

\$2B Antitrust Case Survives Expert Challenges - Key Learnings



by [Maggie Tamburro](#)

When a federal judge issues an opinion chocked full of expert witness challenges and rulings in a massive class action alleging over \$2 billion in overcharges, we make it our business to listen.

Our focus this week: An opinion issued May 1 in the case *In Re: Titanium Dioxide Antitrust Litigation*, a class action suit involving allegations of price-fixing and conspiracy under the Sherman Act. At issue in the underlying dispute is whether defendant companies conspired to fix and raise the price of a chemical powder known as titanium dioxide, resulting in plaintiffs allegedly paying artificially inflated prices since 2003.

Titanium dioxide is used around the globe as a whitening pigment in an vast array of consumer products – including the likes of paint, sunscreen, toothpaste, confectionary food items, and more – which is likely one reason the scope and alleged damages at issue in the case are staggering. One of plaintiffs’ proposed experts claimed that plaintiffs suffered an overcharge ranging from \$2.1 to \$2.7 billion. Some 14 million pages of documents exist in the discovery record.

Plaintiffs initially filed suit in 2010, and in August of 2012 the class was certified. The present opinion came in the form of a Memorandum Opinion issued by U.S. District Judge Richard D. Bennett out of the District of Maryland, on defendants’ motion to exclude the expert testimony of three of plaintiffs’ proposed experts.

Two of the three challenged plaintiffs’ experts survived, keeping the case alive, at least for the time being.

In the opinion, the court offered discussion and analysis on a number of critical expert issues in the context of an area of law that seems to be on fire in the courts right now – class actions and antitrust. Some of the key challenges, and how the court ruled, are discussed below.

Four of the Key Expert Challenges

1. Is expert opinion testimony which speaks to an ultimate legal issue in a case admissible?

Defendants first argued that all three of plaintiffs' experts planned to improperly offer testimony regarding the ultimate legal issue in the case – namely that defendants were allegedly part of a cartel that engaged in price-fixing of titanium dioxide – and therefore such testimony should be excluded under Federal Rule of Evidence (FRE) 704. Here the court took opportunity to discuss applicability of FRE 704.

[FRE 704](#) specifically addresses witness opinions, including those of experts, which address an ultimate issue in the case. As the court stated, FRE 704 “permits the admission of expert testimony that ‘embraces an ultimate issue to be decided by the trier of fact.’”

However, citing a 4th Circuit opinion, the court warned, “Testimony that ‘states a legal standard or draws a legal conclusion’” is inadmissible.

But what exactly is the fine line that separates a “permissible legal opinion on an ultimate issue” – as the court couched the inquiry – from “an impermissible legal conclusion” which must be excluded under FRE 704?

Leaning on precedent from the 4th Circuit, the court determined that the answer largely turned on language – terms used by the witness, and whether such terms “have a separate, distinct and specialized meaning in the law different from that present in the vernacular.”

The court held that expert testimony, based on economic analysis, as to whether defendants' actions were “consistent with collusion and inconsistent with competition” was admissible under FRE 704, as it did not state a legal standard nor draw a legal conclusion, and did not make use of terms which have a specialized meaning within the law.

Noting that other courts – including district courts in Georgia and Kansas – regularly admit expert testimony as to whether conduct is consistent with collusion in antitrust cases, the court allowed plaintiffs' expert testimony to the extent it reflected an opinion that defendants' conduct was more consistent with collusion than with competition.

However, expert testimony regarding legal conclusions (for example testimony as to whether the defendants' actually violated the Sherman Act), or testimony that would tell the jury what conclusion to reach, was barred.

2. Will an expert witness's reliance on another expert's opinion adversely affect admissibility?

Defendants also challenged one of plaintiffs' proposed experts on the grounds that he “blindly relied on the work of another expert” in offering his opinion on two issues – the nature of different grades of titanium dioxide and the price of titanium dioxide relative to the class period. Thus, contended defendants, the expert's testimony was unhelpful and unreliable and should be excluded under *Daubert*.

The court rejected this argument also. Why? Here the expert on whom the challenged expert relied was an expert known to the fact finders in this case and had been subject to review under *Daubert*. The court found that, other than the two specific issues, the challenged expert performed his own analysis consistent with his own economic principles. Furthermore, the court found that both were experts in the same field and held economic theories that were consistent.

The court distinguished the facts here from another antitrust case, where the challenged expert's testimony was excluded due to the fact that it "merely adopt[ed] opinions formed by an expert outside his field of expertise."

Such was not the case here. The court permitted the challenged expert to rely on another expert's opinion, stating, "If the [d]efendants believe that the opinions on which [plaintiff's expert] relied are erroneous, then they may introduce that issue at trial...".

3. Do methodologies specifically developed for litigation render an expert's testimony unreliable and inadmissible under *Daubert*?

The challenged expert here had developed for litigation a multifactorial guide, which had not undergone peer review, for determining what types of industries may be "ripe" for formation of a cartel, and what type of behavior can be explained by a price-fixing conspiracy.

The defendants argued that because the guide had been developed "solely for litigation" and had not undergone peer review, it was unreliable and should therefore be excluded.

The court recognized, "[S]ome courts have concluded that methodologies developed for litigation purposes are less likely to be deemed reliable." The court recognized, as *Daubert* suggests, expert testimony which is "based directly on legitimate, preexisting research unrelated to the litigation provides the most persuasive basis for concluding that the opinions were reliable."

However, the court found that it was nonetheless reliable. Why? Because it consisted of "standard economic factors that economic experts often consider in antitrust cases" which courts have found to be reliable as indicators of cartel behavior.

The court also found the expert's analysis extensively rooted in antitrust literature. These factors helped mitigate concerns that the guide was developed solely for litigation. The court stated, "[T]he contents of the guide are not fledgling theories of collusion and cartel behavior, but well-accepted, standard principles" and the court found the testimony sufficiently reliable to withstand *Daubert* challenge.

4. Does an expert's failure to account for alternative explanations affect admissibility?

Defendants also challenged one of the experts on the basis that the proffered testimony “disregarded alternative explanations for the defendants’ behavior.”

However, the court was unpersuaded here as well, finding the claimed lack of alternative explanations did not mean the expert’s testimony was inadmissible under *Daubert*. The court stated, “In general, an expert need not account for every possible explanation before reaching an opinion on the matter. ... Rather ... an expert ‘need only demonstrate that he has ‘adequately accounted’ for alternative explanations.”

The court also pointed out that if defendants believed that the plaintiffs’ expert neglected a critical piece of evidence, they were free to raise the issue at trial.

One Expert Win for Defendants...

The defendants did succeed in having one of plaintiffs’ experts excluded entirely, based in part on the argument that he was not qualified and therefore unreliable as to certain economic evidence. The expert, a law professor with expertise in antitrust law, was offered by plaintiffs to rebut the testimony of defendants’ experts, who were both economists.

Finding a distinction between a law professor and an economist, the court found that the rebuttal of economists was outside the expert’s competence as a law professor – despite his recognized expertise in the area of antitrust law – and would not assist the jury. The court also concluded that, under [FRE 403](#), the professor’s status had the potential to mislead rather than enlighten the jury when giving an economic opinion, and excluded it.

The full citation to the opinion, which is full of nuggets and in-depth court analysis regarding expert witness challenges in the context of antitrust actions, is *In Re: Titanium Dioxide Antitrust Litigation*, [1:10-cv-00318 \(D. Md., May 1, 2013\)](#).

Do you agree with the court’s rulings?

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