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Journal of Sports Economics 2013 14: 389 originally published online 23 July 2013
DOI: 10.1177/1527002513496014

Article

Journal of Sports Economics
14(4) 389-400

DOI: 10.1177/1527002513496014
jse.sagepub.com

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Ryan M. Rodenberg[1], Anastasios Kaburakis[2], and Dennis Coates[3]

Abstract

On June 30, 2012, a North American Association of Sports Economists-sponsored symposium session entitled "Sports Economics on Trial" was held in conjunction with the 2012 Western Economics Association International conference in San Francisco, California. The foci of the symposium were two-fold. First, speakers discussed relevant evidentiary rules and recent legal cases that turned on sports economics issues and expert testimony related thereto. Second, the panel sought to collectively provide a primer that academics and professionals working in the sports economics realm could subsequently turn to as a guide when involved in litigation pertaining to their research. This article represents an outgrowth of the symposium, highlighting four recent legal cases under the sports economics umbrella and addressing discrete issues relevant to sports economics' role in litigation.

Keywords

evidence, expert witnesses, litigation, antitrust

Introduction

Economic-driven evidence and testimony is often dispositive in the resolution of sports-related legal disputes. The framework for such evidence and testimony was

[1] Sport Management, Florida State University, College of Education, Tallahassee, FL, USA
[2] John Cook School of Business—Saint Louis University, St. Louis, MO, USA
[3] UMBC, Department of Economics, Baltimore, MD, USA

Corresponding Author:
Dennis Coates, UMBC, Department of Economics, 1000 Hilltop Circle, Baltimore, MD 21250, USA.
Email: coates@umbc.edu

set forth over 20 years ago in the seminal U.S. Supreme Court opinion of *Daubert v. Merrell Dow Pharmaceuticals* (1993). As controlling precedent nationwide, *Daubert* requires courts to determine whether potential evidence "both rests on a reliable foundation and is relevant to the task at hand" (p. 597). In addition, the judge must consider "whether the reasoning or methodology underlying the testimony is scientifically valid" (pp. 592–593). One residual impact of the *Daubert* case is that the use of so-called hired guns is limited.

The trial court judge acts as a *de facto* gatekeeper under *Daubert*, preventing the admission of unreliable expert testimony (pp. 592–594). As subsequently outlined in *Nelson v. Tennessee Gas Pipeline* (2001), several factors must be considered under *Daubert*:

> ... (1) whether a 'theory or technique ... can be (and has been) tested;' (2) whether the theory 'has been subjected to peer review and publication;' (3) whether there is a high 'known or potential rate of error' and whether there are 'standards controlling the technique's operation;' and (4) whether the theory or technique enjoys 'general acceptance' within the scientific community. (p. 251)

Kentucky Speedway v. NASCAR is illustrative. Plaintiff *Kentucky Speedway*, an auto-racing track, alleged that NASCAR and an affiliate's rejection of its race sanctioning application constituted a federal antitrust law violation. Defendant NASCAR prevailed at both the trial court and the appellate level after a determination that the testimony espoused by the plaintiff's primary expert failed the *Daubert* test. As explained in detail below, the *Kentucky Speedway* court found that the plaintiff expert's version of a well-accepted metric pertaining to consumer substitution in the marketplace "has not been tested, has not been subjected to peer review and publication; there are no standards controlling it, and there is no showing that it enjoys general acceptance within the scientific community ... [f]urther, it was produced solely for this litigation" (p. 918).

Working in concert with *Daubert*, Federal Rule of Evidence 702 guides whether evidence is admissible in federal court. In relevant part, the rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In the two decades since *Daubert*, a plethora of academic work has provided a more textured understanding, with a varied discussion of topics such as antitrust damages under *Daubert* (Zohn, 2005), economists as expert witnesses (Angner, 2006; Mandel, 1999), expert testimony in antitrust economics (Solow & Fletcher, 2006), the role of amicus briefs in antitrust litigation (Haw, 2011), class certification

in labor-related antitrust lawsuits (Johnson, David, & Torelli, 2010), the loss of consensus among adversarial expert witness economists (Haw, 2012), and how litigation impacts the practice of econometrics (Kaye, 2001; Kordana & O'Reilly, 2001).

In the second section below, a quartet of recent sports economics-related cases are analyzed. Each case motivated the drafting of this article, given the widely publicized media coverage and precedential value in future cases with similar fact patterns. In the third section, we discuss protection of ongoing academic research under subpoena pursuant to the so-called scholar's privilege that sometimes attaches during litigation. The fourth section draws from the conference symposium session that inspired this article to infer lessons for sports economists as expert witnesses. For the avoidance of doubt, given the readership of this journal, our focus is on sports economists, not scientists generally.

A Quartet of Recent Sports Economics Cases

Kentucky Speedway v. NASCAR (2008, 2009)

The *Kentucky Speedway* case arose out of the Eastern District of Kentucky and resulted in both a district court and court of appeals decision. Described succinctly by the District Court judge as a "jilted distributor" case, the antitrust claims put forth by plaintiff Kentucky Speedway required proof of a relevant market through qualified expert testimony. Defendant NASCAR challenged the plaintiff's expert via a *Daubert* motion.

The judge moved to evaluate the motion by generally outlining the parameters of *Daubert* and Federal Rule of Evidence 702 before moving to a narrow inquiry regarding the admissibility of testimony that may have been specifically formulated for purposes of the current litigation. *Mike's Train House v. Lionel* (2006) was directly quoted for the proposition that "[w]e have been suspicious of methodologies created for the purpose of litigation" (p. 408). Similarly, *Turpin v. Merrell Dow Pharmaceuticals* (1992) was cited for the finding that "expert witnesses are not necessarily always unbiased scientists [because] they are paid by one side for their testimony" (p. 1352). Both cases applied to *Kentucky Speedway*, as the judge found that the plaintiff's expert did not adopt the Department of Justice's well-accepted and agreed-upon test to analyze the product interchangeability and substitute issues. Instead of applying the appropriate test (described as the "merger guidelines test"), the judge determined that a litigation-specific version was unjustifiably adopted, leaving the plaintiff without any proof of a relevant market.

The U.S. Court of Appeals for the Sixth Circuit reconsidered the district court's grant of summary judgment in favor of NASCAR after the trial court determined that "the opinions of [Kentucky Speedway's] expert witnesses were unreliable" (p. 908). Judge Gilman, writing for a unanimous three judge appellate panel, specifically revisited the relevant market issue. The judge cited *Worldwide Basketball & Sport*

Tours v. NCAA (2004) to flag the important rule that "[f]ailure to identify a relevant market is a proper ground for dismissing a Sherman Act claim" (p. 962). An influential sports-specific decision along this line of inquiry cited by Judge Gilman was *Chicago Professional Sports v. National Basketball Association* (NBA) (1996), a case that found NBA-level basketball competes with other amateur and professional basketball leagues, other sports, and various other entertainment options such as musicals, movies, television, amusement parks, and casinos. Taken together, Judge Gilman found no abuse of discretion in the district court excluding the plaintiff's expert on *Daubert* grounds.

Deutscher Tennis Bund v. ATP Tour (2010)

Deutscher Tennis Bund and the Qatar Tennis Federation, co-owners of a major professional tennis tournament, sued the sport's governing body on antitrust grounds when the tournament was demoted and placed in a less desirable slot on the annual tournament calendar. During trial, defendant ATP Tour cited its authority to set the tournament schedule and respond to changing market demands as justifiable reasons for its decisions. Supported by expert testimony, the plaintiffs countered by alleging the ATP Tour's actions were anticompetitive under the Sherman Act and the tour's structure did not lend itself to single-entity protection under antitrust law. The jury disagreed, concluding that the co-plaintiffs failed to prove the requisite contract, combination, or conspiracy with another entity for an antitrust claim. On appeal at the U.S. Court of Appeals for the Third Circuit, Judge Scirica upheld the jury verdict in favor of the ATP Tour, finding that Deutscher Tennis Bund and the Qatar Tennis Federation's failure to prove a relevant market for professional tennis players' services was a fatal weakness.

Championsworld v. U.S. Soccer (2012)

Decided August 17, 2012, *Championsworld* was described by Judge Leinenweber of the U.S. District Court for the Northern District of Illinois as a case of considerable size and complexity. Now bankrupt plaintiff Championsworld was an organizer and promoter of soccer matches and sued the U.S. Soccer Federation, Major League Soccer, and 10 unnamed codefendants on antitrust, civil RICO, contract, and other miscellaneous grounds. For purposes of this article, we shall solely focus on the antitrust claim and defendants' motion to exclude the plaintiff's expert testimony related thereto.

Among other things, Championsworld hired an expert to opine on the relevant market. On this point, the court noted that "relevant markets have product and geographic dimensions, which must be analyzed from both the supply and demand sides." In granting the defendants' motion, Judge Leinenweber found the expert's opinion "unreliable and unhelpful on both [aforementioned] dimensions." The defendants challenged the expert on numerous grounds, including the alleged failure to consider enough potential substitutes and purported deficiencies in the multiple

regression equation the expert estimated. The court largely agreed, granting the defendants' motion to exclude the expert's market definition opinion and extinguished Championsworld's connected antitrust claim.

American Needle v. National Football League (2010)

After successive wins by the National Football League (NFL) at both the district court and court of appeals level, the U.S. Supreme Court heard oral arguments in *American Needle v. NFL* on January 13, 2010. At issue was whether the NFL could be considered a "single entity" immune to certain claims under Section 1 of the Sherman Act for some of the league's intellectual property licensing activities. Plaintiff American Needle, an apparel manufacturer, alleged that the NFL's exclusive merchandising contract with Reebok amounted to an illegal restraint of trade. Prior to the NFL–Reebok agreement, American Needle had contracted with a small number of individual NFL teams to create officially licensed sporting goods. On May 24, 2010, in a unanimous decision penned by Justice Stevens, the Supreme Court ruled against the NFL, concluding that the league's pooled intellectual property activities in the apparel market are properly subject to antitrust law's "rule of reason" test.

Over the course of a tightly written 20-page opinion, Justice Stevens cited a plethora of cases supporting the proposition that substance, not form, is dispositive when evaluating conduct alleged to be anticompetitive. Justice Stevens found that if the NFL-Reebok contract merged "independent centers of decision-making" (p. 2212), §1 of the Sherman Act should apply. He then explained how individually owned NFL teams compete against each other in the licensing and sale of merchandise to consumers, a finding that precludes "single entity" immunity from antitrust scrutiny under §1 of the Sherman Act.

Subpoenas and Scholar's Privilege

Occasionally, researchers are challenged to balance the call of duty on the academic research front and a call to serve as experts in litigation. Should the researcher decide that the research is not for sale or that the timing of the research is impeccable for an important and influential publication, chances are that he or she will politely decline an expert witness call. Still, his or her research may be subpoenaed by litigants. There is also a likelihood that relevant (to litigation) research streams, some of which may be in press, pending peer review, or simply in drafting/data collection phases, may be very attractive for litigants who may aspire at securing beneficial data and analysis for their arguments during discovery, settlement negotiations, class certification adjudication, or trial hearings.

Past scholarship discussed the subpoenas-related problems faced by researchers and avenues these unretained experts may consider when dealing with the pressure

of litigation (Cecil & Boruch, 1988; Gardner, 2004; Gillis, 1992; Holder, 1986, 1989; Jasanoff, 1996; Labaton, 1987; Matherne, 1984; Maurer, 1984; O'Neil, 1983; Palys & Lowman, 2002; Shelling, 2000; Traynor, 1996). Duke University Law School's *Law and Contemporary Problems* published a special issue on "Court-ordered disclosure of academic information: A clash of values of science and law." Therein, legal scholars and practitioners commented on the evolving balance between litigants' needs and scholars' intellectual property, privacy, academic freedom, and related rights. The timing of this significant publication came 5 years after the 1991 amendments of Federal Rules of Civil Procedure Rule 45, which has since acknowledged unique circumstances of unretained experts and academic researchers whom courts may protect by quashing or modifying a subpoena (Rule 45(c)(3), 2012). In a nutshell, what was *de facto* recognized as a scholar's privilege prior to the amendments on a case-by-case basis, pursuant to influential scholarship (Matherne, 1984; Maurer, 1984) and the 1991 amendments became *de jure* confirmation.

Rule 45(c) is entitled "Protecting a person subject to a subpoena" and is followed by three subsections: (1) Avoiding Undue Burden or Expense; Sanctions; (2) Command to Produce Materials or Permit Inspection, and (3) Quashing or Modifying a Subpoena. Rule 45(c)(1) imposes a duty for the subpoena-issuing party to refrain from causing undue burden or expenses to the subpoena subject, under penalty of sanctions including lost earnings and reasonable attorney's fees. Thus, researchers who have been subpoenaed and urged to disclose unpublished research may argue that such disclosure equates to undue burden (e.g., compromises years of work, jeopardizes publication prospects, or detrimentally impacts promotion and tenure considerations). Rule 45(c)(2)(B) outlines the process by which a researcher would have to submit any objections to the subpoena (served before the earlier of the time specified for compliance or 14 days after the subpoena is served). It is important to note that counsel to the party issuing the subpoena and counsel for the researcher may negotiate and agree to time and method of production of material in a narrower scope than originally outlined in the subpoena. Doing so would mean taking into consideration actual scope of research, application to the pending case, timing of publication/acceptance notification, and respect of the benefits of the rigorous peer review process. Alternatively, per Rule 45(c)(2)(B)(i) the subpoena-issuing party may move to compel production or inspection, however in subsection (ii) the court is also instructed to protect a non-party (to the litigation) ordered to comply from significant expense resulting from compliance.

Rule 45(c)(3) is important for researchers targeted with a subpoena. This section protects working papers and research under review via several procedural mechanisms. Rule 45(c)(3)(A) *obliges* the court to quash or modify a subpoena that (i) fails to allow reasonable time to comply, (ii) requires a non-party to travel more than 100 miles, (iii) requires disclosure of privileged or other protected matter if no exception or waiver applies, and (iv) subjects a person to undue burden. The researcher and his or her counsel need to demonstrate, for example, that given the patently long peer review process it is necessary to allow sufficient time for any agreed limited

production of an ''in press'' piece, which a publisher may deem ''embargoed'' for the purpose of subpoena production. The researcher may also submit institutional review board forms, surveys, and confidentiality statements, which will clearly document that research subjects, their information, responses, and data were expressly protected from disclosure. Ultimately, the court will determine whether the particular matter is privileged and whether compelling disclosure may lead to undue burden. Closely, Rule 45(c)(3)(B) *permits* the court to grant a researcher's motion to quash or modify a subpoena that (i) requires disclosure of a trade secret or confidential research, development, or commercial information (a section intimately tied to a scholar's privileged communications with coauthors, editors, reviewers' responses, and overall items that are sensitive information and inherently tied to the scholar's advancement in the respective field, institution, and academia overall); (ii) requires disclosure of an unretained expert's opinion and information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; and (iii) requires a nonparty to the litigation to incur substantial expenses to travel more than 100 miles to attend trial. Finally, Rule 45(c)(3)(C) allows the court to order appearance or compliance with a subpoena instead of quashing/modifying it, in the cases under subsection (B) (above), and provided the serving party (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and (ii) ensures the subpoenaed party is reasonably compensated.

Rule 45(d)(2) contains important procedural information for researchers and their counsel. Anyone who withholds subpoenaed information under claims that it is privileged and protected *must expressly make that claim* and describe the nature of the withheld information without revealing information itself privileged or protected, thus enabling parties to assess such claims. Rule 45(d)(2)(B) further instructs researchers claiming a privilege that they need to notify parties who have received the protected information of the privilege claim. Hence, the other parties (may be coauthors, journal editor, supervisor, academic administrators, research assistants, and other third parties) will need to withhold this information and protect it accordingly. Such parties may not use the information or disclose it until the privilege claim is resolved. If the third parties disclosed the information, they need to take reasonable steps to retrieve it, and may present this information to the court under seal, for privilege claim determinations.

There is ample case law establishing a scholar's privilege both before the Rule 45 amendments and subsequent to the adoption of the new standards. For example, in *Buchanan v. American Motors* (1983), a company attempted to compel production of raw data and thousands of documents by an unretained expert. The Sixth Circuit's quashing of the subpoena as unreasonably burdensome is enlightening:

> Compliance with the subpoena would require the expert who has no direct connection with the litigation to spend many days testifying and disclosing all of the raw data, including thousands of documents, accumulated over the course of a long and detailed

> research study. Like the District Court, we note that the expert is not being called because of observations or knowledge concerning the facts of the accident and injury in litigation or because no other expert witnesses are available. Appellant wants to attempt to prove that the expert's written opinions stated in the research study are not well-founded. (p. 151)

In *Cusumano v. Microsoft* (1998), the First Circuit concluded that interview materials collected by two scholars were privileged. In a *Jurimetrics* article commenting on the case, Shelling (2000) noted:

> The ability to conduct scholarly research freely is an activity that lies at the heart of higher education and falls within the First Amendment's protection of academic freedom. Research and teaching activities are closely linked components of scholarly activity in American higher education. Academic freedom includes the freedom to search for knowledge; therefore, it is as much an infringement on the scholar's academic freedom to constrain or limit the scholar's research activities as to limit his or her freedom in the classroom. (pp. 524–525)

First Amendment protection was also granted by the Seventh Circuit for an academic's work encompassing research notes, working papers, unpublished data, and other research-related material (*Dow Chemical v. Allen*, 1982). Courts usually attempt to balance the hardship suffered by the researcher with the litigant's need of the information (*Andrews v. Eli Lilly,* 1983). Academic researchers should also consider that even in cases where courts sided with subpoena-issuing parties, there may be reasonable fees and costs payable to the researcher (*Wright v. Jeep Corp.,* 1982). Interestingly, the court in *Wright* termed a Michigan professor a "person who has become a public figure as a result of a research project yet wants to remain essentially anonymous so far as the administration of justice is concerned" (p. 871).

Conclusion

This conclusion provides cautionary lessons for sports economists as expert witnesses and for the law firms that hire them. With the Federal Rule of Evidence 702 explicitly referring to the witness's "knowledge, skill, experience, training, or education," it is perhaps especially important for litigants seeking to employ sports economists as expert witnesses to know that sports economics is a very young field within economics. Most active sports economists' training is predominately in some area of applied microeconomics, such as labor economics, public finance, and industrial organization. Most came to sports economics because there exist interesting and important research questions and issues within sports that dovetailed with their specialization. Few, perhaps none, were hired by their academic institution to fill a faculty position advertised for a sports economist. Indeed, very few economics departments have listed job openings specifically for a sports economist. Moreover,

the leading journal in sports economics has only been published since 2000, and the first textbook in sports economics was not published until a few years later. Sports economists taking the role of expert witness in cases involving sports should be aware that courts, and especially opposing counsel, may use this lack of specific training as a tool to discredit an economist's testimony.

Consider again the recent trial results and court rulings from *Championsworld* and *Deutscher Tennis Bund* . In the *Championsworld* case, the court rejected expert witness testimony because the analysis did not adequately define the relevant market or consider enough possible substitute goods to that provided by the defendant. In the *Deutscher Tennis Bund* case, the court confirmed the jury's conclusion that the relevant market had not been adequately defined. In *Championsworld*, the court noted that sports events may be substitutes for one another as well as the whole range of entertainment options. Interestingly, the court in *Championsworld* gave no guidance on how many alternatives must be tested for substitutability, instead stating, "While the Court cannot agree with Defendants that Plaintiff had to conclusively rule out every alternate form of entertainment, individually and cumulatively, it needed to do more than" (p. 79) was done. It is precisely these kinds of cases, where data are likely to be imperfect or unavailable, that complexity and nuance are keys to the best, most accurate understanding of the situation.

Academic economists are accustomed to searching for the fullest understanding of the situation when the ideal data set does not exist because economics cannot rely on experimental data for questions like those addressed in these legal cases. To publish research in peer-reviewed journals, academic economists utilize their knowledge and experience to make judgments and draw inferences when data are less than perfect. This also requires a measure of creativity to devise alternative measures of the relevant concepts, like an expert's version of the well-accepted metric pertaining to consumer substitution, even when that metric is litigation-driven as in *Kentucky Speedway*. When publishing in a peer-reviewed journal, referees and editors assess the appropriateness of the researcher's application of his or her knowledge and experience to resolving data and other problems in the complex and nuanced circumstances under study. Economists as expert witnesses, and the lawyers that hire them, have to recognize that the courts may be ill-equipped, unwilling, or even barred by precedent and accepted legal standards from evaluating their analysis for what it contributes to understanding the situation. Particularly when there exist specific legal standards, economist experts and the lawyers who hire them need to follow those standards or make significant efforts to explain to skeptical judges and juries why this complex understanding improves the ability to make correct and just decisions.

Indeed, the adversarial process of the legal system may even bar the courts from looking for the best understanding of the situation. Haw (2012) makes this point for the general case of opposing expert witnesses, arguing that the adversarial system gives equal weight to both the views of a fringe element and those of a broad consensus of experts in a field. In the litigation between the City of Seattle and

ownership for the soon-to-be Oklahoma City Thunder NBA team, each side hired an economist to assess the impact on the City of Seattle if the Seattle Sonics basketball team were able to break its lease with the city-owned facility and move to Oklahoma City. Press accounts at the time of the trial and one of the lawyers in the case suggested that the economists did not agree. Coates (2008) used the trial transcripts to show how both economists had given essentially the same answers to questions about the economic impact of sports franchises. The transcript of the team's lawyer trying to discredit the city's expert makes one think the trial was about self-plagiarism or defrauding the City of Seattle of consulting fees rather than the likely impact of the team leaving town. But a careful reading of the transcripts and, one suspects, the pretrial depositions, would have made the Sonics' case that the impact of the departure would be small, at worst, and possibly even beneficial to the city. In other words, the staged drama manufactured disagreement where none likely existed and actively obscured the wide consensus on the issue of sports teams and economic impact.

Economists can also assist with, and possibly influence, legal cases outside of being formally retained as an expert witness by one of the litigants. For example, two groups of professional economists contributed amicus briefs in the *American Needle* case, one on each side of the argument. Economists supporting the NFL focused especially on the intellectual property market for apparel with logos or league emblems, arguing that NFL team and league logo merchandise is only one contributor to a large market for such items. According to this view, such NFL merchandise competes with and is a substitute for the apparel affiliated with other sports leagues, for example.

By contrast, economists supporting American Needle's position limited the market to NFL and NFL franchise-marked merchandise. By doing so, they suggested that such merchandise neither competes with nor substitutes for similar items bearing logos of teams from other sports leagues or from colleges. Given NFL-marked merchandise is a market unto itself, the brief posited that licensing only one firm to manufacture and market the merchandise is anticompetitive, leading to higher prices and reduced quantity. The unanimous decision of the Supreme Court in *American Needle* makes no mention of either brief, though it does implicitly agree with the point made by the amicus brief in support of American Needle that there is nothing inherently necessary to efficient league organization and operation of the sort of joint marketing activity at the center of the case.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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Author Biographies

Ryan M. Rodenberg works as an assistant professor of sports law analytics at Florida State University.

Anastasios Kaburakis holds Ph.D. and M.S. degrees from Indiana University in Bloomington, IN and a Law degree from Aristotle University of Thessaloniki, Greece. He is currently an Asst. Professor in the Dept. of Management, John Cook School of Business, Saint Louis University. His research has been utilized by federal courts and litigants in intellectual property, antitrust, gambling, and college sports litigation.

Dennis Coates is Professor of Economics at UMBC.