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Class Certification And Economic 'Argle Bargle'

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Referencing technical language such as "heteroscedasticity" used by an economic expert, the magistrate judge in the matter of Air Cargo Shipping Services candidly stated: "Whatever this technical argle bargle means, it is beyond the grasp of the court and likely many jurors as well."[1] However, courts are commonly called upon to evaluate complex economic analysis and interpret technical terms in antitrust class actions. Indeed, the magistrate judge himself in Air Cargo Shipping Services opined on the appropriateness of an expert's use of "weighted least squares," an adjustment sometimes applied in conducting econometric analysis. Can courts consistently and properly evaluate complex economic analysis in antitrust class actions or will they perceive it as incomprehensible "argle bargle"? An examination of how courts have recently evaluated the importance of a relatively simple statistical result — positive price "correlations" — provides some insights on this important question.

A Simple(?) Example From Recent Antitrust Class Certification Decisions: Correlations

A small sample of terms used by economists in recent antitrust class actions includes "hedonic indexes," "multicollinearity," "weighted least squares" and "coefficient of variation." The concept of a "correlation coefficient," ubiquitous in fights over class certification, is relatively straightforward compared to many terms utilized by economic experts. A "correlation coefficient" (sometimes shortened to simply "correlation" in practice) measures the degree to which two variables are linearly related. A positive correlation between two variables means that higher values of one variable tend to be associated with higher values of the other variable (e.g., education and income). It ranges between a maximum of 1.0 (where two variables are perfectly linearly positively related) and a minimum of -1.0 (where two variables are perfectly negatively linearly related). A correlation coefficient of zero indicates that two variables are not linearly related. Put simply, a correlation coefficient measures the extent to which two variables "move together."

Prior to the Third Circuit's decision in Hydrogen Peroxide Antitrust Litigation,[2] economic experts retained on behalf of plaintiffs commonly pointed to the existence of high correlations between the prices for different products, different customers, or both as critical to their conclusion that alleged anti-competitive behavior broadly impacted a putative class.[3] Following Hydrogen Peroxide, plaintiff experts have continued to rely on correlation coefficients but have often presented these as part of a larger analysis of pricing, sometimes in conjunction with more sophisticated "co-integration" analysis. Economic experts retained on behalf of defendants, on the other hand, commonly point out that factors

unrelated to any alleged anti-competitive behavior (such as products sharing a common cost factor) can result in a high correlation between prices. Defendant experts often dismiss a finding of high correlations as having little or no importance.

In recent antitrust class actions, courts have interpreted a finding of high price correlations inconsistently. The array of judicial assessments of this relatively simple statistical concept demonstrates the inherent uncertainty in future class certification decisions as courts continue to grapple with competing expert views on more complex econometric issues.

In Cathode Ray Tube (CRT) Antitrust Litigation, defendants allegedly agreed on "target" prices for some CRT products (different types of cathode ray tubes used in computer monitors and televisions).[4] The plaintiffs' expert opined that price targeting for some products "would likely have impacted" the prices of products not subject to a target and that the alleged agreements between the defendants impacted prices "across the product spectrum."[5] These opinions were based, in part, on a finding of a high correlation between the prices for different product categories including the prices of targeted and non-targeted products. In its ruling on class certification for two of the defendants in July of this year, the district court stated that "regression and correlation analysis is well established as a means of providing class-wide proof of antitrust injury and damages."[6] The court specifically referred to the high price correlations (and other evidence) in granting class certification.

The district court in In re Optical Disk Drive Antitrust Litigation[7] treated findings of high price correlations very differently. In the Optical Disk Drive matter, a major supplier pled guilty to fixing the prices of products sold to three customers, but not to other customers. Similar to the use of price correlations between targeted and nontargeted products in CRT, plaintiffs' experts for both direct purchasers and indirect purchasers used a finding of a high correlation between prices charged to targeted customers and those of other customers (along with other evidence) to conclude that higher prices to targeted customers impacted the prices paid by other customers.

Unlike the court in the CRT matter which emphasized that correlation analysis was "well established," however, the court in the Optical Disk Drive matter emphasized that "economic methodologies, including correlation analyses and regression analyses, may be employed to establish class-wide impact" (emphasis in the original).[8] In denying class certification in October of last year, the court explained that high correlations could be driven by a common price trend and that, therefore, the plaintiffs "have not made a sufficient showing that such a correlation can serve as common proof of class-wide impact."[9]

The district courts' decisions Processed Eggs Products[10] in September and in Blood Reagents Antitrust Litigation[11] in October appear to occupy a middle ground in evaluating the importance of a finding of high price correlations between products. Both courts attached some importance to the presence of high positive correlations between prices of different products and different customers but were cautious in doing so. In Processed Eggs, the court noted the "limited value" of analysis showing co-movement of prices across different eggs. However, when considered in conjunction with other evidence, the court also concluded that this result had "value because it is probative to the extent to which different subsets of the market are related."[12] In Blood Reagents, the court noted that "a showing that prices behaved similarly across groups of customers contributes to a finding of predominance at the certification stage."[13] However, the court also explained that it did not find this analysis "as persuasive" as other analysis presented by the plaintiffs' expert.[14]

Future Uncertainty

Courts now routinely evaluate complex economic analysis and the technical "argle bargle" that accompanies it in antitrust class actions. This occurs both in class certification decisions and in assessments of the reliability of expert testimony under the standards set forth by Daubert v. Merrell Dow Pharmaceuticals Inc.[15] Courts have interpreted a finding of high price correlations inconsistently in recent antitrust class certification decisions. Given that an analysis of correlations is relatively straightforward, it is quite plausible that courts will also be inconsistent in future assessments of more technical analyses commonly performed by economists.

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[1] In re Air Cargo Shipping Services Antitrust Litigation, Master File No. 06-MD-1175 (JG)(VVP), United States District Court Eastern District of New York; Report and Recommendation of the Magistrate Judge dated October 15, 2014 at page 23.

[2] In re Hydrogen Peroxide Antitrust Litigation, 552 F. 3d 305 (3d Cir. 2008).

[3] See, e.g., In re Urethane Antitrust Litigation, 237 F.R.D. 440 (D. Kan. 2006); In re Rubber Chemicals Antitrust Litigation, 232 F.R.D. 346, 353 (N.D. Cal. 2005); In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, No. M 02-1486 PJH, 2006 U.S. Dist. LEXIS 39841.

[4] In re Cathode Ray Tube (CRT) Antitrust Litigation, Master File No. CV-07-5944-SC, MDL No. 1917, United States District Court for the Northern District of California.

[5] In re Cathode Ray Tube (CRT) Antitrust Litigation, Master File No. CV-07-5944-SC, MDL No. 1917, United States District Court for the Northern District of California; Order in re Class Certification with Respect to the Thomson and Mitsubishi Defendants, filed July 8, 2015, at page 34.

[6] Id. at page 48.

[7] In re Optical Disk Drive Antitrust Litigation, Case No. 3:10-md-2143 RS, United States District Court for the Northern District of California.

[8] In re Optical Disk Drive Antitrust Litigation, Case No. 3:10-md-2143 RS, United States District Court for the Northern District of California., Order Denying Motions for Class Certification filed October 3, 2014 at page 14.

[9] Id. at page 20.

[10] In re Processed Eggs Antitrust Litigation, No. 08-md-2002, United States District Court for the Eastern District of Pennsylvania.

[11] In re Blood Reagents Antitrust Litigation, MDL No. 09-2081, United States District Court for the Eastern District of Pennsylvania.

[12] In re Processed Eggs Antitrust Litigation, No. 08-md-2002, United States District Court for the Eastern District of Pennsylvania, Memorandum, September 18, 2015 at page 25.

[13] In re Blood Reagents Antitrust Litigation, MDL No. 09-2081, United States District Court for the Eastern District of Pennsylvania, October 19, 2015, at page 66.

[14] Id.

[15] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

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