MINI ROUNDTABLE

EXPERT WITNESSES IN COMPETITION DISPUTES
PANEL EXPERTS

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David Blackburn's areas of expertise include intellectual property (IP), antitrust and competition policy, and econometric analysis. In his IP practice, he conducts research and prepares expert reports for patent, trademark and copyright infringement disputes, as well as false and misleading advertising cases. Dr Blackburn regularly conducts analyses related to the issues of commercial success and preliminary and permanent injunctions in both inter partes review and abbreviated new drug application (ANDA) proceedings, pursuant to the Hatch-Waxman Act.

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Nathan Blalock specialises in the economics of antitrust and IP. His research focuses on the evaluation of liability and damages in antitrust lawsuits, the competitive effects of mergers & acquisitions and joint ventures, and global trends in the enforcement of IP rights. He has analysed economic issues across a wide range of industries, including agricultural products, oil & gas exploration, midstream oil products production and distribution, wholesale and retail gasoline, natural gas distribution, pharmaceuticals, ocean care services, retail clothing, air travel and travel services, mutual funds, microfinance loans, chemical production, pulp and paper products and construction materials.

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Subbu Ramanarayanan is an associate director in NERA’s antitrust and healthcare practices, and adjunct associate professor of competitive strategy at UCLA Anderson School of Management. Dr Ramanarayanan has extensive experience advising clients on antitrust review of proposed mergers & acquisitions where he has analysed issues relating to market definition and market power, alleged monopolisation, exclusive contracting, price-fixing, alleged foreclosure and for profit ownership across a variety of settings in healthcare, including hospital services, health insurance, physician services, group purchasing organisations, dialysis services, pharmaceuticals and benefits management.

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Paul Wong is a member of NERA’s healthcare and life sciences practice, and the antitrust and competition practice. Since joining NERA, Dr Wong has consulted on a variety of healthcare mergers, including the Advocate–NorthShore hospital merger challenged by the Federal Trade Commission, the Aetna–Humana and Centene–Health Net health insurance mergers, as well as mergers involving major hospital systems in more than 15 states. Dr Wong has also consulted on antitrust litigation in healthcare industries, including those involving hospitals, multispecialty physician groups, health insurance, medical devices and medical supply distribution.
CD: Reflecting on the last 12 months or so, how would you describe the frequency and nature of competition disputes? What are some of the common sources of conflict?

Blalock: Department of Justice (DOJ) and Federal Trade Commission (FTC) investigations are potentially reliable indicators of broader trends in competition disputes. Actions taken by the antitrust agencies can give rise to class actions, opt-out litigation, state attorneys general investigations and possibly even arbitration or investigations by enforcers in foreign jurisdictions. For example, if the trend in price fixing disputes follows trends in DOJ criminal antitrust investigations, then one might anticipate fewer price fixing cases in the next few years. The number of criminal antitrust cases involving price fixing brought by the DOJ in 2017 fell by roughly half year-on-year, continuing a similar decline relative to 2015. However, these trends, more generally, must be taken with a pinch of salt. Antitrust enforcers have demonstrated an interest in expanding the frontiers of competition law to address new concerns arising in constantly evolving markets, such as antitrust markets for data and ‘algorithmic collusion’. Given greater uncertainty about the outcomes of investigations into these new topics, the allocation of agency resources to these ‘frontier’ matters may limit resources available to investigate more traditional areas of dispute in the near term – one possible explanation for recent declines in DOJ criminal antitrust cases – and possibly lead to more non-traditional competition disputes in the future.

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CD: Could you provide some insight into when and how an expert witness may be deployed during a competition dispute?

Wong: An expert can contribute value to a client at all stages of a dispute, and can be utilised in a consulting role, alongside counsel or in an independent testifying role. Before a dispute even begins, an expert can be a valuable adviser,
helping firms avoid or mitigate their exposure to certain behaviours or helping to formulate a sound strategy heading into a litigation or investigation. In the early stages of the dispute itself, an expert can also be a valuable sounding board for legal and economic theories, best practices in discovery, complex technical issues and developing preliminary measures of risk and exposure. Further into a dispute, experts can be used surgically to probe and highlight specific topics that might prove crucial to a winning theory. And toward the end of a dispute, perhaps most significantly, an expert is often an important narrator for the audience, be it judges, juries or regulators. Experts can help explain both difficult or complex ideas and how these ideas fit into the overall dispute.

CD: What benefits can an expert witness typically bring to a competition dispute?

Blackburn: An expert’s role will typically evolve over the course of a dispute – or different experts may serve different roles as a dispute unfolds – but a well-credentialed expert should be able to provide valuable guidance, advice and analysis throughout the entire dispute. An expert can typically provide the benefit of experience in understanding the fundamental issues of a competition dispute. For example, in disputes that might rely heavily on issues related to relevant market definition, the benefit of engaging with an experienced expert is not just the quantitative and qualitative analysis undertaken, but also the expert’s experience in understanding the way decision makers in the industry typically view, process and understand analysis and evidence that relates to identifying the boundaries of the relevant market. This can often be both direct experience – having provided expert advice and testimony in similar matters in the past – as well as indirect experience in having presented analyses focused

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on the dispute’s key issues to laypeople in other settings. And, of course, one should not overlook the clearest benefit of engaging an expert: the ability to provide a deep understanding of the issues at hand.
and to use that understanding to shape the overall strategy of the dispute.

CD: How crucial is it to bring an expert witness on board early in the process? Can this ultimately prove to be a determining factor in the outcome of a dispute?

Ramanarayanan: Engaging an expert early in the process can be very beneficial and can meaningfully improve the likelihood of obtaining a favourable outcome. Particularly in complex disputes, early engagement allows the expert to spend the amount of time needed to develop and support the expert opinion that will be expressed at trial or in another forum. It allows the expert to become familiar with the record and conduct interviews with relevant personnel in order to seek out additional information and undertake a more informed analysis than that of an opposing expert. It also allows the expert the opportunity to participate more fully in the discovery process with the aim of helping counsel focus information requests on information that is most valuable to economic analysis and prepare for the depositions of important witnesses. Early engagement also enables an early exchange of information between the expert and counsel regarding the economic theories of harm that are most appropriate and the relevant legal standards that should guide expert analysis, thereby granting counsel additional flexibility to refine the legal theory of the case as needed.

CD: In your opinion, what general characteristics should parties seek when looking to identify and retain a suitable expert witness in this space? How important is the impartiality and independence of an expert witness, for example?

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Blalock: Parties may often seek out a ‘brand name’ with a long history of analysing both the specific type of alleged anticompetitive behaviour and the specific industry at issue. Although these characteristics may improve the probability that
a court accepts an expert’s opinion in some instances, they are neither necessary nor sufficient to achieving a successful outcome. In particular, Daubert challenges can, and in many cases are raised regardless of an expert’s background. Skill in conducting high quality, independent analysis and clearly communicating an opinion targeted within the appropriate legal scope likely rivals the value of a ‘brand name’ background. Indeed, the rigorous application of economics in competition disputes can transcend case- and industry-specific facts. Likewise, the goal of communicating clearly to a non-technical audience – be it judge, jury or regulator – is not necessarily best served by obscure or esoteric economic approaches. It is, therefore, important to seek an expert who places a high value on his or her reputation for producing independent opinions, can communicate the complexities of an economic approach in down-to-earth language and has the time and resources, including staff, quality control procedures and computing assets, to produce an error-free opinion.

**CD:** Once an expert witness has been identified, what steps should parties take to ensure the witness is adequately prepared?

**Wong:** Counsel and experts face increasing magnitudes of information and data, which requires attention on two fronts. First, because an expert

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opinion must be applied to the specific context of a dispute, access to data stored on IT systems and to knowledgeable personnel may be vital to the work of an expert. In practice, the transfer of information and coordination of schedules between an expert and company personnel can require significant lead time. Starting the process early and establishing the appropriate conduits for flow of data and interviews can help ensure that the expert ultimately has access to the most relevant information in preparing a complete and thorough opinion. Second, it is important that counsel works with an expert to navigate the large volume of information and data once access is granted. For example, counsel can leverage its knowledge of documents and facts to
identify examples and ‘natural experiments’ which, in turn, can help an expert leverage a large dataset to undertake more powerful analyses.

**CD: Are there any challenges or pitfalls involved in engaging an expert witness during a competition dispute? How can these be minimised or avoided?**

**Blackburn:** The biggest challenge involved in engaging an expert is the risk that despite investing resources in identifying, engaging and working with an expert, and the time and money involved in doing so, the court may exclude the expert’s testimony, through a successful Daubert challenge, for example, and render that investment moot. Winning challenges typically result from successfully arguing that an expert has not undertaken relevant and reliable analysis, generally because a court is convinced that the expert’s methodology is unsound or untested or the evidence relied upon is not directly tied to the allegedly unlawful conduct. Of course, even expert testimony that survives exclusion may ultimately not prove persuasive to the decision maker, often for the same reasons. Minimising these risks requires a consistent and careful approach throughout the process. First, it is important to work with experts who place a high value on producing independent opinions, have the ability to produce rigorous analysis and can communicate the opinions clearly, both orally and in written testimony. It is equally important to work with the expert to be sure the relevant information is available and that the expert’s work, as well as the data and other information relied upon, is focused on the key issues in the dispute. Finally, the expert should not simply serve as a mouthpiece for the client; rather, it is important to ensure that the expert witness is in a position to conduct an independent and rigorous analysis of these issues.

**CD: What trends and developments do you expect to see fuelling competition disputes in the months ahead? Are expert witnesses set to play a key role in the resolution of these disputes?**

**Ramanarayanan:** Based on recent enforcement trends across jurisdictions and recent academic literature, there appears to be at least three broad trends developing in competition disputes that will likely continue in the near future. First, the issue of whether common ownership of competing firms by institutional investors leads to anticompetitive effects has garnered a fair amount of attention in recent academic studies, and has prompted antitrust agencies in the US and Europe to examine whether such effects might be pertinent to merger review. Second, the extent to which a merger, or any conduct by a firm or a group of firms acting in unison, might impact the incentive and ability of firms to invest and engage in innovation, has
been a key issue of focus in recent enforcement actions, particularly those brought by the European Commission. Third, the issue of whether availability and access to Big Data and algorithmic tools enables collusion or other forms of anticompetitive conduct is becoming increasingly relevant. In many of these areas, however, the economic literature is at a nascent stage and there continues to be substantial debate about the mechanisms by which these factors might impact competition. That makes the role of an expert witness a critical one – not only to properly analyse the underlying mechanisms and ascribe cause and effect, but also to educate judges, juries, regulators and legislators about the same.