



American Agricultural Law Association Annual Educational Symposium Antitrust Case Update 2019

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Agenda

- *Eggs* Trial and Appellate Issues
- *Ramen* Trial and Post-Verdict Motions
- Agri Stats Info Exchange Cases
(*Pork, Broiler Chicken, Broiler Growers*)
- Other Food & Ag Cases
- Trends and Forecasts

Disclaimer: The opinions presented herein do not necessarily reflect the views of the speakers' respective firms or the clients of those firms.



Overview

2008: classes of indirect and direct purchasers filed lawsuits against sixteen egg farmers and their cooperatives alleging that farmers conspired to reduce the domestic supply of eggs in order to increase the price of eggs.

Plaintiffs allege farmers did this through three mechanisms:

- 1) animal husbandry program: UEP Certified Program
- 2) coordinated exports through USEM
- 3) short-term supply management recommendations

In re Processed Egg Products Antitrust Litigation,
08-md-2002 (E.D. Pa.)

Status

- Direct Purchaser Class went to trial in E.D. Pa. May 2018 against three defendants
- 6 week trial
- The jury returned in favor of Defendants
- Plaintiffs appealed to the Third Circuit
- Indirect Purchaser cases were voluntarily dismissed June 2018 after class certification was denied.
- **Opt-Outs from the direct purchaser class scheduled for trial starting on Oct. 31, 2019.** Also, recent rulings on interesting motions *in limine*.





In re Processed Egg Products Antitrust Litigation,
08-md-2002 (E.D. Pa.)

Interesting Issues

•Capper-Volstead

–50% Rule: value vs. volume: “[T]he association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by its members.”

–Definition of a farmer/producer: processors, integrated production: “Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers ...”

–Good Faith Defense: What about the “Reasonable Farmer?”

•*Per Se* vs. Rule of Reason

In re Korean Ramen Antitrust Litigation, **No. 3:13-cv-04415-WHO (N.D. Cal.)**

Overview

- Originally filed in 2013, alleging the price fixing of Korean Ramen Noodles in violation of Section 1 of the Sherman Act and various state repealer statutes
 - Nongshim Co. Ltd. and U.S. subsidiary
 - Ottogi Co., Ltd. and U.S. subsidiary
 - Samyang Foods Co. Ltd. and its U.S. subsidiary
 - Korea Yakult Co. Ltd.
- Alleged conduct = overt price fixing supported by, *inter alia*, regular exchanges of price information; Plaintiffs alleged conduct occurred abroad (Korea), but had a substantial effect on domestic commerce





In re Korean Ramen Antitrust Litigation,
No. 3:13-cv-04415-WHO (N.D. Cal.)

Jury Trial

- Five weeks
- Defense Rule 50 motion for judgment as a matter of law denied
- Plaintiffs moved for a mistrial; motion denied
- Case submitted to the jury
- Jury returned a defense verdict on the first question on the verdict form: existence of a conspiracy; as such, the jury did not reach the six other questions on the verdict form



more on this later



In re Korean Ramen Antitrust Litigation,
No. 3:13-cv-04415-WHO (N.D. Cal.)

Post-Verdict Developments

- Plaintiffs filed a Rule 59 motion for new trial
- Principle grounds:
 - Evidence at trial had no plausible non-conspiratorial explanation, such that a finder of fact, evaluating the evidence properly, would have found conspiracy
 - Defense claimed, without evidence, key plaintiff expert was a racist in their opening statements, and poisoned the jury
 - Defense claimed, without evidence, that Samyang cooperated with the KFTC merely to “do in their competitors” and “get off cheaply” because Samyang’s president had been convicted of embezzlement in an unrelated matter
 - Defense referred to the Korean Supreme Court’s reversal of the KFTC’s finding of conspiracy, despite an *in limine* instruction directing the parties not to refer to the decision during trial
 - Now concluded with no appeals

In re Mushrooms Direct Purchaser Antitrust Litigation,
06-cv-00620 (E.D. Pa.)

Overview

2006 Class of direct purchasers filed suit vs. Eastern Mushroom Marketing Cooperative and 37 of its members and officers. Suit alleges that the cooperatives minimum pricing program and “supply control” program are anticompetitive.



In re Mushrooms Direct Purchaser Antitrust Litigation,
06-cv-00620 (E.D. Pa.)

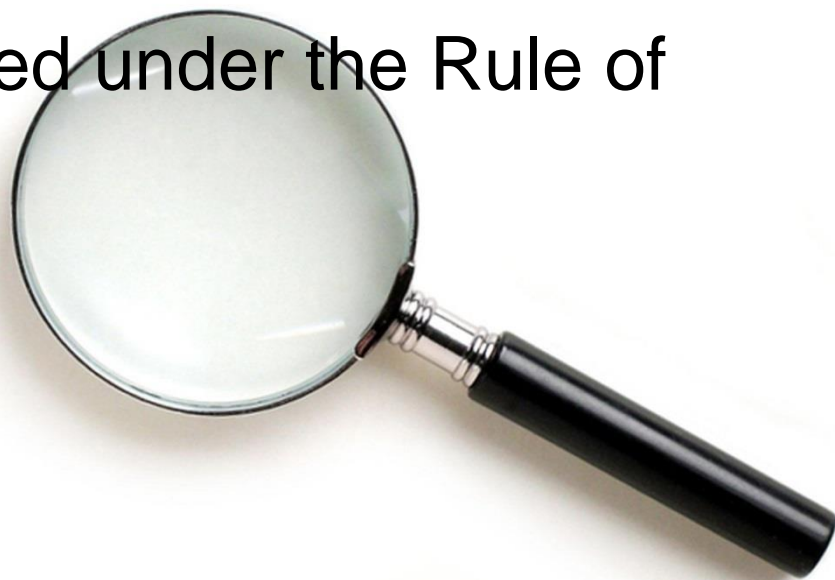
Status

- Direct Purchaser Class certified in 2017
- Opt-Outs, Winn-Dixie and Bi-Lo, complaint as to individual growers defendants dismissed on January 8, 2019. Complaint was not dismissed as to the cooperative, EMMC
- Class cases now settled



Interesting Issues

- *Per Se* vs. Rule of Reason
 - Price-fixing claims judged under the Rule of Reason
- Capper-Volstead
 - Good Faith Defense
 - Vertical Integration



In re Broiler Chicken Antitrust Litigation, No. 16-cv-8637 (N.D. Ill.)

Overview

- Case originally filed in 2016, alleging over 20 vertically integrated poultry companies (e.g. Pilgrim's, Tyson, Perdue) orchestrated since 2009 a supply-reduction and price information exchange scheme to inflate the price of broiler chicken in violation of Section 1 of the Sherman Act and various state repealer statutes
- Information exchange scheme perpetuated through agricultural data aggregator company Agri Stats, Inc.

In re Broiler Chicken Antitrust Litigation,
No. 16-cv-8637 (N.D. Ill.)



Procedural Posture

- Motions to dismiss denied late 2017; DOJ has intervened and the Judge has granted a second stay of discovery from defendant, though plaintiff depositions continue
- Discovery = sprawling; represented maybe as many as **300 percipient and 30(b)(6) witness depositions**
- Direct and indirect classes – e.g. *Packaged Seafood* – series of direct action complaints
- Class certification and expert discovery slated for later 2019

In re Broiler Chicken Antitrust Litigation, No. 16-cv-8637 (N.D. Ill.)



Developments

- One alleged conspirator, Fieldale Farms, reached settlement with direct and indirect classes; agreed to cooperate
- Agri Stats, data aggregator that facilitated the scheme, brought in as defendant by the “end user” class and certain direct action plaintiffs
- Agri Stats’ motion to dismiss was denied in November 2018. The Court found that there are sufficient and plausible allegations that Agri Stats facilitated the conspiracy. This includes that Agri States profited from the conspiracy because its payment for its data aggregation services is a share of the revenues earned by the poultry companies.

***In re Broiler Chicken Grower Litigation,* E.D.N.C and E.D. Okla.**

Overview

- Originally filed in 2016
- Broiler grower case focuses on the anticompetitive effects of Agri Stats information exchange on the broiler labor market
- Broilers defendants also share information through Agri Stats on grower (farmer) compensation data in addition to retail broiler prices
- Claims pled under the Sherman Act and Packers and Stockyards Act
- Only sued the largest 5 poultry integrators (Tyson, Pilgrim's, Perdue, Sanderson, Koch)





In re Broiler Chicken Grower Litigation, E.D.N.C and E.D. Okla.

Procedural Issues

- Case originally filed in Eastern District of Oklahoma
- Every district judge in E.D. Okla. recused themselves
- Judge Shelby from D. Utah. currently sitting by designation
- 2017, Shelby dismissed two of five named defendants on personal jurisdiction grounds; deferred argument on the Twombly motions
- Plaintiffs re-filed against those two defendants in E.D. of North Carolina
- Plaintiffs moved MDL to consolidate cases in E.D. Okla.; defendants agreed. But JPML **denied** consolidation, suggesting two Judges could coordinate and cases proceed in parallel
- Texas Bankruptcy court enjoined growers from proceeding against Pilgrim's in E.D. Okla. for damages arising prior to 2009 bankruptcy discharge



In re Broiler Chicken Grower Litigation,
E.D.N.C and E.D. Okla.

Developments

- April 2018 hearing on motions to dismiss under Rule 12(b)(6), Judge Shelby indicated from the bench he was inclined to uphold the complaint, at least in part, and deny a motion to compel arbitration filed by Perdue
- Meanwhile, the E.D.N.C. stayed the Carolina action until resolution of the Oklahoma action under the first to file rule

In re Pork Antitrust Litigation, No. 18-cv-1776 (D. Minn.)

Overview

- Case originally filed in 2017 and analytically similar to broilers case, alleging many of same defendants orchestrated supply-reduction and price information exchange scheme to inflate price of pork products in violation of Section 1 of the Sherman Act and various state repealer statutes
- Information exchange scheme perpetuated through data aggregator Agri Stats, Inc.; allegations are Agri Stats promoted scheme to pork companies because of how successful it had been in driving broiler prices up
- Direct and indirect classes and numerous direct action plaintiffs expected





In re Pork Antitrust Litigation,
No. 18-cv-1776 (D. Minn.)

Procedural Issues and Developments

- Motion to dismiss was granted without prejudice; amended complaint is due Nov. 6th
- Similar to Packaged Seafood and Broiler Chicken, a number of direct-action plaintiffs opted out of class actions; filed their own suits



In re Pork Antitrust Litigation,
No. 18-cv-1776 (D. Minn.)

Motion to Dismiss

- Motions to dismiss were granted without prejudice and with leave to amend.
- “The plus factors identified and discussed by Plaintiff are undoubtedly strong and are of the type often used to support an inference of an agreement.”
- However, the Court found the allegations of parallel conduct to be “sparse and conclusory,” and thus insufficient.



In re Packaged Seafood Products Antitrust Litigation, No. 15-md-2670 JLS (S.D. Cal.)

- Defendants are manufacturers of packaged seafood, including canned tuna—StarKist, Bumble Bee Foods, and Tri-Union Seafoods (“Chicken of the Sea”).
- The latter two announced a \$1.5B merger in 2015 that the complaint alleges would have created a duopoly
 - Complaint alleges that the deal was shelved in December 2015 after the merging parties received grand jury subpoenas from the DOJ
 - Complaint alleges that industry is a merger-fueled oligopoly and that manufacturers colluded to artificially inflate the price of PSPs even while canned tuna consumption decreased
- Collusion on pricing allegedly occurred through Tuna Council marketing programs and bilateral co-packing agreements.
- Complaint alleges a concentrated oligopoly created by numerous mergers.



***In re Packaged Seafood Products Antitrust Litigation,
No. 15-md-2670 JLS (S.D. Cal.)
(cont'd)***

- Three proposed classes. Class was certified.
 - DPPs
 - IPP “food preparers”
 - IPP “end-payors/end-consumers”
- Court required IPP Food Preparers and IPP End-Payors/End-Consumers to be represented by different counsel
- At least 20 direct action plaintiffs (non-class) filed 11 separate complaints, with more expected by defendants.
- Court granted in part and denied in part Defendants’ motions to dismiss
 - Tuna-specific claims survive
 - Non-tuna related claims fail for lack of plausible allegations



BEEF LAWSUITS

APRIL 23, 2019

R-CALF
(Producers & Trade
Organizations)

Chicago & (Class Action)
Minnesota

APRIL 26, 2019

Peterson
(Indirect Purchasers)

Minnesota (Class Action)

MAY 9, 2019

Sevy
(Futures Trader)

Minnesota (Class Action)

OCTOBER 16, 2019

Pacific Agri-Products
(Direct Purchasers)

Minnesota (Class
Action)



“BIG BEEF” DEFENDANTS (80% of Market)

- JBS USA FOOD CO. HOLDINGS
- TYSON FOODS, INC.
- CARGILL, INC.
- NATIONAL BEEF PACKING, CO.
- OTHER



MAJOR ALLEGATIONS

- Since 2015, coordinated supply cuts to raise their own prices and lower prices paid to producers. (Doubled spread).
- Coordinated slaughters and herd reductions to reduce supply.
- Reduced capacity by closing slaughter plants (2013 Cargill Texas; 2014 National Beef California)
- Manipulation of cattle auctions.
- Coordinated boycott of regional feed lots.
- Unnecessary imports from Canada and Mexico.



RANCHER ASSOCIATION CEO

“These are unprecedented levels of packer margins. The American consumer is still paying near-record prices for beef while we have these depressed cattle prices.”



2016 SENATE JUDICIARY COMMITTEE

“[N]o evidence of collusion.”

2018 G.A.O. INVESTIGATION

Data “indicated that competition levels among packers that slaughter and process cattle did not appear to affect the national price changes in the fed-cattle market.”



Other Cases

CWT Antitrust Litigation

- *Jien v. Perdue*, No. 1:19-cv-251 (D. Md., filed Sep. 3, 2019)
- *Earnest v. Perdue*, No. 1:19-cv-02680 (D. Md., filed Sep. 3, 2019)

Cattle price fixing case

- *In Re Cattle Antitrust Litigation*, 19-cv-01222-JRT-HB (DMN)

Potato legacy case -- Capper-Volstead advice and counsel

Trends and Observations

- Information Exchange Liability
- Proliferation of Direct Action Plaintiffs



