DOJ to Investigate Meatpackers – What's It All About?

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Overview

Earlier this week President Trump asked the U.S. Department of Justice (DOJ) to investigate the pricing practices of the major meatpackers. In addition, 11 state Attorneys General have asked the DOJ to do the same. They pointed out in the DOJ request that the four largest beef processors control 80 percent of U.S. beef processing. According to USDA data, boxed beef prices have recently more than doubled while live cattle prices dropped approximately 20 percent over the same timeframe. The concern is that the meatpackers are engaged in price manipulation and other practices deemed unfair under federal law.

Questions about the practices of the meatpacking industry are not new – they have been raised for well over a century. Indeed, a very significant federal law was enacted a century ago primarily because of the practices of the major meatpackers. So, why is there still talk about investigations? Is existing law ineffective?

Meatpacking industry practices, investigations and the law – it's the topic of today's post.

Historical Background

The United States Senate authorized an investigation of the buying and selling of livestock in 1888 to determine if anti-competitive practices were present. The investigation revealed that major meatpackers were engaging in unfair, discriminatory and anti-competitive practices by means of price fixing, agreements not to compete, refusals to deal and similar arrangements. The Senate report contributed to the political support for the Sherman Act of 1890.

In 1902, an injunction was sought against the major meatpackers alleging antitrust violations. The injunction was issued in 1903 and was sustained by the Supreme Court in 1905. *See, e.g., Swift & Company v. United States, 196 U.S. 375 (1905).* The injunction, however, was not successful in correcting the situations deemed anti-competitive. The same defendants or their successors were indicted and tried for alleged violations of the antitrust laws, but were acquitted after trial in 1912. The dominance and anti-competitive activities of the packers continued, and in 1917, President Wilson directed the Federal Trade Commission (FTC) to investigate the packing industry. The FTC report documented widespread anti-competitive practices involving operations of stockyards, actions of commission persons, operation of weighing facilities, disposal of dead animals and control of packing plants.

During congressional debate of the Packers and Stockyards Act (PSA), the major packers signed a consent decree in an attempt to ward off the new legislation. The consent decree was entered into on February 27, 1920, and it enjoined the "Big Five" meatpackers (Swift & Co., Armour & Co., Cudahy Packing Co., Wilson & Co., and Morris & Co.) from certain activities. The Big Five were prohibited from maintaining or entering into any contract, combination or conspiracy, in restraint of trade or commerce, or monopolizing or attempting to monopolize trade or commerce. The consent decree also prohibited the Big Five from engaging in any illegal trade practice as well as owning an interest in any public stockyard company, any stockyard terminal railroad or any stockyard market newspaper or journal. The injunction also prohibited the Big Five from having an interest in the business of manufacturing, selling or transporting, distributing or otherwise dealing in any of numerous food products, mainly fish, vegetables, fruits, and groceries and many other commodities not related to the meatpacking industry. Similarly, the injunction prohibited the Big Five from using or permitting others to use their distribution systems or facilities for the purchase, sale, handling, transporting or dealing in any of the enumerated articles or commodities. The injunction also prevented the owning or operating of any retail meat markets except in-plant sales to accommodate employees. Because the Big Five controlled all the warehousing in their exercise of monopoly power, the injunction prevented them from having an interest in any public cold storage warehouse or engaging in the business of selling or dealing in fresh milk or cream.

Even though the Attorney General of the United States personally appeared before the House Committee on Agriculture and recommended against the proposed legislation on the ground that the consent decree would eliminate the evils in the packing industry and make legislation unnecessary, President Harding signed the PSA into law on April 15, 1921. Consequently, some of the "Big Five" filed suit seeking to have the consent decree either vacated or declared void. However, in 1928, the United States Supreme Court upheld the consent decree. *Swift & Co. v. United States, 276 U.S. 311 (1928).* Similarly, the Supreme Court turned down a request to modify the decree in 1932. *Swift & Co. v. United States, 286 U.S. 106 (1932).* A similar request was also rejected in 1961. *Swift & Co. v. United States, 367 U.S. 909 (1961).* The decree, however, was terminated on November 23, 1981. *United States v. Swift & Co., 1982-1 Trade Cas. (CCH) ¶64,464 (N.D. Ill. 1981).*

The PSA was "the most far-reaching measure and extend[ed] further than any previous law into the regulation of private business with few exceptions." *61 Cong. Rec. 1872 (1921).* In addition, the powers given to the Secretary of Agriculture were more "wide-ranging" than the powers granted to the FTC, the Act was upheld as constitutional in several court cases from 1922 to 1934. Unquestionably, the PSA extends well beyond the scope of other antitrust law.

Price Manipulation

One of the major provisions of the PSA concerns price manipulation.

Section 202 of the PSA (7 U.S.C. §§ 192 (a) and (e)) makes it unlawful for any packer who inspects livestock, meat products or livestock products to engage in or use any unfair, unjustly discriminatory or deceptive practice or device, or engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices or creating a monopoly in the buying, selling or dealing any article in restraint of commerce. This is a distinct concern in the livestock industry.

In recent years, numerous courts have addressed the issue of whether the statutory language requires a producer to prove that a packer's conduct had an adverse impact on competition. For example, in late 2001, a nationwide class action lawsuit was certified against Iowa Beef Processors (subsequently acquired by Tyson Fresh Meats, Inc.) on the issue of whether Tyson's use of "captive supply" cattle (cattle acquired other than on the open, cash market) violated Section 202 of the PSA. *Pickett v. IBP, Inc., No. 96-A-1103-N, 2001 U.S. Dist. LEXIS 22453 (M.D. Ala. Dec. 26, 2001).* The class included all cattle producers with an ownership interest in cattle that were sold to Tyson, exclusively on a cash-market basis, from February 1994 through and including the end of the month 60 days before notice was provided to the class. The claim was that Tyson's privately held store of livestock (via captive supply) allowed Tyson to need not rely on auction-price purchases in the open market for most of their supply. Tyson was then able to use this leverage to depress the market prices for independent producers on the cash and forward markets, in violation of the PSA. In early 2004, the federal jury in the case returned a $1.28 billion verdict for the cattle producers. However, one month later the trial court judge, while not disturbing the economic findings that the market for fed cattle was national, that the defendant's use of captive supply depressed cash cattle prices and that cattle acquired on the cash market were of higher quality than those the defendant acquired through captive supplies, granted the defendant's motion for judgment as a matter of law, thereby setting the jury's verdict aside. The trial court judge ruled that Tyson was entitled to use captive supplies to depress cash cattle prices to "meet competition" and assure a "reliable and consistent" supply of cattle. *Pickett v. Tyson Fresh Meats, Inc., 315 F. Supp. 2d 1172 (M.D. Ala. 2004)*. On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed. *Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272 (11th Cir. 2005).* The U.S. Supreme Court declined to hear the case. *547 U.S. 1040 (2006).* Later the U.S. Court of Appeals for the Tenth Circuit reached the same conclusion. *See Been, et al. v. O.K. Industries, 495 F.3d 1217 (10th Cir. 2007), cert. den., 131 S. Ct. 2876 (2011).* The courts held that to establish a violation of §202 of the PSA, a plaintiff must show that defendant's practice injured or was likely to injure competition. In other words, the courts held that to demonstrate that a monopsonist (e.g., a single buyer that significantly controls the market) engaged in unfair practices, the seller must show that the buyer's practices threatened to injure competition by arbitrarily decreasing prices paid to sellers with likely effect of increasing resale prices.

Most of the other courts that have considered the issue have also determined that Section 202 of the PSA requires a producer to prove that a packer's conduct adversely impacted competition. *See, e.g., London v. Fieldale Farms Corp., 410 F.3d 1295 (11th Cir. 2005), cert. den., 546 U.S. 1034 (2005); Adkins v. Cagle Foods, JV, LLC, 411 F.3d 1520 (11th Cir. 2005); Terry v. Tyson Farms, Inc., 604 F.3d 272 (6th Cir. 2010), cert. den., 131 S. Ct. 1044 (2011).* While the United States Court of Appeals for the Fifth Circuit, in a contract poultry production case, ruled that the plain language of Section 202 does *not* require a plaintiff to prove an adverse effect on competition, the court granted en banc review with the full court later reversing the 3-judge panel decision. *Wheeler, et al. v. Pilgrim's Pride Corp., No. 07-40651, 2009 U.S. App. LEXIS 27642 (5th Cir. Dec. 15, 2009).*

In 2009, contract poultry growers in Texas, Arkansas, Oklahoma and Louisiana brought a PSA price manipulation case against the company that provided them with chicks, feed, medicine and other inputs. *City of Clinton v. Pilgrim's Pride Corporation, 654 F. Supp. 2d 536 (N.D. Tex. 2009).* The company had filed for Chapter 11 bankruptcy and, as part of reorganizing its business activities closed certain facilities and terminated some grower contracts. The terminated growers claimed the defendant's actions violated Section 192(e) of the PSA as actions that had the effect of manipulating the price of chicken by terminating those growers that were not near another poultry integrator so that they couldn't sell their chickens to one of the defendant's competitors, and terminating those growers who would not upgrade their chicken houses to include cool-cell technology even though not required by grower contracts. While the court held that the defendant could have a legitimate business reason for its decisions and might be able to show that the plaintiffs were not harmed by its actions, the court determined that the plaintiffs' pleadings were sufficient to survive a motion to dismiss. In addition, the court held that the Texas growers had posed legitimate claims under the Texas Deceptive Trade Practices Act. In the subsequent bankruptcy proceeding, the bankruptcy court also held that the chicken supplier did not violate Section 192 of the PSA when it sought to reduce the supply of chicken on the commodity market by curtailing production in geographic areas where the supplier controlled the market. The court reasoned that the supplier closed plants and terminated particular grower contracts with the business purpose of trying to avoid going out of business, and that such conduct was more beneficial than detrimental to competition because if the supplier had gone out of business competition would have been lessened. *In re Pilgrim's Pride Corp., et al., 448 B.R. 896 (Bankr. N.D. Tex. Mar. 2, 2011).* In a later proceeding in the same case, the court ruled on the claim that the supplier had violated Section 192 of the PSA when the supplier induced the growers to sign a new contract that allowed the supplier to terminate the contract for "economic necessity." The court held that the growers failed to establish that the supplier had engaged in the kind of unfair or deceptive acts that Section 192 prohibited. The court held that the "economic necessity" clause was valid and enforceable because it provided flexibility and efficiency that the PSA encouraged and because the supplier had a valid business reason for utilizing the clause*. In re Pilgrim's Pride Corp., et al., No. 08-45664 (DML), 2011 Bankr. LEXIS 960 (N.D. Tex. Mar. 24, 2011).*

Proposed Regulations

In June of 2010, the USDA issued proposed regulations providing guidance on the handling of antitrust-related issues under the PSA. *75 Fed. Reg. No. 119, 75 FR 35338 (Jun. 22, 2010).* Under the proposed regulations, "likelihood of competitive injury" was defined as "a reasonable basis to believe that a competitive injury is likely to occur in the market channel or marketplace." It includes, but is not limited to, situations in which a packer swine contractor, or live poultry dealer raises rivals' costs, improperly forecloses competition in a large share of the market through exclusive dealing, restrains competition, or represents a misuse of market power to distort competition among other packers, swine contractors, or live poultry dealers. It also includes situations "in which a packer, swine contractor, or live poultry dealer wrongfully depresses prices paid to a producer or grower below market value, or impairs a producer's or grower's ability to compete with other producers or growers or to impair a producer's or grower's ability to receive the reasonably expected full economic value from a transaction in the market channel or marketplace." According to the proposed regulations, a "competitive injury" under the PSA occurs when conduct distorts competition in the market channel or marketplace. The scope of PSA §202(a) and (b) is stated to depend on the nature and circumstances of the challenged conduct. The regulations specifically note that a finding that a challenged act or practice adversely affects or is likely to affect competition is not necessary in all cases. The proposed regulations note that a PSA violation can occur *without* a finding of harm or likely harm to competition, but as noted above, that is contrary to numerous court opinions that have decided the issue. The regulations eventually made it into the form of an Interim Final Rule but were later withdrawn. *82 FR 48594 (Oct. 18, 2017).*

Conclusion

The current request that the DOJ investigate the meatpacking industry is nothing new. As noted, investigations of the industry have been going on for over 130 years. A good case can be made that the courts have not carried out the legislative intent of the PSA provision concerning price manipulation.

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