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Deciding Between Bench and Jury Trial: Reflections After *US Airways v. Sabre*

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ANTITRUST BENCH TRIALS ARE rare enough in this "Age of Settlement." Trying an antitrust case to a jury is rarer still. When lawyers have to choose between a jury or bench trial, they debate endlessly whether their chances improve or diminish before one or the other. In antitrust cases particularly, the conventional wisdom holds that economic and business complexities put most disputes beyond the intellectual reach of the average lay jury; that defendants can count on getting a fair shake only when a judge decides the merits; and that plaintiffs prefer juries because the plaintiff uniquely stands to benefit from the confusion that arises from competing economic testimony, debates over unfathomable concepts like relevant market, and the seemingly intemperate things that business people put in emails when discussing the merits of competition they face. And everyone assumes that a jury will award damages more generously.

Conventional wisdom greatly oversimplifies the tradeoffs that an antitrust lawyer must consider in deciding whether to press for or resist a jury trial. Having recently finished an eight-week jury trial in the Southern District of New York representing the plaintiff in *US Airways vs. Sabre*, we offer some comments on how to decide between one or the other. The considerations we outline are equally applicable to plaintiffs and defendants. Indeed, in our case we opted for a bench trial, only to be thwarted when the defendants exercised their constitutional prerogative to have the case decided by a jury.

First, a few words about the case to set the scene, with the caveat that any concise summary of a complex litigation is by necessity an oversimplification. US Airways sued its largest distributor, Sabre, in 2011. Sabre is a Global Distribution System, or GDS. GDSs connect travel agents to airlines—each time a traditional (brick and mortar) travel agent books a flight through the GDS, the GDS charges the airline a booking fee, in the case of US Airways roughly $3.50 per travel segment (or $14 for a connecting roundtrip). To prevent US Airways from giving bookers an incentive to go through less expensive channels (for example, its website) Sabre's contract included "full-content" provisions, which antitrust lawyers would recognize as "parity" or "most-favored-nation" clauses. These contractual restraints prevent the airline from offering any fare through a distribution channel other than Sabre unless the same fare is offered through Sabre, or from offering any inducements to book outside Sabre. Thus, even though a booking that came through Sabre cost US Airways approximately 20 times more than a booking that came through the airline's own website, the contract prevented US Airways from offering discounts or even non-financial rewards (e.g., airline "miles") for website bookings and from surcharging the travel agent for a booking that came through Sabre.

Although these "full-content" restraints are disfavored by airlines, Sabre was successful in achieving contracts with airlines that included these provisions. Roughly 50 percent of an airline's income flows through the GDS channel, comprised of Sabre and two smaller GDSs, and much of this business comes from the handful of international travel management companies that manage business travel spending that is essential to an airline's survival. Sabre passes along a portion of the fees it collects from airlines to the largest travel management companies as an inducement for them to book through Sabre. From the perspective of US Airways, this business model achieved supracompetitive fees for Sabre that it shared with the large travel agents to keep the model in place.

US Airways' chief theory was that the "full-content" provisions were unreasonable restraints of trade under Section 1 of the Sherman Act and that they dampened competition between distributors for the airline's business and thereby allowed Sabre to charge an inflated, supracompetitive booking fee. After five years of litigation, the case finally went to trial in October 2016. Following an eight-week trial in the Southern District of New York, the jury returned a verdict finding that Sabre violated Section 1 and awarding damages to the airline. The case is currently on appeal in the Second Circuit.

As we experienced during a tumultuous march toward a jury trial, deciding whether you really want one is a constant challenge. Though the right to trial by jury can be waived if not demanded at the pleading stage, most courts allow the parties to opt out of a jury right up to the start of trial, so the

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question needs to be reconsidered right up to opening statements. Though the decision does not lend itself to a paint-by-numbers analysis, there are important considerations in antitrust cases counsel will want to weigh, even if the ultimate calculus is more art than science.

Variability: Does A Greater Margin of Error Favor You or Your Opponent?

Jury trials are inherently less predictable than bench trials. By the time trial rolls around in an antitrust case, the parties will likely have amassed significant signs of how the judge is leaning. The jury venire, by contrast, is largely a blank slate. Though social media (along with conventional research) can reveal much about potential jurors, it cannot match the predictive value of a judge's track record in disposing of summary judgment and in limine motions, colloquy during argument, and views the court may have expressed during settlement discussions.

For even the strongest of cases, jury trials can be a roll of the dice. This is especially so in federal court, where a single hold-out can block a verdict. Even a judge with modest reservations about the plaintiff's case may be a better bet than 6-to-12 complete strangers, any one of whom can stand in the way of victory.

Because they are lawyers like us, judges are generally easier to read. No big mystery exists as to the analytical lens the judge will use as the finder of fact: it is the same rule-based thinking that we have been deploying to analyze problems since law school. Jurors are a different animal. Each brings a unique set of life and professional experiences that will shape how he or she thinks about the case. Each juror will acquire and process information differently than the others, and likely differently than the judge, who has become accustomed to learning by reading and to thinking linearly. A judge may not reach the same conclusion as you, but the information the judge will use to make a decision is significantly more "knowable," as are the factors she will likely consider relevant to her analysis.

From this flows a potential decision tool: The party whose case looks like a sure winner has reason to prefer a bench trial. But lower bench trial variance may drive the opponent in the opposite direction. A defendant with a seriously flawed case may prefer a jury, since juries up the uncertainty quotient, which favors the underdog. In the inevitable horse-trading that precedes every trial, reaching agreement with your opponent over the trier-of-fact is most achievable when both sides are evenly matched, and both have as much to gain (or lose) by enhanced predictability. If you find yourself in that situation, which way should you jump?

Is Your Case (or Defense) Tied to Themes that Will Resonate?

In deciding between a judge and a jury, one of the most important considerations is whether the principal theme of your case (or defense) is jury-friendly. Some antitrust cases may appear to jurors to allege "technical violations" that do not easily map to traditional notions of "right and wrong." Or, to explain why the conduct is wrongful, a party may need to present a complicated economic theory that is not easily transformed into an intuitive story. Making matters worse, many antitrust cases inescapably entail industry jargon and business practices with which jurors will have little familiarity. Although skillful lawyers earn their keep by distilling complex cases into simple stories and accessible human themes, sometimes that is easier said than done. Cases (and defenses) that do not lend themselves to easy storytelling may be more suitable for a judge, who typically will be more inclined to "follow the law" even if the equities point in the opposite direction.

Fortunately, antitrust cases frequently do lend themselves to themes that can resonate with jurors. For the plaintiff, it can be David versus Goliath: a dominant bully abusing its position to harm competitors and customers. Or greed and dishonesty: wrongdoers conspiring behind the scenes to cheat the unsuspecting. For the defendant, a theme can be the virtues of aggressive competition: our economy was built by companies doing what they can to get ahead. Open competition has its winners and losers, and it is positively un-American to punish the winners for their superior skill, foresight, and work ethic. When your side of the case can naturally be told using one of these storylines (or better yet, a more novel but strongly resonant theme) and the other side cannot, a jury trial is likely to maximize your chances of winning, and winning big.

Applying these principles to our case, there was no easy answer. US Airways had a strong case, solidly supported by economics. Discovery yielded a trove of Sabre documents attesting to its anticompetitive goals and graphically (and colorfully) describing its leverage over airlines. But the economic logic, even abetted by email chains that we were confident would make a favorable impression with the jury about US Airways' case, did not easily translate into a recognizable theme. This was no David versus Goliath: even before its merger with American Airlines (which defense counsel reminded the jury of time and again), US Airways was many times the size of the defendant in revenues and employees, if not profits. What's more, US Airways repeatedly signed con-

tracts containing the very competition-stifling restrictions that we said caused it antitrust injury—giving the defendants a ready-made jury-friendly theme: big corporations, no less than ordinary folks, ought to live up to contractual obligations they assume. Further, Sabre could offer evidence that US Airways accepted its first "full-content" contract (not the one we were suing over) in exchange for a booking-fee discount, fueling the theme that "you can't have your cake and eat it too."

US Airways, of course, had a response: Sabre used its market power to coerce the airline into agreeing to anticompetitive restraints that it would have adamantly rejected if it had the ability to walk away from the relationship. But this required showing that airlines do not always call the shots—a proposition at odds with the human experience of every juror who had boarded a commercial airline. We believed we were strong on the substance, but convincing a jury that a major air carrier was bullied into signing contracts that charged too much would be a formidable challenge.

An assessment of other likely battles in the case followed the same pattern. We claimed that Sabre's restraints caused market dysfunction by disabling the price mechanism. An airline had to pay approximately 20 times as much for a booking made through Sabre as for a booking made through the airline's own website. In a "normal" market, the airline would encourage travelers or their agents to book through the website or other cheap channels: by offering special web-only fares, by providing other benefits and discounts, or by charging the cost of the booking to the booker. GDSs would then have reason to compete to charge airlines less, as lower booking fees would make the distribution channel more attractive to bookers and result in more business being conducted through that distribution channel.

To win the case, we needed to convince the trier of fact that for price competition to work, there must be a link between cost (that the airline faces for a distribution channel) and price (paid by bookers for using that distribution channel); Sabre's contractual restraints severed that link. Though logical to us as lawyers, questions persisted whether the average juror would follow and buy the argument. To make it more accessible to jurors who might have difficulty grasping economic concepts, we were prepared to distill it further: the contracts prevented airlines from discounting fares on their website (where many potential jurors go to buy their tickets). So the average leisure traveler was paying more than she should, and the average business traveler less, leading inescapably to the conclusion that leisure travelers like our typical jurors subsidize corporate chieftains booking through American Express (the travel agency, not the credit card). That Sabre imposed on leisure travelers booking on a website a portion of the cost of business travel had a nice ring to it, and we suspected it might resonate better than an abstract defense of the "price mechanism."

But we were all too aware that Sabre would have a response that played equally well to a jury: Sabre just wanted to ensure an even playing field with other distribution channels. Why should its customers be deprived of access to all of an airline's fares (including its cheapest) while the airline made them available over its favored channels? And how could travel agents possibly do their jobs if they could not see all of an airline's fares when recommending to clients which flights to book? Cast in this light, we were made to sound like we were defending discrimination, and it changed the balance of "jury-friendly" themes. Explaining why a price signal is needed for allocative efficiency requires an economics lesson; explaining that Sabre just wants to be treated like other distributors and have the opportunity to sell all of the airline's fares appeals to an innate sense of fairness.

Moreover, Sabre had a ready-made answer to our subsidization theme. How could it be the case that leisure travelers were subsidizing business ones when corporate travelers were buying all the expensive seats in the front of the plane, paying penalties for booking just days before departure, and buying costly refundable tickets? Moreover, would consumers really benefit from a reduction in the cost of Sabre's services or from relief that would allow US Airways to pass along its cost savings in the form of lower fares? With many jurors unaccustomed to seeing airlines in the "victim" role and all too ready to hold any travel mishaps experienced over their lifetime against the airlines, Sabre would have a lot of material to play with.

Is Your Narrative Jury-Friendly and Can It Be Told by Your Witnesses in a Compelling Manner?

When an assessment of each side's case themes is not dispositive, a trial lawyer must look beyond the themes to the actual evidence as well. Does your side have appealing and credible fact witnesses who can explain the story in a sympathetic and relatable way? Do the factual narrative and economic presentation lend themselves to storytelling? To explain why the other side is wrong, can you rely on documents that will grab the jury's attention, such as emails that are both colorful and immediately revealing of the alleged wrongdoing without requiring convoluted explanations or strained re-interpretation?

In our case, our assessment of the witness lineups argued for taking the case to a jury. For example, we could rebut the anticipated "deal is a deal" theme with a soft-spoken, earnest Midwestern executive who exuded credibility when he explained that his airline had no choice but to sign the onerous GDS contract. It helped that on the eve of signing, when a competing airline faced expulsion from the Sabre system, the executive emailed his father a worried message saying "removal from . . . [Sabre] is death" (a passage the court admitted as a prior consistent statement). We also took comfort in knowing we could confront virtually every Sabre fact witness with handfuls of emails and PowerPoint presentations they would have to disavow. Many of these documents were damning on their face, such as a thread among a group of junior executives extolling the virtues of what they charac-

terized as Sabre's business model: "Drink beer, play golf and pay agency incentives."

But as in many plaintiff-cases, our witnesses were outsiders to the planning that went on within Sabre in developing the restraints we complained of. We realized early on that we would need experts who could cogently explain the economic pitfalls of parity clauses like Sabre's, while deftly weaving into the narrative the most damaging party admissions unearthed during discovery. This was a task for top-notch teachers, so we focused on academic rather than testifying experience, choosing experts accustomed to commanding a classroom and distilling complexity for students.

For both sides, the case put a premium on fielding economic experts who could assimilate the disparate narratives provided by the different fact witnesses and supporting expert witnesses, and who could offer a comprehensive theory that tied everything together for the jury, all without lapsing into impermissible factual narration. An accounting expert, for example, can describe why the defendant's return on invested capital is sky high. But the jury will wonder why that matters unless the expert testimony first teaches the dangers that flow from market power and identifies "economic profits" as a telltale sign of its existence and exercise. A thwarted entrant can testify that its superior technology failed to catch on, but that matters little unless the jury has already been taught that parity clauses prevent suppliers from steering customers to more efficient, lower cost alternatives, which stifles competition.

While our theory was complex and had many moving parts, it was ultimately grounded in logical concepts rather than econometric proofs. The former can be transformed into a narrative that makes sense for the jury; there is less hope for the latter. Like many antitrust cases involving abusive market power that is prolonged by artificial restrictions, ours could be boiled down to a familiar paradigm—the vicious circle. A distributor earning supracompetitive profits uses its market power to impose contractual restraints on its suppliers; the restraints short-circuit competition among distributors; and in the absence of competition, market power is preserved to be deployed again to extract anticompetitive terms when the next negotiation comes around. A verdict was needed to break the vicious circle.

Having experts who are both good storytellers and skillful teachers is only part of the calculus. Another key question to ask is this: Has discovery borne fruit in the form of admissible evidence capable of bringing an essential trial theme—in our case the "vicious circle"—to life? Our opponent's documents gave us much to work with. The challenge of explaining why parity clauses can insulate against horizontal competition is made simpler when the defendant's documents candidly state that it did not want to "drive [a] more competitive framework into [the] airline relationship side of [the] business." The premise that parity provisions allow an inefficient company to continue to prosper is bolstered by a party admission that "we are not built for speed, agility and innovation." The force of an opinion that the defendant exercises market power by threatening to cut off airlines from their customers is amplified when the defendant's documents talk about "bury[ing] [the airlines] so deep in the display order that no one would ever find them." And of course, the core contention that Sabre's business model is built on overcharging airlines and paying off large travel agencies could hardly be expressed more concisely than Sabre's own semi-joking description: "Extortion + bribery works!" The existence of potentially explosive material to augment what otherwise might produce only courtroom boredom is an important consideration in deciding whether to opt for a jury.

Does the Potential Damages Award Justify the High Variance of a Jury Trial?

Liability is only part of the analysis when deciding whether to choose a jury trial; damages matter too, and to clients they matter a great deal. Most lawyers, including the authors, believe that an angry jury doling out damages to a sympathetic plaintiff will be more generous than the average trial judge. While the academic support for this proposition may be mixed,[1] there is no denying that having jurors call the shots injects a degree of variance that makes the outcome less predictable.[2] It is just this unpredictability that drives defendants to distraction (and very frequently to settlement). The threat of an extreme verdict that a jury trial introduces is not a tool that a plaintiff's lawyer will want to casually jettison.

In more clinical terms, the plaintiff will tend to favor high variance when there is a high cap (or no cap) on potential damages. That was the situation at the start of our litigation. With a chance to recover Sabre's overcharge of US Airways for every year since 2007, the potential damages exceeded $400 million, well over a billion dollars after trebling. But a summary judgment on statute of limitations granted the year before trial reduced the potential recovery significantly. Having shrunk to 19 months, the damages period would only support a verdict of approximately $70 million (before trebling).

While it can be tempting to allow damages to control the choice of the trier of fact, at times even a plaintiff may prefer the lower level of outcome variance that a bench trial provides. As was our situation, prevailing can mean the elimination of contract terms or other abusive conduct that threatens to continue propping up a dominant firm. With due consideration of the future cost savings that competition can supply, as well as the flexibility that a healthy marketplace can afford, a big damage award may be less important than just winning a liability judgment. That may change the judge versus jury calculus.

Conclusion: The Best-Laid Plans . . .

The decision between jury and bench trial in *US Airways* was not easy or obvious, and the calculus was far from static. US Airways had a strong theory, grounded more in economics than in intuitive appeals to jury sympathy. That weighed in

favor of a bench trial. But US Airways also had the necessary ammunition for a jury trial: compelling storytellers and teachers, as well as evidence that was sure to grab jurors' attention. With the potential damages recovery in excess of $1 billion (post-trebling), the high variance of a jury trial seemed worth the cost. But the calculus shifted when the court slashed the potential damages by limiting the recovery period. Now, achieving industry reform and ensuring the airline would be able to benefit from a more competitive distribution market going forward became the higher priority. With variance no longer the plaintiff's friend, US Airways sought to reverse course and opt for a bench trial.

Unsurprisingly, the defendant now had the opposite goal: to keep the case in front of a jury. US Airways went as far as waiving all of its damages (above the nominal $20 amount that triggers the constitutional right to jury) and pressing only its "equitable" declaratory relief claim to ensure a trial before the judge. The strategy did not work; the court adjudged US Airways' requested declaratory relief to be moot, and Sabre was all too happy to offer the $20 in remaining damages. To avoid a forced dismissal under Rule 68 (offer of compromise), US Airways reinstated its damages claim. That entitled the defendant to trump our preference for a bench trial, so the case was tried to a jury.

The decision between seeking a jury or bench trial is complex, and requires an honest and searching evaluation of your entire case: the themes, the witnesses, the evidence, the relief. Of course, deciding what you want is not the same as getting it. For all its analysis and handwringing, US Airways in the end had to live with a jury trial. But all's well that ends well. A strong presentation that marries coherent analytical themes with compelling storytelling will appeal to any factfinder, be she a lay juror or a seasoned jurist. The verdict went for US Airways. ■

[1] See Valerie P. Hans, *What's It Worth? Jury Damages As Community Judgments*, 55 Wm. & Mary L. Rev. 935, 961–62 (2014) (reviewing existing studies comparing judge and jury awards and reporting inconsistent findings); Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 Fla. St. U. L. Rev. 469, 493 (2005) ("[E]xperimental studies comparing the noneconomic damage awards made by judges and jury-eligible persons primarily show similarities in the damages awarded"); Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 Mich. L. Rev. 751, 798–99 (1999) (survey study based on hypothetical cases found that in one state jurors awarded higher damages than judges; but in another state, there were no significant differences).

[2] See Wissler, *supra* note 1, at 751. Though note that results pertaining to how individual jurors award damages do not necessary translate into reliable predictions into what groups of jurors do when jointly deciding on damages. *See also* Valerie F. Reyna et al., *The Gist of Juries: Testing a Model of Damage Award Decision Making*, 21 Psych. Pub. Pol'y & L. 280, 282, 288 (2015) (predicting that "[l]ower numeracy would . . . be associated with greater variability in numerical estimates of damages," and finding as part of experimental study that while there was no correlation between numeracy and damage awards, "once other factors were controlled for in regression analyses . . . numeracy emerged as a significant predictor of variability in award judgments").