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PROVING ANTITRUST DAMAGES

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Proving Antitrust Damages An Overview

Three Concepts

- Fact of Damage
- Antitrust Injury
- Amount of Damages

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Proving Antitrust Damages

Fact of Damage – Injury In Fact

- Antitrust violation caused “some damage” to plaintiff
- Need not be sole cause: “material” or “substantial”
- Proved with “reasonable certainty”
 - Preponderance of the evidence

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Proving Antitrust Damages

Antitrust Injury

- Plaintiff's injury is of a type the antitrust laws were intended to prevent
- Injury flows from that which makes defendant's conduct unlawful
- Injury reflects the anticompetitive effects of the violation or anticompetitive effects made possible by the violation
- Example: Brunswick v. Pueblo Bow-o-Mat (1977). Losses caused by the competing bowling alley remaining in business, not from the fact the alley was controlled by dominant supplier of equipment

Proving Antitrust Damages

Amount of Damages

- A "just and reasonable estimate . . . based on relevant data"
- "May not be based on speculation or guesswork"
- More lenient standard of proof

Proof of Antitrust Damages

Measure of Damages

- Difference between the plaintiff's actual profits and what they would have been absent the violation
- Difference between reality and the hypothetical "but for" world without the violation

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Proof of Antitrust Damages

Typical Measure of Damages

- For a customer – The overcharge between the actual price and the price without the violation or lost profits

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Proof of Antitrust Damages

Typical Measure of Damages (continued)

- For a competitor: Lost profits incurred because of the violation:
 - Past lost profits
 - Either
 - Future lost profits; or
 - Value of the business

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Proof of Antitrust Damages

Methods of Proof:

- Identify specific lost sales or customers
- “Before and After” time of the violation
- “Yardstick”: Comparison to another similar market in which the violation did not occur
- “Market Share”: Actual market share v. “but for” market shares
 - Often takes on the characteristics of a “before and after” projection or a “yardstick” model

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Proof of Antitrust Damages

Defense Issues:

- Effect of plaintiff's own business errors
- Impact of exogenous market trends
- Impact of general economy
- Impact of increased competition in the market
- Impact of lawful competitive activity

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Disaggregating Damages

- Plaintiff can only recover for damages resulting from the antitrust violation
- There must be a basis to separate out losses caused by lawful competition, mismanagement, recession or other non-violation factors

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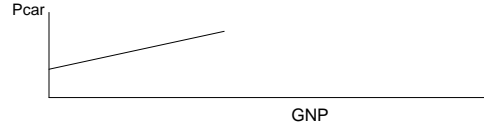
Proving Antitrust Damages

Estimating the "But For" world often requires econometrics

- Multiple regression equation – An attempt to determine how the dependent variable (*i.e.* price, market share, volume) varies mathematically with changes in a variety of "independent variables" that affect the dependent variable

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Proving Price Fixing Damages: Multiple Regression



Factors affecting car prices:

- Cost of steel S
- Cost of energy E
- Gross National Product G
- Collusion C

$$P_{car} = a + bS + cE + dG + eC$$

Statistical significance

Proving Antitrust Damages: Expert Testimony

Daubert/Kumho Tire

- Reliable and not speculative
- Fits the case
 - Assists the trier of facts in resolving a material issue

Proving Antitrust Damages: Expert Testimony

Rule 702

(1) Expert has sufficient specialized knowledge

(2) Testimony is

- Based upon sufficient facts or data
- Product of reliable principals and methods
- Principals and methods applied reliably to the facts of this case
