

---

## Evidentiary Aspects of Relevant Product Market Proof in Monopolization Cases

Orrin K. Ames III

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Orrin K. Ames III, *Evidentiary Aspects of Relevant Product Market Proof in Monopolization Cases*, 26 DePaul L. Rev. 530 (1977)  
Available at: <https://via.library.depaul.edu/law-review/vol26/iss3/5>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# EVIDENTIARY ASPECTS OF RELEVANT PRODUCT MARKET PROOF IN MONOPOLIZATION CASES

By Orrin K. Ames III\*

*Professor Ames offers a useful survey of the evidentiary aspects of relevant product market proof in monopolization cases. He first examines those factors which may be used to determine which items or services compete or might compete with products or services supplied by the defendant. He then suggests various evidentiary techniques for establishing the parameters of the relevant market.*

*An antitrust case, of course, does not possess the dramatic interest of a murder mystery, but it does share, with other trials, the excitements of clashing strategies and tactics and the crossing of swords by worthy antagonists imbued with a fierce will to win.<sup>1</sup>*

Milton Handler

## I. INTRODUCTION

When deciding whether a defendant corporation has violated the Sherman Antitrust Act, courts determine whether there is or could be competition in the defendant's relevant product market. Obviously, the defendant wants and needs to demonstrate to the court that the relevant product market is broad and that there is competition rather than monopolization by the defendant. This Article first sets forth various factors used to define the relevant market and then analyzes several types of evidence with reference to the way they are used by the courts and how they can be applied in relevant product market inquiries.<sup>2</sup>

---

\* Associate Professor of Law, Memphis State University School of Law; B.S., University of Alabama, 1966; J.D. cum laude, Cumberland School of Law, Samford University, 1969; LL.M., Harvard Law School, 1975.

1. Handler, *Introduction: Symposium*, 18 A.B.A. ANTITRUST SECTION 13 (1961).

2. The focus of this work is on evidentiary aspects in the context of a trial in a court of law and not before administrative agencies such as the Federal Trade Commission. Certain cases examined will be those decided at the court of appeals level because courts at this level review Federal Trade Commission decisions. The focus will be on how the courts view evidence under this review procedure.

The analysis will be within the framework of monopolization as prohibited by Section 2 of the Sherman Act<sup>3</sup> in which courts specifically use the term relevant product market. Because the same analytical process takes place in merger cases under Section 7 of the Clayton Act,<sup>4</sup> both monopolization and merger cases will be cited to illustrate evidentiary examples and analytical processes. It is necessary to point out that the courts in merger cases frequently use the term relevant product market interchangeably with the term line of commerce.

## II. RELEVANT PRODUCT MARKET

Interpreting Section 2 of the Sherman Act,<sup>5</sup> the Supreme Court in *United States v. Grinnell Corp.*<sup>6</sup> stated:

The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.<sup>7</sup>

Monopolization, therefore, requires the possession of monopoly power in an economic sense plus the element of deliberateness. Courts have defined monopoly power as "the power to control

---

3. 15 U.S.C. §2 (Supp. V 1975).

4. 15 U.S.C. §18 (1970).

5. 15 U.S.C. §2 (Supp. IV 1975).

Section 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or both said punishments, in the discretion of the court.

15 U.S.C. §2 (Supp. V 1975). Prior to the 1974 amendment the offense was a misdemeanor and less severe penalties were available. These changes are not of importance in the present discussion.

Section 2 establishes three offenses: monopolization, attempted monopolization, and combinations or conspiracies to monopolize. It can be violated by one or more persons or businesses. This work will be primarily concerned with the first offense of monopolization.

6. 384 U.S. 563 (1966).

7. *Id.* at 570-71.

prices or exclude competition."<sup>8</sup> The question raised is not necessarily whether prices actually have been raised and competition actually excluded, but rather whether there is the power to do so when desired.<sup>9</sup> The litigation of a monopolization case turns on an analysis of the entity's structure, power, and actions, and the effect of those factors within a competitive environment.<sup>10</sup>

Whether one prefers to view and test monopolization by its abuse within the area of competition, by its structure, by its performance, or by its conduct,<sup>11</sup> a threshold issue is that of relevant market. Before it can be determined whether monopoly power exists in an economic sense, it is necessary to define the relevant market in which the supposed power over prices or competition is to be tested. There are various indicators of competition<sup>12</sup> and once the market in which competition does, or might take place is defined, these indicators of competition can be applied. In defining the relevant market, the courts look to the relevant product market as well as the relevant geographic market. Both combined constitute the relevant market in which the businessman must operate and in which an alleged monopolist's power will be tested.

The term relevant product market describes those items or services which compete or might compete with the products or services supplied by the defendant. The inquiry focuses on actual

---

8. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

9. *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946).

10. There are no precise definitions of competition and monopoly. Neither economics nor law has produced a uniform classification of competitive and monopolistic situations. True, there are well-accepted concepts of the two conditions in their pure forms. However, neither of these fits the world in being.

M. MASSEL, *COMPETITION AND MONOPOLY* 186-87 (1962) (footnotes omitted) [hereinafter cited as MASSEL].

11. For an excellent comparison of the "abuse" and "structure" theories and their applicability in determining whether an illegal monopoly exists, see G. HALE & R. HALE, *MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT* (1958) [hereinafter cited as HALE]. For a discussion of conduct versus structure approaches to antitrust litigation as well as a good example of economic testimony involving such issues, see Scanlon, *Economics in the Courtroom: The "Technology" of Antitrust Litigation*, 3 *ANTITRUST L. & ECON. REV.* 43 (1969) [hereinafter cited as Scanlon]. For an argument favoring considerable use of economic theory by the legal profession and a shift from conduct offenses to an analysis of performance, see MARX, *Economic Theory and Judicial Process: A Case Study*, 20 *ANTITRUST BULL.* 775 (1975).

12. MASSEL, *supra* note 10, at 186-235.

competition and what products are, or will be, substitutable with the product in question. This does not encompass the infinite range of possible substitutes, but only those reasonably interchangeable.<sup>13</sup> In analyzing the relevant product market, there are key areas of inquiry which should be considered in every case. They are economic in nature and serve to provide a framework for determining the dimensions of the relevant product market.

### A. Customer Factors<sup>14</sup>

#### 1. Physical Characteristics

One factor used to determine whether a product should stand alone in a market or be joined with other products is its physical similarity to other products. However, even when courts have noted physical similarities or dissimilarities, relevant product market determinations most often are made on the basis of one or more other factors. This is because the basic focus is on substitutability. Even products that are not physically identical sometimes may be substituted by consumers.<sup>15</sup>

A recent case in which inherent similarities were recognized was *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club*.<sup>16</sup> The court had to determine whether to include major league professional hockey, minor league professional hockey, and amateur hockey in the relevant product market or whether to restrict the market to major league professional hockey.<sup>17</sup>

The court recognized identities, saying:

---

13. See *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

14. The discussion that follows is not meant to be all-inclusive. There may very well be other key areas that counsel will have to examine. These will, however, serve as a framework for this Article and enable analysis of some evidentiary aspects involved in the litigation of these areas of inquiry. For a discussion of these, see MASSEL, *supra* note 10, at 240, in which the author lists other indicators such as stages of marketing, integration, and manufacture. These additional indicators are not generally concentrated on by the courts in product market analysis and will not be discussed in this Article. For further discussions of these indicators, see 16 J. VON KALINOWSKI, *BUSINESS ORGANIZATIONS/ANTITRUST LAWS AND TRADE REGULATIONS* §8.02(2)(a) (1976); 16B *id.* § 18.03(2).

15. See *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 393-94 (1956).

16. 351 F. Supp. 462 (E.D. Pa. 1972).

17. *Id.* at 501.

Any hockey match whether in the NHL, the minor professional hockey leagues, or in the amateur leagues always includes one hockey rink, 12 hockey players, two referees, and a similar set of rules before a greater or lesser number of spectators.<sup>18</sup>

In spite of this similarity, the court held that the relevant product market included only major league professional hockey because of factors such as "higher ticket prices, increased television revenues, and greater players' skill and salaries" and "discretion in the fans to refrain from paying higher prices for low performance."<sup>19</sup>

Physical characteristics, however, may be so unique as to enable a court to consider a particular product in a separate relevant market. In *United States v. M.P.M., Inc.*<sup>20</sup> the court held that ready-mix concrete occupied a relevant product market distinct from other building materials. The court cited key physical properties of ready-mix such as the fact that it, unlike other construction materials, could be used to conform to practically any shape within design limitations and that it had tremendous strength, durability, and fire resistance. The court also drew on testimony from various building contractors that for certain purposes ready-mix was used exclusively.<sup>21</sup>

## 2. *End Use of Products*

In examining end uses, the courts will look for those products which are used by consumers for the same purpose and are reasonably interchangeable. Although the aspect of end use is closely related to physical properties, a product may be used differently by varying groups of consumers. The market determination, therefore, may not be based on the product's physical properties alone. Furthermore, consumers may employ physically dissimilar items toward essentially the same end use, thus necessitating

---

18. *Id.*

19. *Id.* For a similar treatment of the issue, see *International Boxing Club v. United States*, 358 U.S. 242 (1959).

20. 397 F. Supp. 78 (D. Colo. 1975).

21. *Id.* at 87. See also *United States v. Blue Bell, Inc.*, 395 F. Supp. 538, 544-46 (M.D. Tenn. 1975), in which the court cited unique construction and appearance features in holding industrial rental garments to be a line of commerce.

that these products be included in the same relevant product market.

*United States v. E.I. duPont de Nemours & Co.*<sup>22</sup> serves as an excellent example of the latter situation. *DuPont* involved products which were chemically and somewhat physically dissimilar, such as different types of cellophane, glassine, and wax paper. In presenting its case, *duPont* concentrated on the end uses of products. In so doing, *duPont* was able to show that in spite of physical dissimilarities, its product, cellophane, competed with various other forms of wrapping material for the end use of packaging.

There also may be certain products that are unique for certain purposes, thus tending to show that they are in a separate market.<sup>23</sup> In the recent case of *SmithKline Corp. v. Eli Lilly and Co.*,<sup>24</sup> the district court narrowed the relevant product market by holding that it was not made up of all antibiotic drugs as the defendant contended, but rather that it was limited to the nonprofit hospital market for cephalosporin drugs. This conclusion was based partly upon findings that the cephalosporin family of antibiotic drugs displayed "noticeable and acknowledged differences in the relative effectiveness" when compared with other antibiotics in treating certain illnesses.<sup>25</sup>

A court's finding that a product is unique also can serve as a basis for excluding it from a relevant product market. Such a situation occurred in *Beatrice Foods Co. v. FTC*<sup>26</sup> in which the court excluded aerosol spray paints from the paint brush and roller market because aerosols were used for specialized painting for which a roller or brush would be impractical. The end use determination, therefore, was not directed at which products to include in the market, but at which products to exclude.

---

22. 351 U.S. 377 (1956).

23. See *Mississippi River Corp. v. FTC*, 454 F.2d 1083, 1090 (8th Cir. 1972) (portland cement); *United States v. M.P.M., Inc.*, 397 F. Supp. 78, 87 (D. Colo. 1975) (ready-mix concrete); *United States v. Blue Bell, Inc.*, 395 F. Supp. 538, 544-46 (M.D. Tenn. 1975) (industrial rental garments); *Calnetics Corp. v. Volkswagen of America*, 348 F. Supp. 606, 617-18 (C.D. Cal. 1972) (car air-conditioning units for Volkswagen products).

24. 5 TRADE REG. REP. (CCH)¶61,199 (E.D. Pa. Jan. 3, 1977).

25. *Id.*

26. 540 F.2d 303 (7th Cir. 1976).

### 3. *Attractiveness to Buyers*

Certain products simply may have more customer appeal. This may or may not be related to physical characteristics. The court in *Philadelphia World Hockey Club*,<sup>27</sup> in holding that major league professional hockey was a separate market, relied in part on a finding that major league hockey games are generally sold out whereas minor league games draw only a fraction of arena seating capacity.<sup>28</sup>

### 4. *Cross-Elasticity of Demand*

Within the aspect of product substitutability, elasticity of demand and cross-elasticity of demand are pivotal concepts. Elasticity of demand reflects the change in the quantity of a product demanded compared with its change in price.<sup>29</sup> Because the relevant product market analysis concerns which products or services exert competitive pressures on the product or services in question, the inquiry focuses on the relationship between price and quantity of the defendant's product and the prices and quantities of other possible substitutes. Economists define this relationship as cross-elasticity of demand.<sup>30</sup>

For example, Company A might increase its price on a product, causing a decrease of sales of that product. If, as a result of the price increase, Company B sells more of a similar product, then Company B's product may be considered to be in the same market as Company A's product because consumers seem to regard the products as substitutable.

---

27. 351 F. Supp. 462 (E.D. Pa. 1972).

28. The court stated that:

The popularity of major league professional hockey vis-a-vis its minor league counterpart is indicated by the fact that average 1969-70 season attendance in the NHL East Division was more than 100% of rated seating capacity. . . .

Chicago Blackhawks President William Wirtz testified that his team's games are typically sold out, but that in contrast the Blackhawks' Dallas minor league team draws only 2,500 in an 8,000 seat arena.

*Id.* at 471. See also *Affiliated Music Enterprises, Inc. v. Sesac, Inc.*, 268 F.2d 13, 15 (2d Cir. 1959), *cert. denied*, 361 U.S. 831 (1959) (court sustained district court's finding that performance rights in gospel music constituted separate product market because the music was distinct and without substitute).

29. For a discussion of elasticity of demand and the formula for it, see P. ASCH, *ECONOMIC THEORY AND THE ANTITRUST DILEMMA* 139-41 (1970).

30. *Id.* at 141.



The major problem in determining relevant product market is how to measure and show cross-elasticities and at what coefficient to say meaningful cross-elasticity exists.<sup>31</sup> Where products do exhibit some price/demand responsiveness, they are more likely to be included in the same market.<sup>32</sup> If the products do not respond to each other by virtue of price changes, this is evidence that they are in separate product markets.<sup>33</sup>

### 5. Relative Prices

Where products are thought to be substitutes, but are very different in price, their price difference may place the products in separate markets. For example, unique price was one key factor in the district court's determination in *Philadelphia World Hockey*<sup>34</sup> that major league professional hockey was a separate

---

31. *Id.* See MASSEL, *supra* note 10, at 245; HALE, *supra* note 11, at 109. The formula used to measure cross-elasticity is really a way of expressing, numerically, the substitutability of products by consumers in relation to prices for those products. The higher the numerical coefficient, the greater the substitutability. Consumer response is the key to the measurement.

32. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 400 (1956) in which the Supreme Court recognized cross-elasticity of demand. In *Brown* the Court also recognized the fact that, as in merger cases under Section 7 of the Clayton Act, there may be well-defined submarkets within broader markets, which can themselves be analyzed as product markets. See also *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524, 530 (2d Cir. 1958) in which beet sugar and cane sugar were held to be in the same market because of evidence of price changes in one producing equivalent and corresponding changes in the other. The court recognized that sensitivity to price changes and not price differentials was the key to cross-elasticity of demand.

33. In *United States v. ALCOA*, 377 U.S. 271, 275-77 (1964), aluminum conductors and copper conductors were considered separate lines of commerce under Section 7 of the Clayton Act because of a lack of price response to one another. The court in *General Foods Corp. v. FTC*, 386 F.2d 936, 942 (3d Cir. 1967), in affirming and enforcing an FTC divestiture order, noted that the FTC had failed to introduce evidence on consumer sensitivity to price changes between steel and non-steel wool soap pads, but that there was sufficient evidence to support a finding that the prices between the two displayed no sensitivity. This evidence was in the form of oral testimony from company executives regarding pricing policies. In *United States v. Tidewater Marine Serv., Inc.*, 284 F. Supp. 324, 330 (E.D. La. 1968), the court held that crew boats were in a separate market from supply or utility boats because of distinct uses and because their relative different costs showed the lack of sensitivity to price. See also *SmithKline Corp. v. Eli Lilly and Co.*, 5 TRADE REG. REP. (CCH) ¶61,199 (E.D. Pa. Jan. 3, 1977).

34. 351 F. Supp. 462 (E.D. Pa. 1972). The average ticket price for the National Hockey League was \$5.22, for the American Hockey League it was \$3.07, for the World Hockey League it was \$2.47, and for the Canadian Hockey League it was \$2.42. *Id.* at 471. See

market from minor league professional hockey and amateur league hockey. The court found that there was a much higher average ticket price for major league professional hockey than for the other two.

There also can be a separate market determination based on a low price advantage enjoyed by a product.<sup>35</sup> Price alone, however, will not always be a determining factor and even where there are price differences, the courts may find that the products still compete and should be included in the market.<sup>36</sup>

---

*also* International Boxing Club v. United States, 358 U.S. 242 (1959), in which the Supreme Court, in determining that the relevant product market was the promotion of championship boxing as compared to all professional boxing events, cited the following monetary differences:

[T]he average revenue from all sources for appellants' championship bouts was \$154,000, compared to \$40,000 for their nonchampionship programs; . . . television rights to one championship fight brought \$100,000, in contrast to \$45,000 for a nontitle fight seven months later [and] spectators pay "substantially more" for tickets to championship fights than for nontitle fights.

*Id.* at 250-51. *See also* United States v. Pennzoil Co., 252 F. Supp. 962, 973 (W.D. Pa. 1965), in which the court found Penn Grade crude oil to be in a relevant product submarket because for one reason, it commanded distinct prices; *Abex Corp. v. FTC*, 420 F.2d 928, 931-32 (6th Cir. 1970), *cert. denied*, 400 U.S. 865 (1970) in which the court upheld the FTC's determination that sintered metal friction materials were in a relevant submarket from organic friction materials, one reason being the former's higher prices; *Elco Corp. v. Microdot Inc.*, 360 F. Supp. 741, 749 (D. Del. 1973) in which metal plate connectors which enjoyed a premium price were determined to be in a separate market.

35. In *United States v. ALCOA*, 377 U.S. 271 (1964), the Supreme Court gave great weight to the fact that insulated aluminum conductors were priced considerably below insulated copper conductors in determining that the former was in a separate submarket. The Court considered that "the single, most important practical factor in the business." *Id.* at 276. The court in *General Foods Corp. v. FTC*, 386 F.2d 936 (3d Cir. 1967), *cert. denied*, 391 U.S. 919 (1968), upheld the Commission's determination that household steel wool products were in a market separate from other non-steel wool household aids. One reason was evidence showing that household steel wool products sold at distinctly lower prices. *Id.* at 942. In *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962), the court, in an FTC divestiture action, upheld the Commission's determination that the production and sale of decorative aluminum foil to the florist trade was the relevant line of commerce. One key basis for this was the pricing. The foil sold to florists was considerably lower in price than foil sold to other markets. The court noted the illogic of assuming that a prudent businessman would buy a similar product at a higher price. Absence of such a practice among businessmen, the court held, permits the inference that florist foil is different from other types. *Id.* at 239.

36. *See* *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956), one of the best examples, in which, despite price differentials, other flexible packaging materials were included in the relevant product market with cellophane.

## 6. *Public Recognition of the Product*

When evidence shows that the public distinguishes products in groups or categories, this may be evidence of product markets or submarkets. The district court in *United States v. Brown Shoe Co.*<sup>37</sup> acknowledged the public's tastes in shoes by noting that the male and female population wear distinctly different types of shoes.<sup>38</sup> The Supreme Court eventually upheld the district court's reliance on this public recognition as one reason for considering men's, women's and children's shoes as the relevant lines of commerce.<sup>39</sup>

## 7. *Distinct Customers*

If a product, because of some unique quality, can be utilized only by a defined, distinct customer, this will be an indication that the product might be in a separate market or submarket. For example, foil used by florists has been found to be distinct from other kinds of foil<sup>40</sup> and Pennsylvania crude oil has been found to have a market separate from other crude oils.<sup>41</sup>

### B. *Manufacturing Factors*

#### 1. *Influence of Sellers' Costs*

Although this issue may very well go to the question of monopoly power rather than the determination of the market, Judge Hand's reasoning in the case of *United States v. Corn Products Refining Co.*<sup>42</sup> would exclude products from a relevant market if

---

37. 179 F. Supp. 721 (E.D. Mo. 1959), *aff'd*, 370 U.S. 294 (1962).

38. *Id.* at 731.

39. *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962). The court in *United States v. ALCOA*, 233 F. Supp. 718 (E.D. Mo. 1964), *aff'd per curiam*, 382 U.S. 12 (1965), also specifically cited customer recognition of metal curtain walls as distinct from pre-cast or any other type of curtain wall. The court found that when a specific type of metal wall was called for, such as aluminum, sub-bids would be accepted on alternative metals but not on non-metals. *Id.* at 725.

40. *Reynolds Metal Co. v. FTC*, 309 F.2d 223, 228 (D.C. Cir. 1962).

41. *United States v. Pennzoil Co.*, 252 F. Supp. 962, 974-75 (W.D. Pa. 1965). *But see* *Seeburg Corp. v. FTC*, 425 F.2d 124, 129 (6th Cir. 1970), *cert. denied*, 400 U.S. 866 (1970) in which the court held against *Seeburg Corp.*'s definition of the relevant market because it only took into consideration the single factor of distinct customers.

42. 234 F. 964 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1918).

the production costs of some producers were well above the alleged monopolist's costs.<sup>43</sup> This is because if the alleged monopolist has a very low cost of production, he has the ability, at will, to reduce his price to a level at which cross-elasticity may disappear. In that event, the other products may no longer be realistically considered in the product market. This rationale, however, has not been widely applied in relevant product market analyses.

## 2. *Methods of Production (Unique Production Facilities)*

The use of special machinery in producing a product may be one indication that the product so produced should be in a separate market. The Court in *Brown Shoe Co. v. United States*<sup>44</sup> clearly recognized this as a criteria for a market determination by listing it in its designation of the boundaries of submarkets.<sup>45</sup> While courts may cite unique production facilities as one indicator of the relevant product market,<sup>46</sup> they also may cite the absence of such uniqueness as an indicator that the market should not be so restricted.<sup>47</sup> In this area of inquiry, production facilities,

---

43. MASSEL, *supra* note 10, at 245-46.

44. 370 U.S. 294 (1962).

45. *Id.* at 325. This was a Section 7, Clayton Act case. The Court in its opinion provided a checklist of indicators in such merger cases. This checklist also can be applied to a Section 2, Sherman Act, relevant product market determination because courts recognize that the tests for relevant product markets under both statutory sections may be the same. See *United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966).

46. See *Abex Corp. v. FTC*, 420 F.2d 928, 931 (6th Cir. 1970) (court cited testimony before the FTC's hearing examiner concerning "the differences in methodology and plant equipment required to produce them" as one reason for upholding the FTC's determination that sintered metal friction materials were in a relevant submarket from all friction materials); *General Foods Corp. v. FTC*, 386 F.2d 936 (3d Cir. 1967) (court recognized unique production facilities for producing household steel wool products); *United States v. M.P.M., Inc.*, 397 F. Supp. 78, 87 (D. Colo. 1975) (court found ready-mix concrete to be the line of commerce, stating as one reason: "Production facilities of ready-mix concrete may be utilized for the production of ready-mix concrete and for no other purpose"); *United States v. Kimberly-Clark Corp.*, 264 F. Supp. 439 (N.D. Cal. 1967) (court specifically considered special machinery designed for the purpose of converting pulp and basic tissue stock into sanitary paper products, such as facial tissue and toilet tissue, as unique production facilities and found that sanitary paper products were a distinct product submarket within the coarse paper and paper products submarkets); *United States v. ALCOA*, 233 F. Supp. 718 (E.D. Mo. 1964), *aff'd per curiam*, 382 U.S. 12 (1965) (court cited unique and specialized production facilities as one reason for determining that aluminum curtain wall was a line of commerce within outer markets of curtain wall and metal curtain wall).

47. See *United States v. Hughes Tool Co.*, 415 F. Supp. 637, 642 (C.D. Cal. 1976).

methods, and technology all may be considered.

Although courts consider the uniqueness of production facilities as an indicator of the relevant product market, some economists are skeptical whether unique production facilities necessarily represent the true competitive environment of a product. It is their belief that consumers, by and large, will decide what they want without regard to whether it was produced at a plant with unique production facilities. As long as consumers can, or will, substitute products, there may be competitive pressure regardless of the nature of the plant or the production facilities.<sup>48</sup>

### 3. *Cross-Elasticity of Production Facilities*

This is another area in which the focus is not on the consumer and his choices regarding substitutability. The focus is on other manufacturers or potential manufacturers who can change to the production of the product in question if it becomes economically profitable to do so.<sup>49</sup> Their entry into a market is a function of price. The concept of cross-elasticity of production facilities is tied to the notion that courts should be concerned with those products or the potential supply of those products which put decision making pressure on the producers of the product under examination.

The viability of this criteria for relevant product market determinations is unsettled.<sup>50</sup> Although courts have rejected arguments for expanding the markets in merger cases based on this rationale,<sup>51</sup> they have narrowed markets by focusing on unique production facilities.<sup>52</sup> In spite of the uncertainty regarding the

---

48. See HALE, *supra* note 11, at 105-13.

49. The Supreme Court in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) said: "The cross-elasticity of production facilities may also be an important factor in defining a product market within which a vertical merger is to be viewed."

50. ABA ANTITRUST LAW DEVELOPMENTS 47 (1975).

51. See *United States v. ALCOA*, 377 U.S. 271 (1964); *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962); *United States v. Pennzoil Co.*, 252 F. Supp. 962 (W.D. Pa. 1965). In *Calnetics Corp. v. Volkswagen of America*, 348 F. Supp. 606, 618 (C.D. Cal. 1972), the district judge expressly rejected the concept in a merger case, stressing that competition must be measured by the product and its relation in the marketplace.

52. See *Abex Corp. v. FTC*, 420 F.2d 928 (6th Cir. 1970); *General Foods Corp. v. FTC*, 386 F.2d 936 (3d Cir. 1967); *United States v. Kimberly-Clark Corp.*, 264 F. Supp. 439 (N.D. Cal. 1967); *United States v. ALCOA*, 233 F. Supp. 718 (N.D. Mo. 1964); *United*

use of this factor as an indicator, many economists feel that attention must be given to cross-elasticity of production facilities when determining the relevant product market.<sup>53</sup>

There is recent indication that the courts are now seriously analyzing this factor. In *Telex Corp. v. International Business Machines Corp.*<sup>54</sup> and *Yoder Bros., Inc. v. California-Florida Plant Corp.*,<sup>55</sup> the courts paid considerable attention to the degree of difficulty encountered by potential competitors in adjusting their production methods in order to compete with the defendants' products. Both decisions resulted in findings that the costs were not prohibitive, thus expanding the relevant product markets and defeating the plaintiffs' contentions of monopolization.

#### 4. Entry Barriers

Closely related to both methods of production and cross-elasticity of production facilities is the issue of entry barriers. Although economic and financial conditions which pose obstacles to the entry of another competitor generally have been examined in the context of whether a firm possesses monopoly power, or what the effect will be on competition in merger cases, the court in *United States v. Mrs. Smith's Pie Co.*<sup>56</sup> dealt with this situa-

*States v. Kennecott Copper Corp.*, 231 F. Supp. 95 (S.D.N.Y. 1964), *aff'd per curiam*, 381 U.S. 414 (1965).

53. See Scanlon, *supra* note 11, at 63-64; *Economics in the Courtroom: A "Structural" Defense in a Monopoly Case*, 1 ANTITRUST L. & ECON. REV. 45, 52-53 (1968). See also Edwards, *Use and Abuse of Economics in Antitrust Litigation*, 20 ABA ANTITRUST SECTION 38 (1962) [hereinafter cited as Edwards] in which Corwin D. Edwards, Professor of Government and Business, Graduate School of Business, University of Chicago stated:

Economists worth their salt also realize that, on the supply side of the market, there is cross-elasticity of supply, that under appropriate incentives the seller may be capable of substituting alternative goods for his present goods, and that the substitutability of goods in the productive process also helps determine the boundary of the market.

*Id.* at 44.

With reference to productive capacity and entry barriers, it has been argued that "ease of entry factors at least indirectly shape the concept of relevant market, although not entering into its final determination." Schlade, *Proposed Objective Relevant Product Market Criteria Under Section 2 of the Sherman Act and Section 7 of the Clayton Act*, 35 U. CIN. L. REV. 376, 384 (1966). See also MASSEL, *supra* note 10, at 250; note 56 *infra*.

54. 510 F.2d 894 (10th Cir. 1975), *cert. dismissed*, 423 U.S. 802 (1975).

55. 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 1108 (1977).

56. ANTITRUST & TRADE REG. REP. (BNA), No. 794, at A-1 (E.D. Pa. Nov. 19, 1976).

tion in the context of a relevant product market-type analysis in an acquisition situation.

### 5. *Specialized Vendors*

Where products are marketed through separate and specialized systems of vendors, that fact has been recognized as one indication that the products may be in separate markets.<sup>57</sup> The absence of specialized vendors, however, does not necessarily show that the products are in the same market or submarkets.<sup>58</sup>

### 6. *Industry Recognition of the Product*

Recognition of separate markets by the firms in question or the industry itself has been given considerable weight by the courts. Frequently, the very company involved will have documentation or other internal indicia that it considers its product a separate competitive entity.<sup>59</sup> It also may have its marketing structure set up in such a way as to indicate separate entities.<sup>60</sup>

Indications of the way the industry views the products also may provide evidence as to a relevant product market. Such an indication was found in *General Foods Corp. v. FTC*,<sup>61</sup> in which the

---

57. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *United States v. Blue Bell, Inc.*, 395 F. Supp. 538, 546 (M.D. Tenn. 1975) (district court cited separate sales forces and unique knowledge required of the sales personnel for industrial rental garments to rental laundries); *United States v. Healthco, Inc.*, 387 F. Supp. 258, 265 (S.D.N.Y. 1975); *United States v. ALCOA*, 233 F. Supp. 718, 725 (E.D. Mo. 1964). See also *United States v. M.P.M., Inc.*, 397 F. Supp. 78 (D. Colo. 1975) (court held ready-mix concrete a separate line of commerce and focused on the unique method of distribution).

58. See *General Foods Corp. v. FTC*, 386 F.2d 936, 941 (3d Cir. 1967) (FTC failed to make findings on the issue of specialized vendors and yet found separate markets for household steel wool products as compared to non-steel wool products). The circuit court upheld the FTC, indicating that not all criteria as listed in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), need to be present to make a determination.

59. See *Abex Corp. v. FTC*, 420 F.2d 928, 930-31 (6th Cir. 1970) (specifically referring to the company's annual reports); *General Foods Corp. v. FTC*, 386 F.2d 936, 941 (3d Cir. 1967) (cited the defendant's recognition that certain competition was indirect); *Reynolds Metal Co. v. FTC*, 309 F.2d 223, 228 (D.C. Cir. 1962) (intracompany communications reflected the "specialty nature" of the florist foil converting industry); *United States v. Pennzoil Co.*, 252 F. Supp. 962, 972 (W.D. Pa. 1965) (cited the petition filed with the Public Utilities Commission of West Virginia by the president of Pennzoil).

60. See *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 227 (D.C. Cir. 1962); *United States v. Healthco, Inc.*, 387 F. Supp. 258, 265 (S.D.N.Y. 1975); *United States v. Blue Bell, Inc.*, 395 F. Supp. 538, 546 (M.D. Tenn. 1975).

61. 386 F.2d 936, 941 (3d Cir. 1967).

pricing decisions of several manufacturers of household steel wool products indicated that the manufacturers considered their only serious competition to be from other steel wool products. Other types of industry recognition have been: decisions not to serve a particular market,<sup>62</sup> categorizing products though the use of terminology, sales patterns, catalogues,<sup>63</sup> trade association data,<sup>64</sup> accounting structures,<sup>65</sup> and assignment of standard industrial classification codes.<sup>66</sup>

### III. EVIDENTIARY CONSIDERATIONS

The foregoing indicators of relevant product market are merely guideposts that the courts use in determining the effective area of competition for products or services. Before the courts can utilize them, counsel must employ evidentiary techniques to place various types of evidence before the court. Because of the diverse nature of the relevant product market indicators, the types of evidence will range from those which are highly technical, such as samples and polls, to those which are relatively simple, such as testimony from salespersons. The persuasive impact of the various types does not necessarily correspond with their degree of complexity. This section will examine the use and persuasiveness of various kinds of evidence.<sup>67</sup>

---

62. *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 229 (D.C. Cir. 1962).

63. *United States v. Kimberly-Clark Corp.*, 264 F. Supp. 439, 452-54 (N.D. Cal. 1967).

64. *United States v. M.P.M., Inc.*, 397 F. Supp. 78, 87 (D. Colo. 1975). *See also* *Elco Corp. v. Microdot, Inc.*, 360 F. Supp. 741, 749 (D. Del. 1973).

65. *United States v. Healthco, Inc.*, 387 F. Supp. 258, 265 (S.D.N.Y. 1975).

66. *United States v. M.P.M., Inc.*, 397 F. Supp. 78, 87 (D. Colo. 1975).

67. Problems of admissibility of various forms of evidence will not be stressed. They will be referenced but they are not the focal point of this work. The purpose of this work is to examine how the courts use the various forms of evidence admitted before them in their decision-making processes.

Another key area which will not be treated in this Article is the use of judicial notice. It is unquestionably an important factor in antitrust litigation as well as any other litigation. Its utility ranges over many other areas of specific evidence which will be discussed herein. For a good summary of the use of judicial notice, see Dession, *The Trial of Economic and Technological Issues of Fact: II*, 58 *YALE L.J.* 1242, 1248-50 (1949) [hereinafter cited as Dession]; 16N *J. VON KALINOWSKI, BUSINESS ORGANIZATIONS/ANTI-TRUST LAWS & TRADE REGULATION* §110.02, at 110-31 to 110-32 (1976) [hereinafter cited as *VON KALINOWSKI*]. Section 2.60(h) of the *MANUAL FOR COMPLEX LITIGATION* (rev. ed. 1975) sanctions the use of judicial notice for standard publications, stating:



### A. Visual Techniques

#### 1. Views by the Court

Issues which are capable of being understood and appreciated more by direct observation lend themselves to the use of a view by the trial court.<sup>68</sup> Such issues may involve the nature of unique production facilities or cross-elasticity of production facilities, in which counsel are trying to show the ease or difficulty of other manufacturers duplicating the necessary production capabilities. Issues involving the nature of the product and the nature of competition also may be illuminated by the use of a view. Views have been used and cited as being important in at least two major antitrust cases: *United States v. United Shoe Machinery Corp.*<sup>69</sup> and *United States v. E.I. duPont de Nemours & Co.*<sup>70</sup>

The latter case prevents the more interesting application of the use of a view in a relevant product market determination. In *duPont*, one of the key problems for the court was determining which, if any, flexible wrapping materials should be included with cellophane in the relevant product market. DuPont's position from the beginning was that its product was under intensive competition from other flexible packaging materials and that, because cellophane was not unique for the purposes sold, the

---

Authoritative standard publications, such as government market reports, established statistical manuals and the like, may often be judicially noticed. Whenever such publications are to be judicially noticed, advance notice should always be given the parties and the fact of the notification should appear in the record.

*Id.* (footnotes omitted). FED. R. EVID. 201 contains provisions for the judicial notice of adjudicative facts.

68. For an interesting perspective on views, see McGlothlin, *Some Practical Problems in Proof of Economic, Scientific and Technical Facts, Seminar on Protracted Cases*, 23 F.R.D. 467, 474 n.9 (1958) [hereinafter cited as McGlothlin] in which the author compares the use of a view to a motion picture. He states:

A motion picture film is much less desirable [*sic*] than the direct observations of a personal view. A film is necessarily influenced by the judgment and technique of the photographer. A camera is a selective and interpretive tool in the hands of its user, whereas the eye of an actual observer is objective. Also, the court has less opportunity to obtain fuller explanation of particular points if desired.

*Id.*

69. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). In this case Judge Wyzanski visited factories in the industry.

70. 118 F. Supp. 41 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

company actually had been forced to alter its price due to this competition.<sup>71</sup> It was, therefore, seeking to show that it did not have monopoly power, *i.e.*, the power to control the price or to exclude competition. The proof of actual competitive pressure on its product by other products therefore, was essential to duPont's case.

A very effective demonstration of competition came when, during the course of the trial, the judge saw a reference in a newspaper to a packaging show. After the trial, counsel for duPont explained events as follows:

He indicated from the Bench that he wished to go to the Show to see whether or not it would throw light on the issues being litigated. None of us on either side knew what the exhibits might reveal. Thus it happened that without any advance warning, counsel for both sides accompanied the court while for an entire day he inspected exhibits presenting all phases of the flexible packaging business. To the rising enthusiasm of duPont counsel as the party walked from exhibit to exhibit, the judge encountered the most practical and concrete evidence possible of the interproduct competition which the witnesses had been talking about at the trial. After that visit it was obviously difficult for the Government to carry the day with its theoretical arguments that the materials did not compete because they had a different chemical composition, or a different specific gravity, or a different feel or appearance. The court had seen price and product competition at firsthand.<sup>72</sup>

By visiting the packaging show, the judge was able to observe how cellophane was being displayed along with other flexible packaging materials in the context of the needs and uses of the packaging industry.<sup>73</sup>

---

71. Gesell, *Legal Problems Involved in Proving Relevant Markets*, 2 ANTITRUST BULL. 463, 464 (1957) [hereinafter cited as Gesell].

72. *Id.* at 467. See *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 192 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

73. See *United States v. Morgan*, 118 F. Supp. 621, 650 (S.D.N.Y. 1953) in which the district judge conducted a view of an investment banker's office with counsel. The judge, after gaining familiarity with the operations, felt that he was better equipped to understand the probative value of documents which constituted much of the plaintiff's proof.

## 2. *Physical Evidence*

The basic goal in any relevant product market analysis is to delimit the competitive environment for a product or service by painting a meaningful economic picture.<sup>74</sup> Technical economic evidence is certainly relevant, but successful counsel also may be able to use simple techniques to demonstrate competition.

*DuPont*<sup>75</sup> again serves as an excellent example of how physical evidence was used to demonstrate for the court the nature of competition faced by cellophane in the market. A sales representative of a glassine company brought into court packages of food items that he had purchased in a supermarket. Some of the items were wrapped in cellophane and some were wrapped in one or more of the wrappings which duPont claimed competed with cellophane.<sup>76</sup> This graphic in-court display of competition caused defense counsel to evaluate that day as "one of the most effective days for the defense."<sup>77</sup> Thus, in spite of the complex nature of the case, a very simple but effective method of proof was used by the counsel to show the realities of the market place. Such proof is by no means unique to this particular case. Physical evidence always can be used to demonstrate the functional and physical nature of products. What is outstanding about the use of the evidence in this case is how it was used to give the court an insight into the way *competition* functioned with respect to the various products in questions.

### B. *Written Techniques*

#### 1. *Intracompany Communications, Documents and Internal Studies*<sup>78</sup>

Frequently, the courts will look to the defendant itself to see

---

74. For an interesting perspective on the viewpoint of counsel representing defendants, see Mitchell, *Preparing and Trying an Antitrust Claim: The Defendant's Case*, 18 ABA ANTITRUST SECTION 50, 54 (1961) [hereinafter cited as Mitchell]. The author, in stressing that counsel has to define competition and search out its realities, states that the defense counsel's job is to "develop a theory to fit the facts rather than to try to fit the facts into a preconceived theory."

75. 118 F. Supp. 41 (D. Del. 1953).

76. Gesell, *supra* note 71, at 468.

77. *Id.*

78. Admissibility of these items can fall under exceptions to the hearsay rule. See, e.g.,

how the corporation has viewed its competition. Although it may not be proper to determine a market based solely on how the defendant views it,<sup>79</sup> the defendant's perception of the market can have considerable probative value. Accordingly, the courts frequently have stressed intracompany documents which reflect the defendant's views of the market as well as internal studies prepared by or for the defendant corporation regarding the corporation's product and its competitive environment.<sup>80</sup> The use of internal documents for this purpose is by no means restricted to a defendant corporation. Similar documents from a plaintiff may very well be relevant to the issue.

*DuPont*<sup>81</sup> serves as an excellent example of how internal documents and studies were used to show that duPont considered other flexible packaging materials relevant with respect to competition and pricing. The defendant's documents were used to support the position that cellophane did in fact compete with other flexible packaging materials. The court considered, for example, market studies undertaken by duPont to determine packaging habits of retail customers of a variety of packaging products and the effect on sales of packaging a given product in cellophane.<sup>82</sup>

The court discussed packaging in the candy industry to show the competitive factors. One document the court referred to was a 1937 duPont sales bulletin.<sup>83</sup> The sales bulletin alluded to the price and stated that duPont's loss of sales on wrapping materials for 5¢ and 10¢ candy bars was due partly to "intensive selling efforts on the part of foil and glassine manufacturers."<sup>84</sup> Evidencing the competitive environment, the report went on to state:

---

FED. R. EVID. 801(d)(2), 803(6), 803(16).

79. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 376 F. Supp. 125 (D. Mass. 1974), *cert. denied*, 421 U.S. 1004 (1975).

80. In this area, see S. LEWIS, *MERGERS UNDER THE ANTITRUST LAWS, ANTITRUST WORKSHOP-1970*, 17 (Practicing Law Institute Corporate Law and Practice Course Handbook No. 31) in which the author provides a checklist of factual research to be accomplished with respect to the line of commerce in a merger case in addition to the type of internal documents which are useful in showing the firm's view of the relevant product market.

81. 118 F. Supp. 41 (D. Del. 1953).

82. *Id.* at 87.

83. *Id.* at 201-02.

84. *Id.* at 202.

This seems to be a situation where, in our effort to stimulate individual candy wraps, we have slackened off on our attack on bars, setting the stage for inroads by selling campaigns of other types of wraps. We now have the job of stopping these inroads and striking back in a positive manner.<sup>85</sup>

Thus, by using company documents and studies, duPont was able to show that it had been faced with a market wherein it had to consider key factors such as pricing and competitive maneuvers by manufacturers of products similar to its own.

Although in *duPont*, company documents were used to support the defendant's position, internal documents may also work to the defendant's detriment.<sup>86</sup> In *Abex Corporation v. FTC*<sup>87</sup> the court considered whether sintered metal friction materials for clutches, brakes, and transmissions for heavy duty equipment and machinery should be considered a separate submarket or whether, as the defendant claimed, the market should be made up of a wider competitive field which included "both 'organic' friction materials (asbestos brakes, etc.) and metal friction materials."<sup>88</sup> The defendant contended that any clutch or braking device designed for the use of sintered metal friction could be designed for the use of other material such as organic or other metal friction material.

The court, in upholding the Federal Trade Commission's product market determination that sintered metal friction materials were in a relevant product submarket, referred to annual reports of the defendant for the years 1958, 1960, and 1961.<sup>89</sup> These annual reports contained explanations regarding the unique physical qualities of sintered metal friction parts and comparisons between the functions of sintered metal friction materials and other friction materials. The former were shown to be unique

---

85. *Id.*

86. See *General Foods Corp. v. FTC*, 386 F.2d 936, 943 (3d Cir. 1967) (cited analyses and studies made by General Foods' management); *United States v. Blue Bell, Inc.*, 395 F. Supp. 538, 544 (M.D. Tenn. 1975) (cited documents prepared by the defendants which reflected industry recognition that the product market was more narrow than the defendants were contending).

87. 420 F.2d 928 (6th Cir. 1970), *cert. denied*, 400 U.S. 865 (1970).

88. *Id.* at 930.

89. *Id.* at 930-31.

for some uses requiring extreme durability and strength.<sup>90</sup> The court cited the above reports as clearly showing the indicia of "peculiar characteristics and uses."<sup>91</sup>

Internal documents also may be used against a plaintiff in a private suit. In Telex's suit against IBM<sup>92</sup> the district court held that the relevant product market was limited to peripheral devices which were plug-compatible with IBM central processing units plus some particular product submarkets. On appeal, IBM contended that, at the least, the market should consist of all peripheral products and not be limited to only those plug-compatible with IBM units.<sup>93</sup> An issue for the court centered around the ease of designing interfaces, attachments which allow peripheral products to be used with central processing units of other systems.

The court of appeals held that the relevant product market should include not only peripheral products plug-compatible with IBM central processing units but also those compatible with non-IBM units.<sup>94</sup> One basis for this holding was the court's determination that even those peripherals originally non-compatible with IBM units could be made so at a reasonable cost and were, therefore, reasonably interchangeable products. In support of its position, the circuit court cited a February 4, 1972 memorandum of Telex's Chairman of the Board showing the practicability of interface change on peripheral equipment.<sup>95</sup> The presence of this document prepared by an executive of the plaintiff helped the court to make a ruling contrary to the interests of the plaintiff. Such internal documents and studies, therefore, can play a major role in the analysis of the competitive environments of products.

---

90. *Id.* The reports cited physical properties which made the material unique for use in the brakes of jet aircraft and in the transmissions of heavy duty earthmoving equipment. Uses which required extreme heat and wear resistance were prime areas in which sintered metal friction materials were unique.

91. *Id.* at 932. *But cf.* Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962).

92. Telex Corp. v. IBM, 367 F. Supp. 258 (N.D. Okla. 1973), *aff'd in part, rev'd in part and rem'd in part with directions*, 510 F.2d 894 (10th Cir. 1975).

93. Telex Corp. v. IBM, 510 F.2d 894, 914 (1975), *cert. dismissed*, 423 U.S. 802 (1975).

94. *Id.* at 919.

95. *Id.* at 917.

## 2. Census Data and Industry Statistics

Government and private sources of industrial statistics and data<sup>96</sup> can be used as a source of information for a product market determination. They are valuable for the precise information that they provide, such as data regarding prices from the Consumer Price Index<sup>97</sup> and shares of certain product lines from the U.S. Bureau of Census figures.<sup>98</sup> In addition to government sources, data published regularly in business publications<sup>99</sup> may be helpful. This category would include "market quotations, tabulations, lists, directories"<sup>100</sup> and other published compilations which generally are relied upon by the public or by persons in particular occupations. Examples of these are financial and business data from newspapers<sup>101</sup> and data from Moody's Industrials.<sup>102</sup> Aside from the pure factual information that the above sources can provide, their use in relevant product market determinations may be more novel. Because relevant product markets are to correspond with commercial realities, the manner in which the accepted and relied upon industrial statistical sources classify a product or industry may be relevant.

In *Crown Zellerbach Corp. v. FTC*,<sup>103</sup> the Federal Trade Commission contended that the relevant market was "census coarse paper."<sup>104</sup> This designation came from a Bureau of Census classification that designated a major category to be trade coarse paper<sup>105</sup> and listed thereunder various subclassifications. One of these was census coarse paper. Crown Zellerbach argued that such a determination was incorrect and that all trade coarse pap-

---

96. For a discussion regarding aspects of admissibility of official records and reports, see Dession, *supra* note 67, at 1253-55; FED. R. EVID. 803(8), 803(17) (covering exceptions to the hearsay rule).

97. See generally *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258, 293 (M.D. Pa. 1965), *vacated*, 377 F.2d 776 (3d Cir. 1967) (Consumer Price Index was admitted on the issue of damages).

98. *Telex Corp. v. IBM*, 510 F.2d 894, 916 n.17 (10th Cir. 1975).

99. Regarding admissibility, see FED. R. EVID. 803(17).

100. *Id.*

101. See 16N VON KALINOWSKI, *supra* note 67, at §§110.01(1), 110.02, 110-37 n.9.

102. *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 70 n.222, 71 n.229 (D. Del. 1953).

103. 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962).

104. *Id.* at 806.

105. *Id.* at 805.

ers as listed in the Census classification constituted the product dimension of the relevant market.<sup>106</sup> Crown maintained that the designations of the papers were "grouped together by the Census merely for statistical reasons and that the census grouping means nothing. . . ."<sup>107</sup> The court disagreed and, although not allowing the Census grouping to determine the relevant market, it clearly recognized the probative value of a Census grouping.<sup>108</sup>

A similar use of Census data was made in *United States v. Kimberly-Clark Corp.*<sup>109</sup> in which the court noted that although Census classifications do not "ipso facto establish relevant markets, they may be used to measure a relevant market which has been established by evidence showing industry usage and trade practice."<sup>110</sup> The court supported this use of Census data by the testimony of the Chief, Wholesale Trade Division, Bureau of Census, establishing the

lengthy and careful study of trade practices and industry usage which is made by Census to insure that its classifications, in fact, correspond to commercial realities.<sup>111</sup>

Census classifications, therefore, may be one form of recognition which the courts consider to be a valid relevant product market indicator.<sup>112</sup>

### 3. *Trade Association Data and Trade Literature*<sup>113</sup>

Trade association data and trade literature also can have pro-

106. *Id.* at 806.

107. *Id.* at 807.

108. [W]e must recognize that it is possible that this grouping has behind it some facts or circumstances relating to the paper industry which may have led to the grouping originally although it is not specifically named or designated in the Census report . . . .

. . . .

. . . . The Census classification cannot be meaningless—there must be factual differences on which that classification is made . . . .

*Id.* at 807, 813.

109. 264 F. Supp. 439 (N.D. Cal. 1967).

110. *Id.* at 453 n.17.

111. *Id.*

112. See *Beatrice Foods Co. v. FTC*, 540 F.2d 303 (7th Cir. 1976) (court considered Census groupings); *United States v. Hughes Tool Co.*, 415 F. Supp. 637 (C.D. Cal. 1976) (court cited Census classifications).

113. Regarding admissibility, see *FED. R. EVID.* 803(17).



bative value in demonstrating industry recognition or competitive pressures. The trade association data need not necessarily come from the defendant's industry.<sup>114</sup> For example, in *United States v. E.I. duPont de Nemours & Co.*,<sup>115</sup> duPont used publications from the packaging trade. These publications contained discussions of packaging developments with technical comments regarding the ability of various materials to serve packaging needs.<sup>116</sup> With these publications, duPont was able to demonstrate the industry's recognition of the competitive qualities of duPont's product and other flexible packaging materials for particular end uses. Thus, duPont was able to show competitive pressures on its product.

In addition to the specific evidence of market recognition in trade association market reports, the courts are able to draw other conclusions from trade association information. In *United States v. M.P.M., Inc.*,<sup>117</sup> the court held that ready-mix concrete was a separate product market from other building materials. One basis for so holding was a finding that the building industry recognized that ready-mix concrete producers were a separate economic entity within the construction trade.<sup>118</sup> The court found that trade associations consisting only of ready-mix concrete companies have been formed to promote use of their product.<sup>119</sup> Thus, industry recognition can be shown not only by specific recognition of certain factors by the industry, but also by how the industry reacts and groups itself within the competitive environments.

#### 4. Advertising Claims

In an appropriate situation, the courts may examine the advertising claims of the defendant for their relevance to product market determinations. In *United States v. Blue Bell, Inc.*<sup>120</sup> the court specifically referred to the advertising documents of the defendants as indicating that the manufacture and sale of industrial

---

114. See *Elco Corp. v. Microdot, Inc.*, 360 F. Supp. 741, 749 (D. Del. 1973) (court cited association recognition).

115. 118 F. Supp. 41 (D. Del. 1953).

116. Gesell, *supra* note 71, at 468.

117. 397 F. Supp. 78 (D. Colo. 1975).

118. *Id.* at 87.

119. *Id.*

120. 395 F. Supp. 538 (M.D. Tenn. 1975).

rental garments was recognized by the industry as a distinct line of business.<sup>121</sup>

In addition to the relevant information contained in a defendant's advertising, the claims made by other firms may show the extent of competition faced by the defendant's product. Effective use of such advertising material was made by the defense in *United States v. E.I. duPont de Nemours & Co.*<sup>122</sup> DuPont introduced advertising claims by other flexible packaging manufacturers which were in journals of various trades.<sup>123</sup> The district court recognized this as evidence that other manufacturers were holding their products out as equally able to satisfy the packaging requirements of various principal trade customers.<sup>124</sup> The Supreme Court viewed this evidence as "examples of the competition among manufacturers for the flexible packaging market."<sup>125</sup>

Competitors' advertising claims may be viewed by the courts as mere puffing and not truly representative of the actual competition. Such a finding was made by the court in *General Foods Corporation v. FTC.*<sup>126</sup> General Foods had argued unsuccessfully that non-steel wool products competed with household steel wool products. It was General Foods' position that non-steel wool products whose composition ranged from "plastic, to copper, to abrasive-surface sponges"<sup>127</sup> were functionally similar to the steel wool soap pad. In so doing, it cited various advertisements by the manufacturers of the other products. The court discounted this evidence stating that "[a]dvertising puffs"<sup>128</sup> would not be considered as evidence of something which could not be proved at trial. Thus, advertising claims, although possessing probative value, probably will not stand alone but will be considered in light of the totality of the evidence before the court.

---

121. *Id.* at 544.

122. 118 F. Supp. 41 (D. Del. 1953).

123. *Id.* at 62-63. *See also* Gesell, *supra* note 71, at 467-68.

124. *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953).

125. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 402 (1956).

126. 386 F.2d 936 (3d Cir. 1967).

127. *Id.* at 942.

128. *Id.*

### 5. *Summaries, Tabulations, Graphs and Charts*

Summaries, tabulations, graphs and charts are methods of presenting facts. Their use cuts across the boundaries of various types of factual matter and their prime importance lies in their ability to make what otherwise might be a totally unmanageable case at least somewhat workable. When discussing the types of evidence which are used and desired by courts in making difficult economic determinations, such as relevant market, these forms are of prime importance. Because antitrust cases frequently involve the examination of an industry's activities over an extensive period of time, it is impractical to present to the court invoice after invoice to prove the long-term pricing of products. Likewise, it would be impractical to present to a court piecemeal evidence regarding many other aspects of an industry. The reasonable way to do this is through a compilation of the available data in the forms of tabulations, graphs, charts and summaries.

The Federal Rules of Evidence specifically provide for admission of evidence such as summaries and charts,<sup>129</sup> and the *Manual for Complex Litigation*<sup>130</sup> provides support and guidance for their use.<sup>131</sup> When these methods are used, they can facilitate a court's understanding and appreciation of cross-elasticity of demand by showing relative price movements and market shares. In addition, other relevant product market indicators, such as comparative physical properties, can be presented successfully to courts in this form.<sup>132</sup>

---

129. FED. R. EVID. 1006.

130. BOARD OF EDITORS OF THE FEDERAL JUDICIAL CENTER, *MANUAL FOR COMPLEX LITIGATION* (rev. ed. 1973) [hereinafter cited as *MANUAL*].

131. *Id.* §§2.711, at 72, 2.717, at 87. For consideration of the unique problems with these forms of evidence, see Dession, *supra* note 67, at 1258-59; 16N VON KALINOWSKI, *supra* note 67, at §§110.01(2), 110-10 to 110-11, 110.02, 110-58 to 110-61. McGlothlin, *supra* note 68, at 469-74; Lasky, *Proof of Complicated Economic and Technical Facts and Handling of Documents, Seminar on Protracted Cases*, 23 F.R.D. 319, 606, 609-11 (1958) [hereinafter cited as Lasky]; MASSEL, *supra* note 10, at 285-87; ABA REPORT OF THE COMMITTEE ON PRACTICE AND PROCEDURE IN THE TRIAL OF ANTITRUST CASES OF THE SECTION OF ANTITRUST LAW 40-43 (1954); *MANUAL*, *supra* note 130, §3.50, at 102-03.

132. See *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 63, 82-86, 112-13 (D. Del. 1953).

## 6. *Surveys, Samples and Polls*

Another method which facilitates the gathering and presentation of vast data to the courts is the use of surveys, samples and polls. These are methods which generally enable the user to draw facts and conclusions from sources without actually having to examine the sources directly in court. For example, it would be impossible to call all consumers before the court in order to determine their attitude toward a particular product, their product loyalty, their propensity to change products in accordance with price changes or their conception of competing products. Also, there is a question of how representative the testimony of only a few consumers would be when those consumers are not necessarily selected by a scientific method. They may in fact not be representative of the consumers in the market in question. One way to solve this dilemma is to utilize scientifically conducted sampling and polling procedures to gather the evidence.<sup>133</sup>

The *Manual* refers to sampling as involving physical examinations of the parts of the whole to determine the objectively observable facts.<sup>134</sup> It contrasts polls as dealing with the questioning of a part of the population to determine what the interviewees "have seen, think, do or believe, or . . . why they think, act or believe in a certain way."<sup>135</sup> The primary difficulty with the use of these methods in litigation centers around problems of admissibility. Sampling generally involves problems of relevancy, as to whether or not the sample accurately reflects the whole.<sup>136</sup> Polls, on the other hand, usually involve joint problems of relevancy and competency, the primary problem being one of hearsay.<sup>137</sup> Both the

---

133. See MANUAL, *supra* note 130, §2.712, at 73. For an interesting practical analogy to everyday situations involving sampling and an extensive discussion concerning sampling, its values, procedures, evidentiary aspects, etc., see MASSEL, *supra* note 10, at 287-316.

134. MANUAL, *supra* note 130, §2.712 at 73.

135. *Id.* at 73-74.

136. Lasky, *supra* note 131, at 611-12. See also MANUAL, *supra* note 130, §2.712, at 74-75.

137. Lasky, *supra* note 131, at 612. For a further treatment of this problem area, including the manner in which courts have addressed this hearsay objection, see MANUAL, *supra* note 130, §2.712, at 74; *Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 682-84 (1963).

*Manual*<sup>138</sup> and the Federal Rules of Evidence<sup>139</sup> reflect an acceptance of these methods. In both areas, the methodology employed in structuring and conducting the surveys, samples, and polls are key factors in their admissibility.<sup>140</sup>

Sampling procedures can be used to gather quantitative data which bear on the dimensions of a product market. Data such as the prices of the defendant's product as compared to the prices of other products<sup>141</sup> and information concerning the respective quantities purchased at varying prices is obtainable and will give an indication of the cross-elasticity of demand. In addition, sales data showing how many dealers handle the defendant's product as compared to the possible substitutes will give a good indication of the degree of competition that is taking place at various sales levels.<sup>142</sup>

In *United States v. United Shoe Machinery Corp.*,<sup>143</sup> Judge Wyzanski, urging the use of sampling procedures in antitrust

---

138. MANUAL, *supra* note 130, §2.712, at 76. Consider also the accompanying discussions within that reference of the determination of the factors of necessity and trustworthiness, and the burden of proof with respect to the methodology of the research conducted. *Id.* at 76-77.

139. FED. R. EVID. 703, 803(24).

140. See H. BARKSDALE, THE USE OF SURVEY RESEARCH FINDINGS AS LEGAL EVIDENCE (1957) for an extensive examination of the use of such evidence; Barnes, *Quantitative Data and Sample Surveys as Evidence in Judicial or Administrative Procedures*, 19 CURRENT BUS. STUD. 33 (1954); Dean, *Sampling to Produce Evidence on Which Courts Will Rely*, 19 CURRENT BUS. STUD. 5 (1954); Deming, *On the Contributions of Standards of Sampling to Legal Evidence and Accounting*, 19 CURRENT BUS. STUD. 14 (1954); Early, *The Use of Survey Evidence in Antitrust Proceedings*, 33 WASH. L. REV. & ST. B.J. 380 (1958); Kocker, *Admissibility in Courts of Law of Economic Data Based on Samples*, 28 J. BUS. 114 (1955); Soronsen & Soronsen, *Responding to Objections Against the Use of Opinion Survey Findings in the Courts*, 20 J. MKT'G 133 (1955); Zeisol, *The Uniqueness of Survey Evidence*, 45 CORNELL L.Q. 322 (1960). For discussion of the use of surveys and statistics, see Deming, *On the Presentation of the Results of Sample Surveys as Legal Evidence*, 29 J. AM. STAT. 814 (1954). See also *United States v. Empire Gas Corp.*, 393 F. Supp. 903 (W.D. Mo. 1975), in which the plaintiff tried to use a survey to prove the relevant market. The case is an excellent example of how courts are willing to use surveys which are properly conducted. In this case the plaintiff, however, did not follow the judge's pretrial order with reference to the taking of the survey.

141. See *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 154 F. Supp. 471 (N.D. Ill. 1957), *rev'd in part*, 258 F.2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1958) which, although not a monopolization or merger case, contains good examples of a consumer shopping survey and a price survey which were admitted into evidence in a price discrimination case.

142. For an explanation of duPont's use of this approach at the trial level in *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), see Gesell, *supra* note 71, at 471.

143. 110 F. Supp. 295 (D. Mass. 1953).

cases,<sup>144</sup> admitted depositions from a sample of 45 shoe manufacturers operating 55 factories.<sup>145</sup> The information from these sample depositions was summarized for the court enabling the judge to get a feeling for the nature of the competition and the relation between the defendant's machines and the competitors' machines in American shoe factories at the time of the taking of the sample.<sup>146</sup>

Surveying, sampling, and polling techniques can be used to gather evidence prior to and during trial,<sup>147</sup> but the courts also may look to surveys prepared by a party, its agent, by trade associations or other organizations for other business purposes and not with a view toward any litigation. These surveys may be relevant to industry recognition or actual competition faced by a product.<sup>148</sup> Observations about the market by organizations which

---

144. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953). "If antitrust trials are to be kept manageable, samples must be used, and a sample which is in general reasonable should not be rejected in the absence of the offer of a better sample." *Id.* at 305-06.

145. The nature of the sample, which was taken at the court's suggestion, was as follows:

The court arbitrarily selected from a standard directory of shoe manufacturers, the first 15 names that began with the first letter of the alphabet, the first 15 names that began with the eleventh letter of the alphabet, all eight of the names that began with the twenty-first letter of the alphabet, and the first seven names that began with the twenty-second letter of the alphabet. This sample cover[ed] 3 per cent of the shoe manufacturers. The sample include[d] small and large factories, and concerns manufacturing shoes according to substantially the most popular shoe manufacturing process.

*Id.* at 305.

146. *Id.* at 306. See also C. KAYSSEN, *UNITED STATES V. UNITED SHOE MACHINERY CORPORATION, AN ECONOMIC ANALYSIS OF AN ANTITRUST CASE 45-55* (1956). This book is an entire explanation of the case from the perspective of Dr. Carl Kaysen who was the economist who served as the law clerk to Judge Wyzanski.

147. See *United States v. Healthco, Inc.*, 387 F. Supp. 258 (S.D. N.Y. 1975) (government-run surveys were used); *Telex Corp. v. IBM*, 367 F. Supp. 258 (N.D. Okla. 1973) (court admitted depositions secured through survey methods); *United States v. National Homes Corp.*, 196 F. Supp. 370 (N.D. Ind. 1961) (survey was used to gather sales data to show the dimensions of the line of commerce). The last case is a good example of the types of objections raised to the admission of surveys, how they are distinguished from sampling problems and how the hearsay issue can be treated with respect to such problems. The case also gives examples of good and bad survey questions respecting methodology used in the survey.

148. See *Elco Corp. v. Microdot, Inc.*, 360 F. Supp. 741, 749 (D. Del. 1973) where the manner in which an independent accounting firm's survey analyzed the market was considered meaningful and held to be evidence of a recognition of the market.

conduct surveys independent of litigation also may have probative value. The survey organization's market view was considered in *Science Products Co. v. Chevron Chemical Co.*<sup>149</sup> The court considered the recommendations of the defendant concerning the complimentary nature of products. The recommendation was contained in a marketing survey which had earlier been prepared for Chevron.

Aside from the data that surveys provide, the courts may consider the way that surveys are structured as an indication of industry recognition and a reflection of the competitive situation. In *A.G. Spalding & Bros., Inc. v. FTC*<sup>150</sup> the court relied heavily on surveys conducted by the Athletic Goods Manufacturing Association (A.G.M.A.). At issue was whether the lines of commerce, in the merger case, should be comprised of individual lines of athletic products, such as baseballs and softballs as Spalding contended,<sup>151</sup> or be broken down further into high-priced lines and low-priced lines of each product line as the Federal Trade Commission concluded.<sup>152</sup>

The court referred to earlier surveys taken by the A.G.M.A. which were conducted for the purpose of gathering statistics regarding the athletic goods industry's production. These surveys specifically requested the manufacturers to provide production figures broken down into specific price categories. This fact, plus the testimony of members of the A.G.M.A. who gave reasons why the survey was structured by price categories, was considered to be meaningful. It became part of the substantial evidence in the record which supported the Federal Trade Commission's finding that the line of commerce should be made up of the high-priced and low-priced items within each product line.<sup>153</sup>

### C. Oral Techniques

#### 1. Trade Witnesses

Testimony may be presented by an expert witness with special

---

149. 384 F. Supp. 793 (N.D. Ill. 1974).

150. 301 F.2d 585 (3d Cir. 1962).

151. *Id.* at 597.

152. *Id.* at 595.

153. *Id.* at 598.

expertise in an area such as economics or accounting. However, there is another category of witnesses who prove valuable in anti-trust litigation. These are the industry witnesses such as experienced businessmen who have worked in the industry for an extensive period of time, executives within the companies in question, other businessmen in trades concerned, and salesmen who function at the competitive level. Such witnesses may be uniquely qualified to inform the court of the background of the industry, competitive conditions within it, and the reasons for certain business actions. They may be able to give the court a very real impression of the nature of competitive pressures.<sup>154</sup>

The experienced businessman's testimony may be more meaningful to a court than the economist's testimony.<sup>155</sup> It has been observed by a Department of Justice Antitrust Division attorney that such testimony usually is better received and that courts may have a tendency to rely more heavily on it even in areas where specialized academic study is relevant.<sup>156</sup>

Because one indicator of the relevant product market is how the defendant or parties to the litigation view the market, the testimony of executives of the company or companies involved can be very important.<sup>157</sup> How the executives view the market and whether they consider certain products as direct competitors can be the type of information supplied by people experienced with day-to-day decision-making responsibilities within the competitive environment.<sup>158</sup> Executive testimony, illuminating in the

---

154. For the perspective of a defense attorney on the use of live witnesses, see Mitchell, *supra* note 74, at 58.

155. Reyecraft, *Use of Expert Economic Assistance in the Prosecution of Antitrust Cases*, 20 ABA ANTITRUST SECTION 80, 86-87 (1962) [hereinafter cited as Reyecraft]. For a discussion of the value of this type of witness, see O'Donnell, *Civil Antitrust Trials*, 4 ABA ANTITRUST SECTION 73, 87 (1954).

156. Reyecraft, *supra* note 155. See also Gesell, *supra* note 71, at 473-74 for similar observations regarding such witnesses in the case of *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953).

157. See *General Foods Corp. v. FTC*, 386 F.2d 936, 943 (3d Cir. 1967); *Hughes Tool Co. v. Ford*, 114 F. Supp. 525, 534-38 (E.D. Okla. 1953), *modified*, 215 F.2d 924 (1954).

158. See *Science Prod. Co. v. Chevron Chem. Co.*, 384 F. Supp. 793, 797 (N.D. Ill. 1974) in which the president of the plaintiff corporation gave his opinion regarding whether certain products constituted a single product line. The witness' answer, however, was contrary to the in-court position being taken by the plaintiff and was cited by the court as one basis for accepting the defendant's definition of the relevant product market.



area of pricing decision, also can cast some light on the competitive situation and even cross-elasticity of demand. DuPont successfully used such testimony to demonstrate for the court that in its pricing decisions it considered the prices of other products. By this testimony, duPont showed the court that it was faced with an environment in which there were competitive pressures on its cellophane.<sup>159</sup>

The court in *Science Products Co. v. Chevron Chemical Co.*<sup>160</sup> found cross-elasticity of demand demonstrated in the testimony of the national market manager of a division of the defendant corporation. In examining the relationship of dry fertilizer to liquid fertilizer, the manager testified that in pricing liquid fertilizer, Chevron considered the price of dry fertilizer and that in pricing dry fertilizer they considered the price of liquid. The court concluded that the unchallenged testimony of the national market manager clearly demonstrated the cross-elasticity of demand between liquid and dry fertilizers.<sup>161</sup> Because of the court's ability to make findings regarding cross-elasticity of demand from pricing decision testimony,<sup>162</sup> such testimony can be crucially important in a relevant product market determination.

Not only will testimony of executives of the litigants be important, but testimony of other executives within the industry and businessmen who use the products also may be used to show that products are considered to be competitive<sup>163</sup> and to show industry recognition of distinct lines of business.<sup>164</sup> The testimony of other businessmen within an industry concerning their pricing decisions also has been considered on the question of price sensitivity.<sup>165</sup>

---

159. *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 82-86 (D. Del. 1953).

160. 384 F. Supp. 793 (N.D. Ill. 1974).

161. *Id.* at 798.

162. *See General Foods Corp. v. FTC*, 386 F.2d 936, 942 (3d Cir. 1967) in which, in the absence of evidence of consumer sensitivity to prices, the court upheld the FTC's finding of a lack of sensitivity of prices based partly on the testimony of corporate executives that they had not considered prices of non-steel wool products in pricing their steel wool products.

163. *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 204-06 (D. Del. 1953).

164. *See United States v. Blue Bell, Inc.*, 395 F. Supp. 538, 544 (M.D. Tenn. 1975).

165. *See General Foods Corp. v. FTC*, 386 F.2d 936, 942 (3d Cir. 1967) (court cited

Where questions of unique qualities, special consumer demand, or the variety or uniqueness of end uses are litigated, the testimony of businessmen whose companies use the products in question may be given considerable weight by the courts. These witnesses are the ones who have first hand knowledge of why they can substitute products or, on the contrary, why they can only use a certain product and what qualities make a particular product unique for their purposes.<sup>166</sup> The value of this type of testimony was demonstrated in *United States v. International Boxing Club of New York*,<sup>167</sup> in which the court held that the promotion of championship boxing contests was the relevant product market. In affirming that decision, the Supreme Court specifically cited the testimony of representatives of the broadcasting, motion picture and advertising industries. Although the media representatives were not the ultimate consumers of the product, they were intermediate consumers whose testimony as to special demands by them was very relevant to the issue of the uniqueness of the product.

Finally, examining the competitive environment of a product, a very persuasive source of evidence will be the salesmen of that product who have a unique ability to portray for the court the competition encountered day-to-day.<sup>168</sup>

## 2. *Expert Witnesses*

Most authorities recommend that an economist be brought into the case as early as possible so that he can assist with questions and concepts. He also can assist in the formulation of the economic theory of the case.<sup>169</sup> The economic expert, for example,

---

testimony of other steel wool manufacturers to the effect that in pricing their products they disregarded the prices of non-steel wool products and looked only to S.O.S. and Brillo, the largest household steel wool products producers).

166. See *United States v. M.P.M., Inc.*, 397 F. Supp. 78, 87 (D. Colo. 1975) (building contractors testified regarding the qualities and uses of ready-mix concrete); *Hughes Tool Co. v. Ford*, 114 F. Supp. 525, 534-35 (E.D. Okla. 1953) (drilling contractors testified regarding the uniqueness of roller rock bits in drilling operations).

167. 150 F. Supp. 397 (S.D. N.Y. 1957), *aff'd*, 358 U.S. 242 (1959).

168. See *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 198, 202 (D. Del. 1953) (court specifically cited the use of testimony and reports from salesmen).

169. *Id.* at 42. See also Dean, *Functioning of the Economist in Antitrust Litigation*, 20 ABA ANTITRUST SECTION 71 (1962) for a good summary of the various ways that economic

will not only be of assistance during the trial to testify regarding his opinions on the data and evidence that have come before the court, he is valuable in the beginning of the litigation to assist in the gathering of the evidence and in keeping the volume of evidence within manageable limits.<sup>170</sup> Accountants and experts in the areas of sampling and polling procedures also may be very helpful. As previously indicated, the use of polls and samples for determining relevant product market is becoming more important due to their increasing use by litigants and recognition by courts.<sup>171</sup>

Use of an economist requires consideration of many factors.<sup>172</sup> For example, in the area of relevant product market the economists will make differing judgments regarding such issues as the cut-off point at which they are willing to say there is meaningful cross-elasticity of demand and the relevance of supply substitutability.<sup>173</sup> At trial, the economic expert is valuable for the opinions he can render based on the data before him, the evidence which has come out at the trial or even his study of the industry.<sup>174</sup> Not only is the expert valuable to the litigants, but also to the trial judge who has various options available with respect to expert

---

experts can be used in antitrust situations. For prosecution and defense perspectives on the use of economic assistance, see Reycraft, *supra* note 155, and Groenke, *Use of Economic Assistance in Defense of Antitrust Cases*, 20 ABA ANTITRUST SECTION (1962), respectively.

170. See Edwards, *supra* note 53, at 41.

171. For an example of the considerations in cross-examining such experts, see Kiernan, *Observations on the Problem of Cross-Examining in Antitrust Cases*, 18 ABA ANTITRUST SECTION 71, 71-74 (1961); Deming, *supra* note 140 (statistician's point of view).

172. See Bock, *Choosing an Expert is a Delicate Thing*, 11 CONF. BOARD REC. 8 (1974) for perspective on considerations involved in choosing and understanding the economic expert. One of the consistently recognized factors is that economists will frequently be divided into two schools: the one believing in the structural test and the other believing in the behaviorist test. *Id.* See also McGlothlin, *supra* note 68, at 478. The former will look to the number and size of the units in an industry while the latter is primarily concerned with what actually happens within the industry. Bock, *supra*. This dilemma, however, will more likely come into focus on issues of monopoly power or in an analysis of the acts of the defendant rather than in a relevant product market determination.

173. For references regarding supply substitutability, see note 53 *supra*.

174. For an example of such testimony and the ways the issues can be treated, see Scanlon, *supra* note 11, at 55-112. Both examples come from testimony before the Federal Trade Commission but serve to highlight the type of testimony of economic experts. Conclusions regarding relevant product market and cross-elasticity are not substantially influenced by whether an economist is in the so-called structural or behavioral schools.

assistance. The judge can utilize neutral experts in capacities such as masters, court appointed experts, or even advisors to the court.<sup>175</sup> In such capacities, the experts can provide assistance to the courts in the resolution of the complex economic issues.

The ultimate persuasive power of expert witnesses, however, may not be as great as one might assume. The court in *SmithKline Corp. v. Eli Lilly and Co.*<sup>176</sup> was faced with an impressive array of expert witnesses presented by Eli Lilly and Company to show that the relevant market should be all anti-infective drugs as opposed to the plaintiff's contention that it should only be the cephalosporin family of antibiotic drugs.<sup>177</sup> The trial court's perspective on the evidence can be obtained from the following statement by the court:

The credentials of these scholars are impeccable, but they are not typical representatives of the persons ordering or prescribing drugs for the nonprofit hospital industry. While we all admired the extraordinary speed of the gold medalist who won the 400 meter relay for the United States in Montreal in July, it would be foolish to assume that his speed, finesse, skills and physical condition constitutes the norm of agility and talent of the aver-

---

175. The use of experts in these capacities as aids to the courts is sanctioned in the MANUAL, *supra* note 130, §2.60, at 65-70. FED. R. EVID. 706 provides for court appointed experts.

The appointment of an expert as an advisor to the court was used by Judge Wyzanski. He appointed Dr. Carl Kaysen, who was then an economist at Harvard, as his "law clerk" in the case of *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953). Dr. Kaysen advised the court through frequent conversations with the judge as the trial progressed and by a memorandum at the conclusion of the trial. All contacts between the judge and Dr. Kaysen, including the memorandum, were private and counsel were not privy to them. See KAYSEN, *supra* note 146, for a complete description of the case. The book contains a description of his work as the law clerk as well as a thorough description of the evidence.

Criticisms and questions of fairness have been raised surrounding the procedure used by Judge Wyzanski. For a discussion of the problem with respect to its effect on the adversary system, see Kaysen, *An Economist as the Judge's Law Clerk in Sherman Act Cases*, 12 ABA ANTITRUST SECTION 43, 45-59 (1958). For a criticism of the procedure and an observation that it would reduce the standing of the judicial system and even encourage trials of "unmanageable proportions," see Massel, *Economic Analysis in Judicial Antitrust Decisions*, 20 ABA ANTITRUST SECTION 46, 57 (1962). For expressions of general reservations regarding the feasibility of the use of "neutral" experts on economic issues, see McGlothlin, *supra* note 68, at 479-80; Lasky, *supra* note 131, at 611.

176. 5 TRADE REG. REP. (CCH) ¶64,199 (E.D. Pa. Jan. 3, 1977).

177. *Id.*

age American his age. The blunt truth is that most physicians and hospital administrators, in their daily practice, are no closer to the cost-benefit analysis advocated by Harvard Medical School Professor Dr. Kass, than are little leaguers equal to the performance of the National League All-Star baseball team.<sup>178</sup>

The court's focus was clearly on the realities of the market wherever it found evidence accurately to portray those realities.

#### IV. CONCLUDING OBSERVATION

In examining the indicators of relevant product market, both the courts and counsel have been versatile in fulfilling their respective roles. The issues in these inquiries are economically complex. Counsel and the courts have been creative in the search for evidence which will help identify the competitive environment of a product.

Each type of evidence examined has the capacity for more creative use. If any one category of evidence, however, holds greater promise for more extensive and creative use, it is the area of surveys, samples and polls. The use of these forms offers an excellent opportunity for the courts to reduce litigation time while assessing credible information. The primary goal of relevant product market analysis is to determine consumer reaction, buying patterns and the bases for their decisions and actions. Surveys, samples and polls offer an ideal way to reach more consumers and thereby obtain a broader base of information upon which to make any decision. As a resource they are just beginning to be tapped by the courts. Their further utilization is a goal worth pursuing by both the judiciary and counsel.

---

178. *Id.*