

The Role of Expert Economic Testimony in Antitrust Litigation

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Disclaimer: Views are my own, not necessarily those of FTC or any of its Commissioners.

Courts Ask:

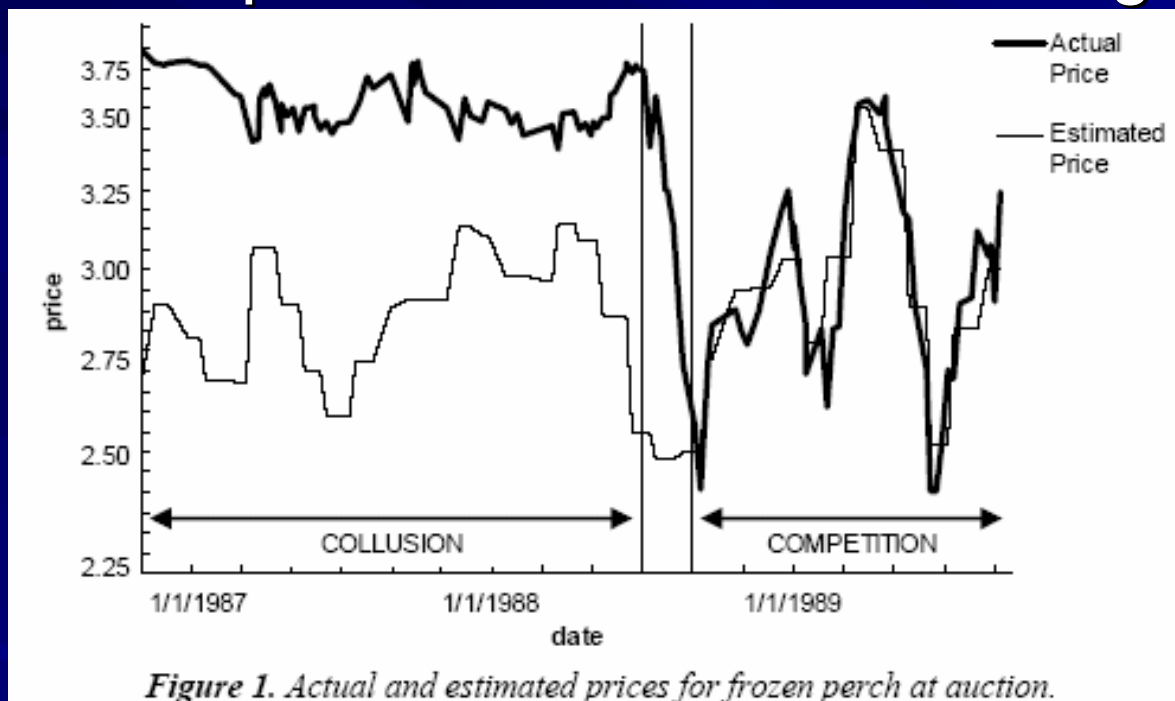
- Will this merger raise price?
- How high did this conspiracy raise price?
- What would profits have been absent some anticompetitive behavior?
- All these questions compare two states of the world, but only one is observed

How Do We Predict Unobserved State of the World?

- Natural experiments
- Economic models
- Classroom experiments

Natural Experiments

- Compare control vs. treatment group



- Try to hold everything else constant
 - Backcast is the “control” group

Structural Models

- Specify and estimate model
- Make sure model can explain observed state
- Then forecast or “simulate” unobserved state
- Models tell you
 - What matters, and how it matters
 - And sometimes how much it matters
- Models force economists to “put cards on table”
 - Provide clear link from evidence to conclusions
 - Attack “linkage” or attack evidence

Concord v. Brunswick

“Conclusions and methodology are not entirely distinct from one another. Neither the Daubert analysis nor the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytic gap between the data and the opinion proffered. A court must focus on the reasonableness of using a particular approach, along with the expert's particular method of analyzing the data thereby obtained, to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant.”

Structural Merger Models

- Structural Merger models have three components
 - Consumer model (“demand”)
 - Firm model (“supply”)
 - Equilibrium: how consumers & firms interact
- Each makes assumptions or predictions that can be refuted by evidence

Does Structural Model Accurately Characterize Consumer Behavior?

- Who are the consumers?
 - e.g., drugs (MD, PBM, consumer)
- Do consumers make a single choice from a well defined set of alternatives?
- Do consumers make choices based on relative prices?
- Do consumers stockpile inventory?
- How is customer heterogeneity handled?

Does Structural Model Accurately Characterize Firm Behavior?

- Do firms behave the way they are modeled?
- Do firms differ the way they are modeled?
- Do costs look the way they are modeled?
- Is the retail sector “transparent?”
- Is competition static?

Does Structural Model Accurately Characterize Equilibrium?

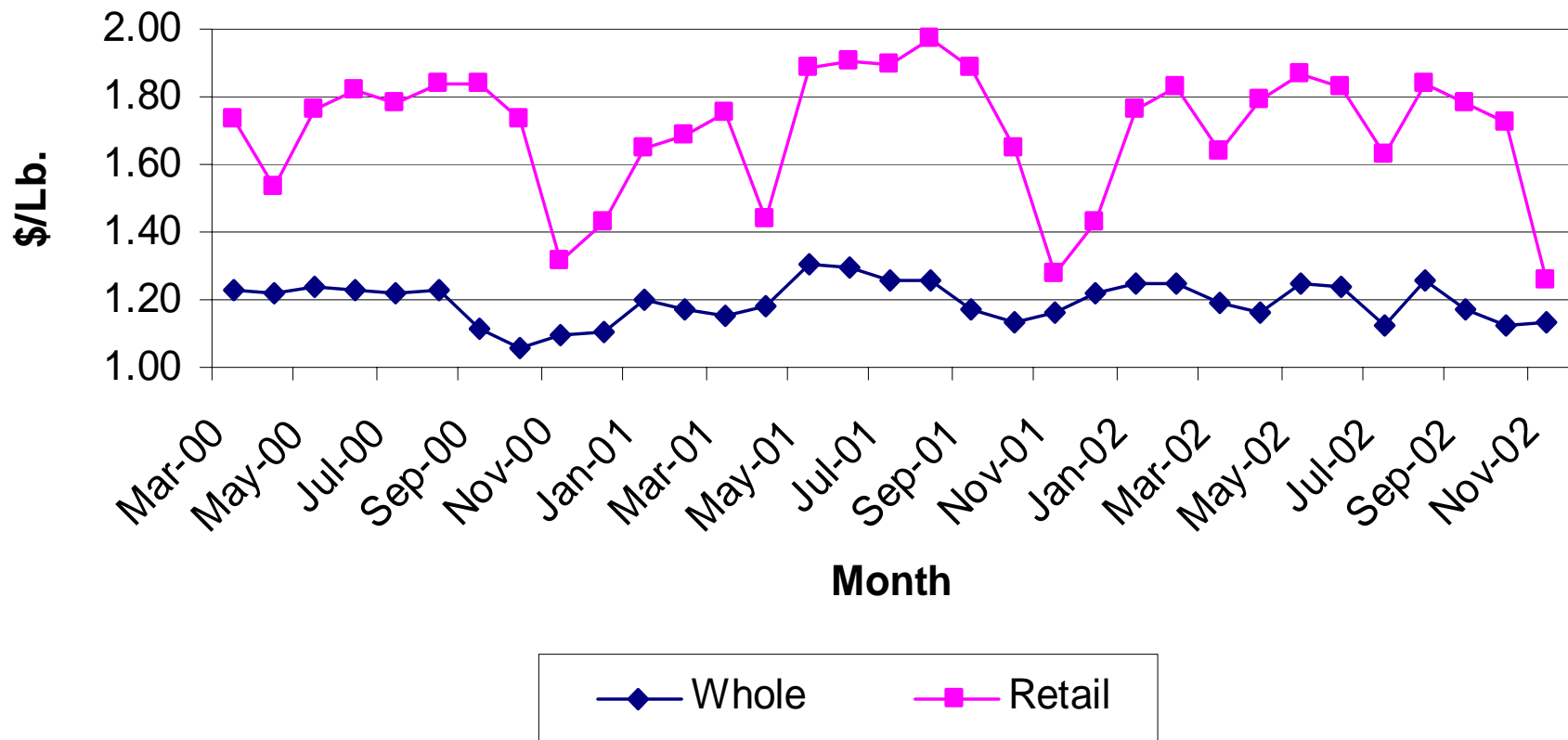
- Do real margins look like actual margins?
- Do prices vary with marginal cost?
- Do prices vary at all?
- What happens following entry or disappearance of a competitor?

How Well Must a Structural Model Fit?

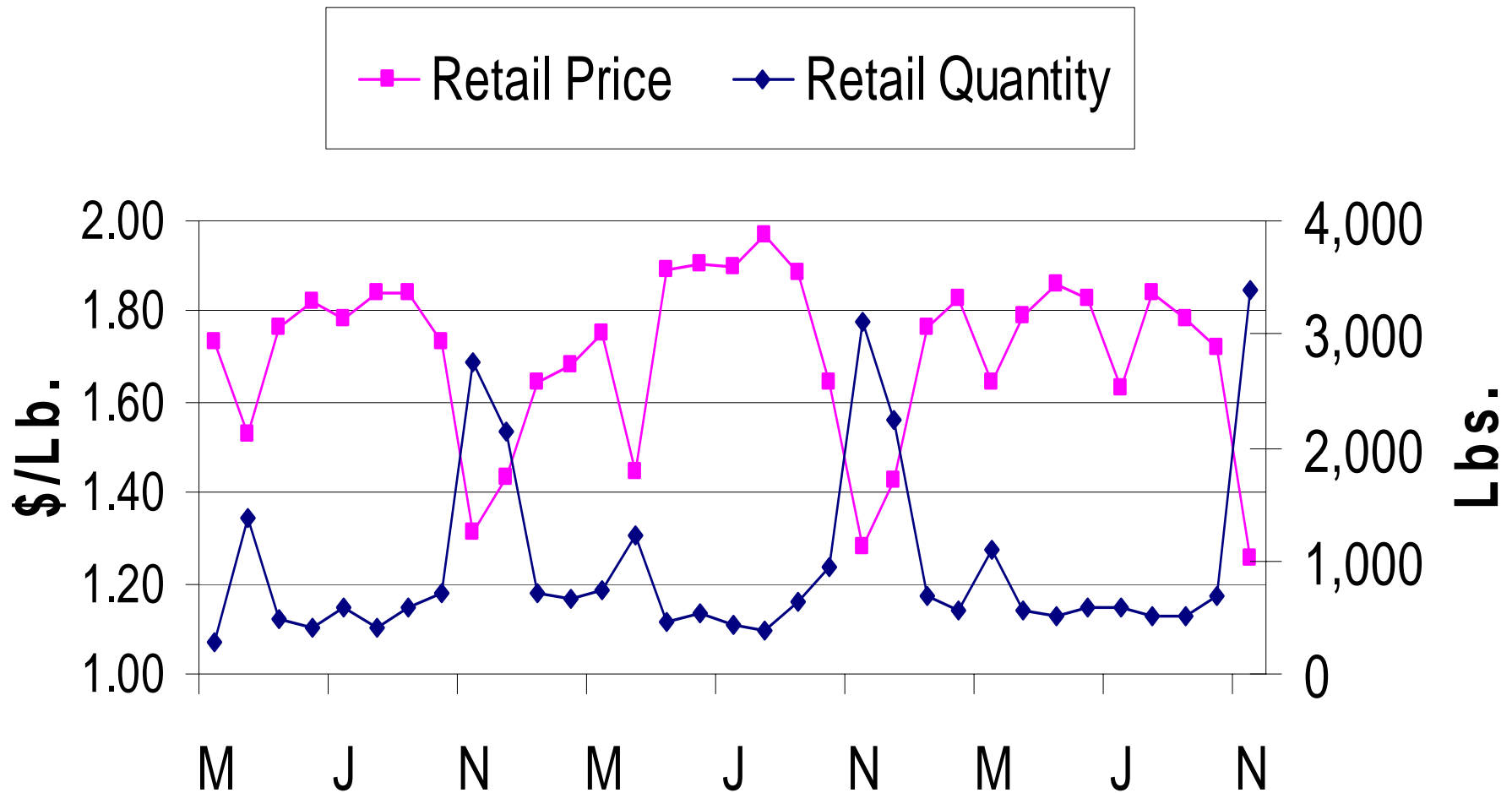
- Models are abstractions that can never be perfect descriptions of the real world
- What matters is not whether the model is unrealistic in any way, but rather whether it is unrealistic in ways likely to make it misleading

Data NOT Consistent with Traditional Models

National Price Series



Price, Quantity Spikes Caused by Same Seasonal Factors



My Current Agenda

■ Reassessment

- Update practice in response to new evidence and learning

■ Administrability

- Methodology must give reliable, robust answers within time constraints of merger investigation

■ Testing

- Examine consummated mergers

Bread Cross Examination Questions

- How do firms compete?
 - What are the four P's of marketing?
- How does the retail sector behave?
- Do prices vary with MC?
 - What is Hi-Lo pricing?; loss-leaders?
- Do all consumers have same price sensitivity?
 - Don't their outside options differ?