

## Law and Economics: This is Water, Three?

### I. Introduction

A famous commencement address starts with a parable about fish and water:

After confronting the older fish who asked them, "how's the water?", two younger fish looked at each other and one said to the other, "what the hell is water?"

The point: the obvious important realities are often the hardest to see and talk about

This applies to Law & Economics

Without question, the most impactful school of thought in law schools over the last 50 years

A great deal of research

It has influenced what schools teach and even how schools are structured

Law curriculums have long been interdisciplinary

But now even more so

And economics plays an outweighed role

Yet this outweighed role doesn't seem obvious in private practice

Why?

Because it is so obvious, and so prevalent that we often simply ignore it

To demonstrate a number of ways in which L&E is actually prevalent in the real world, I have a handful of examples from a litigation perspective

### II. Current term of the US Supreme Court

A bit more than halfway through the argued cases

I've gathered the statistics on how the current Justices are voting

An example of descriptive statistics that can provide a good number of insights

The Justices agree much more than they disagree

Even Thomas and Sotomayor (59%)

The conservative majority is not as cohesive as the liberal bloc

Ginsberg and Sotomayor

Kagen and Breyer

Comparison from last term

Who does this research?

Washington University

Justice's voting patterns change over time (virtually all of them do)

A very good example of time series data and cross-sectional data

Used to evaluate preferences

Which is what we ideally like to do when we examine Damages and estimate demand for produces

A tremendous example of the interdisciplinary use of data and analytics

One slide on how conservative/liberal the Court is

### III. Damages

Contract damages -- expectations damages is generally the most socially valuable measure

In Missouri, called the Benefit of the Bargain

How do economists go about measuring it?

As in the hypo, we often only have a single data point

What demand curve is it on?

And what is the appropriate damages measure?

In consumer misrepresentation cases, we are often trying to measure 2 demand curves, but only have data about one

The actual and the but-for

We may not need to estimate either, as we are really interested in the difference (and may be able to simply measure this difference, without measuring either demand)

Data -- cross-sectional and/or time series

Surveys

How can we get individuals to reveal their actual preferences?

New(er) techniques -- conjoint analysis; natural experiments

A typical problem with plaintiffs' analysis --finding the "difference"

Plaintiffs would have paid less for the product if only they had known "x"

Kona beer and Hawai'i

Diet Coke and saccharin

Low tar cigarettes

But the analysis may not even present a viable market transaction

Bottom line -- know what plaintiff and their expert are measuring and make sure it makes sense

#### IV. Statistics

Last year, I railed against the notion of "statistical significance"

The issue hasn't gone away

In 2016, the ASA came out with a policy statement

In Dec. 2018, the BMJ published a new study

Randomized controlled study

Courts continue to deal with these issues

2011 -- US Supreme Court refused to make statistical significance a bright line test for materiality in securities fraud litigation

In 2017, the 3<sup>rd</sup> Circuit upheld a Daubert ruling against plaintiffs in Zolof/birth defects litigation

Science behind the litigation, but the expert claimed, per Matrixx, that statistical significance shouldn't be the standard

The courts agreed but didn't buy into the analysis presented

In EEOC v. Mavis, SJ denied for the EEOC in sex discrimination case

Statistical evidence quite powerful, but fact questions remained

Yet courts, researchers, everyone still gets this wrong.

Statistical significance is not legal or economic significance

Differences can be statistically significant and meaningless

Differences can be insignificant and important (Matrixx)

For one, sample sizes matter -- get different results simply based on the data you have

#### V. Expert Witnesses

2016 study by George Mason University economist -- good example of L&E that can help litigators in strategy decisions

Big study -- over 2,000 Daubert rulings and their impact on the litigation

Defendants file the motions almost 3X as often as plaintiffs

Defendants win on average (at least in part) half the time

Plaintiffs 40%

Defendants completely successful 25% of the time

Plaintiffs only 18%

Do the rulings affect the outcomes of the cases?

Well, they don't correlate to wins necessarily

They do for plaintiffs, but the effects appear small

Defendants' wins/losses appear uncorrelated to their wins/losses on Daubert motions

But Defendant wins seem to entrench the parties, inhibiting settlement

Plaintiff wins seem to encourage settlement

The result is driven by the high rate of D wins on summary judgment