

# Economic Authority and the Limits of Expertise in Antitrust Cases

John E. Lopatka and William H. Page

## Abstract

*Daubert v. Merrell Dow* has deeply affected how courts evaluate testimony by putative experts of all kinds in a variety of legal contexts. But the influence of *Daubert* on the role of expert economic testimony in antitrust cases has been less clear. Several commentators have noted that, although *Daubert* motions do occur regularly in antitrust cases, courts also continue to scrutinize the legal sufficiency of expert testimony without reference to *Daubert* in motions for summary judgment or for judgment as a matter of law. In this article, we argue that, whatever the doctrinal rubric or procedural context in which courts examine economic testimony in antitrust cases, their inquiry is ultimately guided by *economic authority*, authoritative economic knowledge that courts have adopted from the scholarly literature. In interpreting and applying the antitrust laws, courts acquire their most important economic ideas by a pragmatic process that is independent of the strictures that *Daubert* places on the receipt of economic testimony. Once acquired, economic authority determines the qualifications trial experts must have, the issues on which they can testify, the models on which they can rely, and the methodologies they must use.

In the past thirty years, the most important source of economic authority has been the Chicago School's models of the practices that most concern antitrust—cartels, tying, predatory pricing, resale price maintenance, and so forth. The Supreme Court has relied on these models not, for the most part, to adopt rules of per se legality, as some Chicagoans have suggested, but in less sweeping ways, such as limiting or abandoning rules of per se illegality, defining antitrust injury and standing, and determining the sufficiency of evidence. In some notable examples, of course, the Court has declined to follow Chicago models in favor of others. In all of these contexts, however, economic authority frames and defines the role of expert testimony. In the main part of the article, we examine how economic authority has defined the role of expertise in four critical contexts: predatory pricing; market definition and market power; the characterization and proof of price fixing; and the definition and proof of antitrust injury. In the final section we consider the legitimacy of the deference to economic authority over expertise in the formation of antitrust law, and suggest how our account of the role of economic authority affects the continuing confrontation between Chicago and Post-Chicago economics.