

## **HYDROGEN PEROXIDE: LESSONS FOR CLASS CERTIFICATION IN ANTITRUST LAWSUITS**

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### **I. Introduction**

The recent ruling in *In re Hydrogen Peroxide Antitrust Litigation*<sup>2</sup> carries several important lessons for both plaintiffs and defendants with respect to class certification in antitrust suits. First, the decision makes clear that both plaintiffs and defendants must be prepared to present sophisticated economic analyses that address factual disputes during the class certification phase. Second, it reinforces the need for defendant firms to be prepared to support potentially demanding economic and econometric analyses with complete and usable sales and pricing data. Finally, it emphasizes the need for attorneys representing parties to a class action litigation to begin working with a knowledgeable economic expert early in the litigation process.

In *Hydrogen Peroxide*, the Third Circuit ruled that certain factual disputes may have to be resolved at the class certification stage rather than being put off until the merits phase, that the court must assess the credibility and persuasiveness of the data to be used by plaintiffs to prove common impact and to eventually calculate damages, and that more extensive analysis of the relevant market must be performed at the class certification stage than has been done in the past. The court found that the plaintiffs' expert cannot simply present a theoretical explanation as to how the expert will show class-wide impact using common evidence, but must instead prove that the proposed methodology is feasible with the available data and with generally accepted techniques. The Third Circuit's ruling expanded the earlier role of the defendants' expert when it declared that "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands."<sup>3</sup>

This paper focuses on the types of data useful for mounting a defense against charges of price fixing, and particularly on the class certification stage of litigation. The next section outlines the major categories of data that are useful to support economic and econometric analyses in such cases. The third section lays out some of the challenges associated with collecting, maintaining, and retrieving these data. The fourth section reviews some of the consequences of not having access to these data. The concluding section sets forth some best practices with respect to preparing data when involved in antitrust litigation.

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<sup>2</sup> 552 F.3d 305 (3d Cir. 2008).

<sup>3</sup> *Id.* at 323.

## **II. Data Useful for Antitrust Analysis in Section 1 Cases**

The data potentially relevant to antitrust litigation fall into several broad categories: (1) sales data, which include transaction level data, customer contracts and price sheets, (2) cost data, and (3) demand related factors.

In antitrust litigation, transaction-level sales data is often the useful basis for econometric analysis. Now that factual disputes between the experts need to be resolved at the class certification stage of the litigation, transaction level data is a good starting point for establishing prices and quantities of individual transactions during the time of any alleged price-fixing agreement. The expert can best determine if prices were higher to customers during the period of alleged cartelization by examining transaction data over a period of time starting before the beginning of the alleged cartel and continuing after the alleged cartel has ended.

Ideally, the transaction level data will include information on transaction date, price, quantity, customer, and specific product information, for example, model number and name (and perhaps product attributes). If the dataset does not specifically identify actual transaction prices, then data on rebates, discounts and coupons along with list prices can be used to determine those prices. At both the wholesale and retail level, terms for early payment and published price sheets are helpful in showing both customer differentiation and variation in actual prices paid across purchasers, even where list prices are the same across customers. Finally, any non-arm's length transactions within the sales data, *i.e.*, sales to subsidiaries, should be identified.

Once a transaction level dataset has been created, it can be used by the expert to answer a variety of questions related to the litigation at hand. First, the expert can use it to develop price series for the relevant products over the period of time prior to, during, and after the alleged cartel. There are several methods that the expert can use to evaluate but-for prices and the method ultimately used will be shaped by these data. Second, the expert can use transaction level data to gain insight into the degree of price variation across customers and the degree to which that variation evolves over the relevant period. In a class action suit, this step can be important in determining if all customers were impacted by the alleged cartel in a similar way. Third, these data can be useful in gaining insight into the relationship between price and quantity sold, or the demand elasticities. The values associated with the elasticities can then be used by the expert to inform any damages analysis, specifically, how much demand may have been impacted by the increased price (this typically is not relevant for price fixing cases) and also whether the elasticities vary across different sets of customers. Finally, these data help the expert gain insight into the market structure which can help shape the but-for price estimates.

Cost data can be used for a variety of analyses, including determining profit margins and estimating a reduced form model of but-for prices. In developing a

but-for model, it is often necessary for the expert to be able to control for factors other than the alleged conspiracy which may have influenced price. Increasing or decreasing costs during the relevant period can lead to distorted results if not accounted for, undermining an analysis of the true impact of an alleged conspiracy. For manufacturing firms, it is useful to obtain data separately for variable costs, including materials and labor, and fixed costs. For resellers, an important cost component is the wholesale price paid. Demand-related factors, including prices of complementary goods and substitutes, may also be useful in explaining price changes that were unrelated to production costs or any unlawful conduct. Such data may be available from public sources.

### **III. Challenges**

While the *Hydrogen Peroxide* decision has highlighted the importance of access to a broad set of data, there are several challenges to collecting such data. Among these challenges are having the data over a long enough period of time, getting complete and accurate data, being able to create a comprehensive data set when there have been mergers and acquisitions, and having a clear definition of the main data fields.

First, data must be available for a sufficient length of time. Econometric analysis of price fixing issues ideally is done with data from periods before, during, and after the alleged cartel. In some cases, it may be a challenge to obtain data from early time periods. For example, when the cartel is alleged to have lasted many years, the companies may no longer have the data from the pre-cartel period. Many defendants find it challenging and burdensome to retrieve detailed business records that are a decade or more old. Data that are only available/stored on a legacy computer system may be particularly hard to retrieve.

Even getting complete and accurate data for the entire alleged conspiracy period may be a challenge. Many firms keep business records, including transactional data, in a systematic fashion as part of a well-regulated database. However, sometimes business records are not maintained in such a systematic and comprehensive manner. For example, capacity-related data are often maintained in a series of ad-hoc spreadsheets, which vary in completeness and accuracy across and within defendant corporations. Such problems in record keeping make it much more difficult to compile a complete data set with consistently defined variables over the entire time period.

Another challenge to accessing the necessary business records is the complication caused by mergers and acquisitions involving the defendant firm over the relevant time period. Firms often have only limited access to pre-acquisition detailed business records for acquired entities. Even when this kind of data is available, it is often stored in alternate databases from firm to firm, using different variables, different definitions for the same variables, and different rules regarding how and

what transaction information is recorded. Such differences make it difficult and costly to integrate the different data sources into a unified database.

Finally, clarity of definition for key data fields is extremely important. There are several key data fields for which the definition is not clear a priori. For example, consider the price associated with a transaction. Does the recorded price already reflect all applicable quantity discounts, early payment terms, and rebates? Is the price associated with an arm's length transaction, or are there transfer pricing considerations? These kinds of issues can substantially complicate the effort to identify actual transaction prices. Customer identities may also pose difficulties. Defendant databases may not consistently identify a customer using the same name over time. Furthermore, it may be difficult to identify related parties (parent-subsidiary) among purchasers, and to control for the mergers of customers. There are a whole host of additional definitional questions that arise with other data fields – each requiring careful consideration and research.

#### **IV. Consequences of Not Having Data**

Both plaintiffs and defendants may encounter serious impediments to supporting class certification claims when the data discussed above are not available. Because there are implications for both the plaintiff and the defendant in this environment of more demanding data requirements, the consequences of not having the data are greater. Prior to *Hydrogen Peroxide*, plaintiffs likely were better off seeking class certification early in the litigation process both to reduce costs and reduce the chance that the court would focus on factual issues that were favorable to the defendants rather than focus on the plaintiffs' pleadings. If a class were certified, the potential financial risk to the defendants increased the likelihood of a quick settlement. Under the new requirements, plaintiffs must weigh the desire for quick class certification with the chance of not having sufficient evidence to meet the burden of proof under Rule 23 and the new fact finding requirements. For defendants, the new ruling means that they will have increased ability to present factual evidence to counter plaintiffs' claims of commonality of proof, but to do so they may have to turn over more data, more quickly than previously.

Under the *Hydrogen Peroxide* ruling, an expert needs to put forth a "generally accepted methodology [for calculating the but-for price] which is applicable to the class." In general, the most commonly accepted methodology for estimating the but-for price is regression analysis. A regression model is typically the preferred method of analysis because it allows the expert to control a variety of factors that affect price better than other methodologies; however, it can be quite data-intensive. In addition, the data required to run a regression analysis is generally not data held by the plaintiffs. So while the plaintiffs must now be able to meet the burden of "rigorous analysis" under Rule 23, they typically must obtain the data to do this from either the defendants, outside sources or both. When the data required to implement a regression model are not available, the plaintiffs' economic expert

must choose a different methodology that may not be as widely accepted or as rigorous. Experts cannot just put forth a hypothetical methodology; they have to show that the data exist and can be used in the proposed methodology to produce a reliable result. Now, if the data do not exist at the class certification stage, plaintiffs may face a significant obstacle to class certification.

**V. Best Practices/Conclusions.**

The *Hydrogen Peroxide* ruling has made it clear that parties need to prepare comprehensive analyses, including analyses going to factual disputes based on the data, at a much earlier stage in the class certification process than has been the case in the past. This increases the burden on the plaintiffs, but also on defendants. For firms that wish to contest class certification with sophisticated economic analysis, it often will be helpful to produce clear and consistent sales and transactions records, cost data and capacity data over a long period of time. In addition, parties need to engage an economic expert early in the process and be prepared to provide them with these data and with extensive information about the dynamics of the market.



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