive and exhaustive level of detail and information."[26] This standard was much narrower than the standard for civil antitrust cases. Federal Rule of Civil Procedure 26 requires "a complete statement of all opinions the witness will express and the basis and reasons for them," and economic expert reports may run to hundreds of pages of detailed econometric analysis and data. [27]

Moreover, criminal disclosure needed only to be a summary of expected *testimony*. The expert was under no other obligation to produce any kind of written work product. In practice, however, parties would make data productions, in an excess of caution. In *Penn*, the defendants made separate data production to ensure that the Division had all underlying data used in Professor Snyder's benchmark pricing analysis and the court later required that all underlying data must be produced before it permitted Professor Snyder to testify. Likewise, in *DaVita*, the court ordered the disclosure of all expert data and backup materials, as well as an expert report, essentially imposing the same disclosure requirements as would have been used in a civil case.

In December 2022, after all of these cases were resolved, Federal Rule 16 was amended to provide more clarity to the parties' disclosure obligations. The amendments require that expert criminal disclosures, like civil disclosures, must now include "a complete statement" of all the expert's opinions, the bases and reasons for them, the expert's qualifications, and a list of all other cases in which the expert testified during the last four years, and be signed by the expert witness.[28] However, the defendant is still not required to provide any disclosure unless he or she requests expert discovery from the government first. These changes, which use the same language as the civil rules, will bring criminal disclosure obligations much closer to the civil ones. But how criminal courts may interpret the new rules for antitrust economists remains an open question.

Expert criminal discovery can also be broader than civil discovery in other ways. For instance, there is no express exception in the federal criminal rules to disclosure of intermediate work product, meaning that expert communications can become discoverable even when they were made as an intermediate step in designing the analysis. Frequently, in civil cases the parties would have agreements in order to prevent disclosure of this kind of material. Not so in criminal cases. Instead, the Jencks Act governs, as reflected in Federal Rule 26.2:

> After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.[29]

The breadth of this rule potentially sweeps in other kinds of information that civil antitrust practitioners might not expect must be disclosed. While the revisions to Rule 16 mean that final expert disclosures would have been produced earlier, the Jencks Act would potentially require disclosure of earlier drafts or internal communications between the expert and others. The issue is further complicated because the law is relatively undeveloped so different courts may have different opinions about its scope. At the same time, the sanctions for violating the Jencks Act may be severe, including complete exclusion of an expert witness.

Sequestration. Another consideration is whether to sequester experts from the other evidence at trial. Typically, while fact witnesses are prevented from observing any part of the trial or reviewing any of the evidence, expert witnesses are not.[30] The rule prevents fact testimony from being influenced by evidence not known by the witness. But because experts offer opinions that necessarily might encompass the entirety of the case, they are typically allowed to review any evidence that might be helpful to those opinions.

At the same time, it is not necessarily clear that exposing an economic expert to all of the evidence will actually be a net positive for the offering party. Economic expertise will only permit the expert to opine on a relatively narrow category of issues. The economist can say whether the data reflects evidence of price-fixing, for instance, but likely will not be permitted to opine about such factual issues as disputed emails or text messages, or to opine on the ultimate question of whether the alleged conspirators entered into an illegal agreement at all. An economist should be able to opine that the data does not suggest or support the existence of an illegal agreement, but would not be able, as an economist, to rebut a witness who testified that a price-fixing agreement did, in fact, occur. Thus, at best, exposing an economist to other factual evidence may be unnecessary. And at worst, it could cloud the analysis and expose the economist to cross-examination about why he or she felt it was necessary to review the evidence or to opposing counsel's use of other evidence to contradict the expert or impeach credibility.

Ultimately, whether an expert observes trial testimony is a strategic call. In *Penn*, Professor Snyder did not enter the courtroom until the day of his testimony. On the other hand, Dr. Cremieux observed some of the proceedings in *DaVita*. Attorneys should be aware of the issue and consider all of the ramifications to their case before deciding one way or the other.

Rebuttal Testimony. Finally, criminal defendants who call an economic expert as part of their defense should keep in mind that the government may put on its own expert in rebuttal. If that occurs, not only will the government be permitted to rely on all the same discovery limitations under Rule 16 and the Jencks Act to shield its expert from advance disclosure—but its disclosure obligations might be even less. Certain circuits have held that a rebuttal expert is not subject to disclosure rules at all, as the government has argued in a recent case.[31]

As of this writing, we are not aware of a case in which the government has followed through and brought a rebuttal economist to actually testify. However, the possibility is becoming more real. In *Penn*, the government did designate a rebuttal witness early in the case, but never provided meaningful disclosures and chose not to call him.[32] But in *McGuire*, the government's briefing signaled a much greater willingness to engage with economics. Had the case not been dismissed, the briefing suggests that the government likely would have called its expert in rebuttal.

Conclusion

Economics can offer powerful, relevant evidence in a criminal antitrust case. In a price-fixing case, economists can analyze and compare both the prices of alleged price-fixers with those who were not alleged to be part of the conspiracy to offer evidence on whether the observed pricing patterns between two groups are indicative of price-fixing. Economists can also analyze changes in market share over time to evaluate claims of market allocation or to disprove bid-rigging; study profit margins to identify whether supra-competitive profits were earned during the alleged conspiracy as contrasted with pre- or post-conspiracy periods; and assess whether specific industries' characteristics are conducive to price-fixing agreements. While none of these factors are mutually exclusive with the existence of an illegal agreement—meaning, for example, that competitor prices could be wildly different and still be fixed—a reasonable juror might still find economic testimony relevant and material, especially when considering whether guilt has been shown beyond a reasonable doubt in a criminal case. The tendency for many antitrust cases to focus in large part on circumstantial evidence is important in this context because, to the extent the government is relying upon inferences drawn from circumstantial evidence, it is reasonable to offer competing circumstantial evidence calling such inferences into question. In that context, the trend emerging from the *Penn* and *DaVita* cases is sound: juries should have access to multiple forms of information to assess whether a conspiracy has been proven. However any party chooses to proceed, these issues likely will arise with greater frequency. ■

[1] See Executive Order on Promoting Competition in the American Economy, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ (July 9, 2021); see also John Cassidy, *The Biden Antitrust Revolution*, New Yorker (July 12, 2021), https://www.newyorker.com/news/our-columnists/the-biden-antitrust-revolution.

[2] See U.S. District Courts—Criminal Defendants Filed by Offense, Statistical Tables for the Federal Judiciary, https://www.uscourts.gov/report-names/statistical-tables-federal-judiciary.

[3] See Assistant Attorney General Jonathan Kanter Delivers Opening Remarks at 2022 Spring Enforcers Summit, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers (April 4, 2022).

[4] See Effective Antitrust Enforcement: The Future Is Now, https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-key-note-university-southern (June 3, 2022) ("If the facts and law . . . warrant a criminal Section 2 charge, the division will not hesitate to enforce the law.").

[5] The authors are some of the attorneys who sponsored the economic testimony in *United States v. Penn*, ultimately earning acquittals for our client Jayson Penn. All opinions expressed in this article are our own and do not necessarily reflect the opinions of our law firm, clients, or co-counsel. We receive no financial compensation for any opinion contained herein.

[6] 15 U.S.C. § 1.

[7] *See, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *United States v. Koppers Co.*, 652 F.2d 290, 295 (2d Cir. 1981).

[8] *United States v. Penn*, 1:20-CR-152-PAB, Dkt. 299, 7 (D. Colo. Jul. 26, 2021).

[9] *Penn*, 1:20-CR-152-PAB, Dkt. 649, 7 (D. Colo. Oct. 15, 2021).

[10] *Id.*

[11] O'Melveny & Myers represented Bumble Bee in the criminal investigation and civil litigation. Kelse Moen represented Chicken of the Sea at his prior law firm in the same. Anna Pletcher was employed in Department of Justice Antitrust Division during the criminal investigation but was not a part of the trial team. As noted above, the opinions expressed herein are the authors' own and provided without compensation.

[12] *United States v. Lischewski*, 3:18-cr-00203-EMC, Dkt. 418, 9 (N.D. Cal. Oct. 18, 2019).

[13] *Id.* (citing *Continental Baking Co. v. United States*, 281 F.2d 137, 145 (6th Cir. 1960)).

[14] *Id.* at 12.

[15] *Id.*

[16] *See, e.g.*, *United States v. Finley*, 301 F.3d 1000, 1017-18 (9th Cir. 2002).

[17] *Penn*, 1:20-CR-152-PAB, Dkt. 649, 7 (D. Colo. Oct. 15, 2021).

[18] *Id.*, 1:21-CR-00229-RBJ, Dkt. 213, 4-5 (D. Colo. Mar. 24, 2022).

[19] *Id.*, 1:21-CR-00229-RBJ, Dkt. 222, 10 (D. Colo. Mar. 29, 2022).

[20] This is notably different from civil antitrust cases, where the economist often plays a large role in defining the relevant market.

[21] Although unusual in federal court, it is the practice of Senior United States District Judge R. Brooke Jackson, who presided over the *DaVita* case, to permit jurors to question witnesses during trial.

[22] See *United States v. McGuire*, 1:21-cr-00246-DDD, Dkt. 265, 3 (D. Colo. Oct. 13, 2022).

[23] Fed. R. Crim. P. 16(b)(1). Notably, in *US v. Penn*, one of the ten defendants, Rickie Blake, did not request discovery from the government and therefore was not required to provide any disclosure about his own, separate economist. *Penn*, 1:20-CR-152-PAB, Dkt. 674 (D. Colo. Oct. 19, 2021).

[24] Fed. R. Crim. P. 16(b)(1)(C).

[25] *Id.* at 16(b).

[26] *Penn*, 1:20-CR-152-PAB, Dkt. 649, 5 (D. Colo. Oct. 15, 2021) (quoting *United States v. Shannon*, No. 18-cr-00353-CMA, 2019 WL 458911, at *2 (D. Colo. Feb. 6, 2019)).

[27] Fed. R. Civ. P. 26(a)(2)(B)(i).

[28] Fed. R. Crim. P. 16(a)(1)(G), 16(b)(1)(C).

[29] Fed. R. Crim. P. 26.2(a). As the rule is written, the statement would only need to be disclosed *after* the witness testifies on direct and before cross examination. But given the logistical and timing difficulties with that approach, many courts will order Rule 26.2 discovery beforehand or force the parties to come to a different agreement.

[30] See Fed. R. Evid. 615.

[31] See *United States v. McGuire*, 1:21-cr-00246-DDD, Dkt. 265, 7 (D. Colo. Oct. 13, 2022) (collecting cases).

[32] The government did provide a disclosure months before the first trial. But that disclosure was largely framed as "anticipating" Professor Snyder's testimony and describing potential rebuttal. Most of this anticipation turned out to be wrong—it did not accurately describe Professor Snyder's opinions—and so it remains unclear what, if anything, this expert actually planned to testify about.