COMPETITION AND TRADE PRACTICE IN AGRICULTURE: LITIGATION AND LEGISLATION

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I. INTRODUCTION

Most agricultural markets continue the march toward greater consolidation and vertical integration.[1] These two trends necessarily have the effect of narrowing open markets that were once the principal sales channel for independent farmers.[2] Increased horizontal consolidation results in fewer buyers for farm commodities, while vertical integration means that the remaining buyers have already met much of their supply needs. The result for farmers who choose not to enter into long-term contracts is that they have fewer options for sales. Proponents of these trends argue that the consolidation and integration yield greater efficiencies, management capabilities, and consumer satisfaction with uniform products. Critics of these trends point to consolidation and vertical integration as important factors in the demise of independent family farms because of dwindling markets and the increased disparity in bargaining power between farmers and processors.

Private actors have attempted to utilize state and federal law to address these concerns through private enforcement. Litigation in recent years has occurred almost exclusively in the livestock industry and has usually centered on the Packers and Stockyards Act of 1921. While private actors have pressed litigation, a number of Representatives and Senators have introduced legislation to deal with these concerns on the federal level. Meanwhile, although federal agencies have been part of a few cases involving current federal law, many have criticized the USDA for not aggressively enforcing current statutes.

As an organizational framework to consider competition and trade practice policy, one can consider four different approaches, each of which addresses concerns that consolidation and vertical integration create a disparity in the bargaining power between farmers and agribusinesses: (1) Decrease the market power of the stronger party by affecting the structure of the industry, such as breaking up firms or prohibiting firms from owning livestock; (2) increase the bargaining power of the weaker party by encouraging collective marketing, such as by cultivating cooperatives or protecting farmers' rights to join associations; (3) accept the disparity in market power, but regulate the behavior of the actors, such as in the Packers and Stockyards Act; and (4) improve the enforcement mechanisms of laws currently on the books. This paper

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[1] For a roundup of statistics reflecting increased consolidation in the agriculture and food industries, see Democratic Staff of the U.S. Senate Committee on Agriculture, *Economic Concentration and Structural Change in the Food and Agricultural Sector: Trends, Consequences and Policy Options* 5-7 (Oct. 29, 2004).

[2] A number of commentators have examined this issue in recent years, including Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets*, 2000 WIS. L. REV. 531 (2000); Neil D. Hamilton, *Broiler Contracting in the United States – A Current Contract Analysis Addressing Legal Issues and Grower Concerns*, 7 DRAKE J. AGRIC. L. 43 (2002); Doug O'Brien, *Developments in Horizontal Consolidation and Vertical Integration*, National Agricultural Law Center, http://www.nationalaglawcenter.org/research/#antitrust (Jan. 19, 2005); Harrison M. Pittman, *Market Concentration, Horizontal Consolidation, and Vertical Integration in the Hog and Cattle Industries*, National Agricultural Law Center, http://www.nationalaglawcenter.org/research/#marketconcentration (Aug. 14, 2005); William E. Rosales, *Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and Its Modern Awakening*, 2004 WISC. L. REV. 1497 (2004); Michael C. Stumo & Douglas J. O'Brien, *Antitrust Fairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91 (2003).

utilizes this framework to discuss recent legal activity in the competition and trade practice arenas.

II. PARTICULAR RESPONSES AND APPROACHES TO CONSOLIDATION AND INTEGRATION

A. Affect Structure of Industry

1. Federal Ban on Packer Ownership

A proposed federal ban on ownership of livestock by meatpackers served as a one-time legislative lightening rod for much of the concern surrounding consolidation and vertical integration. Proponents of the ban argue that it will protect the independence of family farmers by ensuring that processors do not control the supply of livestock. Opponents argued that it is a bad idea to take away the industry's ability to fully integrate because this model sometimes yields certain efficiencies and a consistent product that consumers desire.

One of the more contentious topics in the 2002 Farm Bill involved such a prohibition.[3] The Senate version of the Farm Bill included language prohibiting packers from entering into agreements that provided them "operational, managerial, or supervisory control over the livestock, or over the farming operation that produces the livestock, to such an extent that the producer is no longer materially participating in the management of the operation with respect to the production of the livestock."[4] After much heated debate, the language did not survive the Senate-House conference of the Farm Bill.

A group of Senators and Representatives has continued to introduce a version of the packer ownership law in every Congress,[5] but none of this legislation has gained any real traction in the legislative process.

2. State Bans on Packer Ownership and Corporate Farming

(a) Iowa

The State of Iowa has engaged in extensive litigation related to its ban on packers owning livestock. The current version of the law provides:

> 202B.201 Prohibited operations and activities - exceptions.
>
> 1. Except as provided in subsections 2 and 3, and section 202B.202, all of the following apply:
>
> *a.* For cattle, a processor shall not own, control, or operate a cattle operation in this state.

[3] *See generally* Roger A. McEowen, et al., *The 2002 Senate Farm Bill: The Ban on Packer Ownership of Livestock*, 7 DRAKE J. OF AGRIC. L. 267 (2002); Steve White, Note, *Hog Wild: A Look at the Issue of Meatpacker Ownership of Livestock at the Federal and State Level*, 52 DRAKE L. REV. 793 (2004).

[4] 148 Cong. Rec. S558 (daily ed. Feb. 8, 2002) (text of amendment).

[5] H.R. 4713, 109th Cong. (2006); S. 818, 109th Cong. (2005); H.R. 719, 108th Cong. (2003); S. 27, 108th Cong. (2003).

b. For swine, a processor shall not do any of the following:

(1) (a) Directly or indirectly own, control, or operate a swine operation in this state.

(b) Finance a swine operation in this state or finance a person who directly or indirectly contracts for the care and feeding of swine in this state.

…

(2) Directly or indirectly contract for the care and feeding of swine in this state.[6]

A previous version of the legislation included an exemption for cooperatives organized under Iowa law.[7]

In 2002, Smithfield Foods, Inc., filed suit against the State of Iowa in federal district court arguing that the state law violated the dormant Commerce Clause.[8] Because the district court found that the statute discriminated against out-of-state interests "on its face, in purpose, and in effect,"[9] it applied strict scrutiny and found that the statute did not serve a legitimate local interest unrelated to economic protectionism, and thus ruled that the law was unconstitutional.[10] The district court decision largely focused on the Iowa cooperative exemption, an exemption removed in 2003 by the Iowa legislature. On appeal and in the wake of the legislative changes, the Eighth Circuit remanded the case to the district court to consider the amended statute's constitutionality. In particular, the Eighth Circuit instructed the district court to consider

> whether the new section 9H.2 unconstitutionally discriminates against interstate commerce. If the district court concludes section 9H.2 only incidentally discriminates against interstate commerce, the district court must determine whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[11]

Before the district court could deliver its new opinion, the State entered into a consent agreement with Smithfield with a duration of ten years.[12] In return for the state promising not to enforce the state ban on packer ownership, Smithfield agreed to the following:

- Recognize growers' rights to organize and refrain from discriminating against growers who are engaged in organizing activity;[13]

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[6] Iowa Code § 202B.201 (2005) (formerly Iowa Code § 9H).

[7] Iowa Code § 9H (2001).

[8] *Smithfield Foods, Inc. v. Miller*, 241 F. Supp. 2d 978 (S.D. Iowa 2003).

[9] *Id.* at 992.

[10] *Id.* at 993 (citations omitted).

[11] *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1066 (8th Cir. 2004) (citing *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

[12] *Smithfield Foods, Inc. v. Miller*, Consent Decree, Civil Action No. 4:02-CV-90324 (Sept. 2005), available at http://www.iowa.gov/government/ag/latest_news/releases/sept_2005/smithfield.pdf.

- Negotiate in good faith with a grower's bargaining unit;[14]
- Provide the following "grower rights":
  - Right to join an association;
  - Right to be a whistleblower;
  - Right to use contract growers' liens; and
  - Right to disclose contractual terms;[15]
- Not provide false information to a grower;[16]
- Provide statistical information related to payment;[17] and
- Not expand hog production capacity for at least five years.[18]

As to enforcement, the decree provides that a grower who suffers damages and prevails in a civil action is entitled to treble damages, attorneys' fees, and court costs.[19] Smithfield may also be subject to $5,000 civil penalty per violation per day of the contract growers' rights. The Attorney General may enforce any of these rights.[20]

On January 19, 2006, the State of Iowa entered into a similar agreement with Cargill, the parent company of Excel Corp., a large meatpacking company in Iowa.[21] This consent agreement is similar to the Smithfield agreement, except that it does not allow for treble damages[22] and prohibits Cargill from requiring producers to make capital improvements without fair and equitable compensation.[23] On April 6, 2006, Hormel signed a Consent Agreement similar to Excel's.[24]

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[13] *Id.* ¶ 2.

[14] *Id.* ¶ 4(F).

[15] *Id.* ¶ 3(B).

[16] *Id.* ¶ 4(B).

[17] *Id.* ¶ 4(C).

[18] *Id.* ¶ 12.

[19] *Id.* ¶ 3(F).

[20] *Id.*

[21] *Cargill, Inc. v. Miller*, Consent Decree, Civil Action No. 4:06-cv-20 (Jan. 16, 2006), available at http://www.iowa.gov/government/ag/latest_news/releases/jan_2006/SFXCB.pdf.

[22] *Id.* ¶ 6.

[23] *Id.* ¶ 4(F).

[24] *Hormel Foods Corp. v. Miller*, Consent Decree, Civil Action No. 4:06-cv-0061 (Apr. 6, 2006), available at http://www.iowa.gov/government/ag/latest_news/releases/apr_2006/Hormel%20Consent%20Decree%204-6-06.pdf.

(b) Nebraska I-300

In neighboring Nebraska, people challenged a provision of the state constitution that generally prohibits non-family farm corporations from owning farmland or engaging in farming operations.[25] Known as Initiative 300 (I-300) from its genesis as a referendum item before the voters of Nebraska, the family farm corporation exception required that at least one member of the family corporation be actively engaged in farming.[26] Challengers of Initiative 300 argued that it violated: (1) the dormant Commerce Clause, (2) the Privileges and Immunities Clause, (3) the Equal Protection Clause, and (4) the American with Disabilities Act (ADA).

The court focused most of its attention on the dormant Commerce Clause argument where it found that the Initiative both in its purpose and on its face discriminated against out-of-state interests.[27] Because of this finding, the court then applied the second part of the dormant Commerce Clause analysis, which is to determine whether the challenged provision is the exclusive means of advancing legitimate local interests.[28] The court found that although the state may have had legitimate local interests, such as the conservation of natural resources and rural development, there was no evidence that the State attempted less restrictive means of achieving those interests. For example, the court queried whether the State could enact specific environmental regulations that would be more effective in protecting natural resources than the ban on corporate ownership.[29] In the end, the federal district court in Nebraska found that its state provision designed to protect small farms by restricting the ability of certain corporations from owning farms or engaging in farming violated the dormant Commerce Clause.

After quickly disposing of the challengers' Privileges and Immunities, and Equal Protection claims, the court moved to the ADA claim. The court found that the requirement that someone be "actively engaged in farming" to qualify for the family farm corporation exception required

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[25] *Jones v. Gale*, 405 F. Supp. 2d 1066 (D. Neb. 2005). The amendment provides: "No corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching." Neb. Const. art. XII, § 8. "[F]arming or ranching" is defined as "(i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or (ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products." Initiative 300 provides a wide variety of exceptions to its general prohibition, including an exception for "family farm or ranch corporation[s]." Neb. Const. art. XII, § 8 (1)(A). A "family farm or ranch corporation" is defined as:
a corporation engaged in farming or ranching or the ownership of agricultural land, in which the majority of the voting stock is held by members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day to day labor and management of the farm or ranch and none of whose stockholders are non-resident aliens and none of whose stockholders are corporations or partnerships, unless all of the stockholders or partners of such entities are persons related within the fourth degree of kindred to the majority of stockholders in the family farm corporation.

[26] *Jones*, 405 F. Supp. 2d at 1071 (citing I-300).

[27] *Jones*, 405 F. Supp. 2d at 1079-82.

[28] *Id.* at 1082.

[29] *Id.*

active physical labor.[30] Those with handicaps that precluded them from engaging in physical labor were thus not eligible for the exception. The court found that this disparate treatment violated the ADA because it discriminated against those with disabilities. Therefore, the Supremacy Clause of the U.S. Constitution invalidated I-300.[31]

B. Affect Bargaining Rights of Parties

The second way to address concerns related to unequal bargaining power is to increase the power of the weaker party, for example by allowing farmers to bargain collectively. On the federal level, it has been years since there has been significant legislation or litigation affecting farmers' right to organize. In 1968, the President signed the Agricultural Fair Practices Act, [32] a law purportedly designed to protect farmers' right to join cooperatives and bargain collectively. Yet as numerous commentators have pointed out, as one looks more closely, the law reveals conflicting purposes.[33] The law generally prohibits handlers from discriminating against farmers who are members of a bargaining association or cooperative.[34] Two important exceptions, however, prevent the law from having much effect: "Nothing in this chapter shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers."[35] Thus, a handler may discriminate against a producer for

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[30] *Id.* at 1086.

[31] *Id.* at 1087.

[32] 7 U.S.C. § 2301.

[33] *See generally*, Donald A. Frederick, *Agricultural Bargaining Law: Policy in Flux*, 43 ARK. L. REV. 679 (1990); Randi Ilyse Roth, *Redressing unfairness in the new agricultural labor arrangements: An overview of litigation seeking remedies for contract poultry*, 25 U. MEM. L. REV. 1207 (1995).

[34] 7 U.S.C. § 2303, which provides:

> It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices:
>
> (a) To coerce any producer in the exercise of his right to join and belong to or to refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or
> (b) To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers; or
> (c) To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; or
> (d) To pay or loan money, give any thing of value, or offer any other inducement or reward to a producer for refusing to or ceasing to belong to an association of producers; or
> (e) To make false reports about the finances, management, or activities of associations of producers or handlers; or
> (f) To conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by this chapter.

[35] *Id.* § 2304.

any reason other than his or her association with an association; and, at any rate, the handler may simply choose not to deal with the association for any reason.[36]

There have been some federal legislative efforts to amend the AFPA including a proposal to rewrite the AFPA that does not include the exemptions.[37] The legislation also included language allowing a producer to assign part of his or her check to the association for monthly dues.

On the state front, one of the more significant developments in the bargaining rights area is the series of consent decrees entered into by the Iowa Attorney General and a number of large meatpacking firms. See the discussion earlier in this paper for more information on how these consent decrees protect growers' rights to join bargaining associations.

C. Regulate Behavior of Market Participants

1. Packers and Stockyards Act

a. Litigation Alleging Unfair and Manipulative Practices Under Packers and Stockyards Act

The third policy approach to addressing concerns related to consolidation and integration is to regulate the behavior of the participants to address concerns of anti-competitive or unfair practices in the market. The primary example of this approach in federal law is the Packers and Stockyards Act of 1921 (PSA),[38] a law that regulates meatpackers, livestock dealers, and auction markets. Besides requiring certain sound financial practices, PSA prohibits unfair practices, market manipulation and attempts to monopolize. In terms of litigation, 2005 was a very significant year for PSA as the Eleventh (with two cases) and Tenth Circuits resolved significant disputes arising under the law.

The cases present an interesting mix involving the cattle, hog, and poultry industries, as well as private and administrative actions. The one thing they have in common is the core of the cases involved interpretation of the section 192 of the Act that prohibits unfair or unjustly discriminatory practices, as well as manipulation of the market.

(i) Pickett v. Tyson Fresh Meats, Inc.

In *Pickett v. Tyson Fresh Meats, Inc.*, the Eleventh Circuit Court of Appeals considered what a plaintiff must show to prove an adverse effect on competition. In particular, the court held that a beef packer's use of cattle marketing agreements did not violate PSA because the packer had pro-competitive reasons for using the marketing agreements.[39] The case arose out of the allegation of a group of cattle feeders that the packer, IBP Inc. (which was later purchased by

[36] *See Butz v. Lawson Milk Co.*, 386 F. Supp. 227 (holding that although a milk contract cannot include a provision that cancels the contract if the producer joins an association, "a handler could lawfully state in its marketing agreement that should the producer exercise his right to join a cooperative, the handler will exercise its right not to deal with that association.").

[37] S. 2307, 109th Cong. (2006).

[38] 7 U.S.C. §§ 181 to 229b.

[39] 420 F.3d 1272 (11th Cir. 2005), *cert. denied* 126 S.Ct. 1619 (Mar. 27, 2006).

Tyson Foods, Inc.), used the marketing agreements to manipulate the market and thus violated PSA. The Secretary was not a party to the litigation and did not file an amicus brief in the case.

Marketing agreements are contracts between packers and sellers of cattle that base the price of the cattle on the cash or spot market and allow the packer to choose the date of delivery within a two-week window. Unlike cash or spot market purchases, the price of cattle in marketing agreements is not actually negotiated; rather the price is usually based on a publicly reported spot market price. From 1994 to 2002, the packer in this case purchased anywhere from twenty to fifty percent of its cattle through marketing agreements.

The plaintiffs alleged that the packer's use of marketing agreements violated section 192 of PSA because it was an unfair practice and manipulated prices.[40] For the jury to find a violation, the district court judge instructed the jury that it must find a number of facts, including that the practice had an anti-competitive effect on the market and that "the defendant lacked a legitimate business reason or competitive justification" for using marketing agreements.[41] The jury also found that the packer's use of marketing agreements "damaged the cash market price" between 1994 to 2002 for a total of $1.28 billion. Considering the packer's motion to set aside the verdict, the district court judge focused on whether the jury could find that evidence existed to prove that the packer lacked a competitive justification for the practice. The judge found that the evidence was "insufficient to support a finding that defendant lacked a legitimate business justification for its use of" marketing agreements, and thus set aside the verdict.[42]

On appeal, plaintiffs argued they proved a violation of PSA by establishing that the use of marketing agreements had the effect of controlling or manipulating prices. The Eleventh Circuit noted that evidence did exist that the use of marketing agreements resulted "in lower prices for cattle both on the cash market and on the market as a whole."[43] The defendants, however, argued that the plaintiffs had to prove more than a price decrease; they also had to prove the packer had no pro-competitive justifications for the practice.

The Eleventh Circuit stated that to prove a PSA violation, the plaintiff must prove the practice adversely affects competition. The court then stated that if the practice "promotes efficiency and aids competition in the cattle market, the challenged market cannot, by definition, adversely affect competition."[44] To determine whether the practice aids competition, the court focused solely on the pro-competitive justifications asserted by the packer. The court stated that "[i]f there is evidence from which a jury reasonably could find that none of [the packer's] asserted justifications are real, that each one is pretextual, Pickett wins. Otherwise, Tyson wins."[45]

The court then found that the packer did have pro-competitive justifications for the use of marketing agreements, in particular that the practice (1) provided the packer a more reliable

[40] 7 U.S.C. § 192 (a) and (e).

[41] *Pickett,* 420 F.3d at 1277 (quoting jury instruction number 3).

[42] *Pickett,* 315 F. Supp. 2d 1175.

[43] *Pickett,* 420 F.3d at 1279.

[44] *Id.* at 1280.

[45] *Id.* at 1281.

supply; (2) reduced transactions costs; and (3) allowed the packer to purchase the cattle on an individual carcass basis as opposed to the entire lot on a live-weight basis. Because these competitive justifications exist, the Eleventh Circuit agreed with the district court judge that the packer did not violate PSA.

(ii) London v. Fieldale Farms Corp.

In contrast to *Pickett* which focused on a marketing strategy's effect on the market, *London v. Fieldale Corp.* focused on a particular relationship between a poultry grower and a poultry integrator.[46] The plaintiffs were poultry growers who alleged that the integrator, Fieldale, violated PSA when it terminated the poultry production contract with no economic justification. The plaintiffs did not allege that the contract termination somehow harms the competitive environment. Yet the primary issue in this case was whether plaintiffs had to prove that the practice is likely to adversely affect competition.[47]

The court found that PSA was primarily intended to thwart anti-competitive behavior and thus concluded that to be successful on a PSA claim, the plaintiff must prove that the targeted practice "adversely affects or is likely to adversely affect competition."[48] In its finding, the court relied heavily on precedent that included language indicating that the act "was aimed at halting a general course of action for the purpose of destroying competition."[49] Such a holding essentially requires that any PSA analysis focusing on 7 U.S.C. § 192 include some sort of competitive impact analysis.[50]

This case did not involve a regulation promulgated by USDA; rather, a private actor brought the case based on a statutory violation. The only role USDA played in this case was to file an amicus brief before the Eleventh Circuit arguing along with the plaintiff that PSA does not necessarily require proof of adverse effect on competition. The court refused to grant USDA any deference in this case because PSA does not provide USDA authority to bring actions against poultry integrators, in contrast to USDA's enforcement authority *vís a vís* meatpackers and swine production contractors.[51] PSA does have authority to promulgate rules regulating poultry integrators.

The holding could put into question any efforts made by USDA to promulgate rules designed to protect sellers and growers from certain abusive practices unless USDA proves that the practice has an adverse effect on competition. For example, if USDA wanted to promulgate a rule prohibiting a packer or poultry integrator for retaliating against a grower for testifying in court against them (the alleged underlying fact pattern in *Fieldale*), USDA may not be able to uphold

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[46] *London v. Fieldale Farms Corp*., 410 F.3d 1295 (11th Cir. 2005).

[47] *Id.* at 1300.

[48] *Id.* at 1303.

[49] *Id.* at 1302 (quoting *Armour & Co. v. United States*, 402 F.2d 712, 720 (1968) and House Report No. 1297, 66th Cong. (1921), p. 11).

[50] *See London*, at 1304 (noting that "the elimination of a competitive impact requirement would subvert the policy justifications for the PSA's adoption").

[51] *Id.* at 1304.

the rule unless it included evidence in the record that indicated such a practice has an adverse effect on competition.

Interestingly, two unreported cases from the Eleventh Circuit filed within two weeks after *London* considered similar allegations, but the per curium opinions did not state that the plaintiffs needed to prove an adverse effect on competition. In *Wheeler v. Cagle Foods*[52] and *Mims v. Cagle Foods*,[53] the court considered PSA allegations based on 7 U.S.C. § 192. The cases also alleged violations of the Agricultural Fair Practices Act,[54] fraud and state RICO statute,[55] as well as claims of promissory estoppel and breach of contract. The district court in each of the cases granted the integrator's motion for summary judgment, reasoning that the plaintiffs did not provide enough evidence of any of the allegations. The Eleventh Circuit agreed.

(iii) Excel Corp. v. USDA

In *Excel Corp. v. USDA*, USDA brought an administrative action alleging a violation of PSA regulations.[56] The regulation requires that packers who purchase on a carcass basis provide notice to the sellers of the grading to be used.[57] To determine premiums in its purchase of hogs, Excel used a formula that incorporated a number of measurements of such things as the carcass's back fat. Excel changed the formula without notifying the sellers.[58] Upholding the Administrative Law Judge, the Judicial Officer found that Excel violated both § 192 of PSA and the regulation when it failed to notify producers of the change.

On appeal, Excel argued, among other things, that it was justified in failing to notify producers because of business standards. The Tenth Circuit gave short shrift to this argument, instead deferring to the agency:

> [I]t is clear that Congress and the USDA are the arbiters of what practices will impede competition. Thus, contrary to Excel's assertion, the fact that a particular act is "required by the exigencies of the business," or is not violative of a contractual obligation, has no impact on whether that act is violative of the P & S Act and the implementing regulations. Indeed, in the instant case, the USDA concluded that Excel's failure to disclose its formula change was violative of § 201.99(a) of the implementing regulations, even though Excel did not have a contractual obligation to disclose that change to hog producers and was otherwise justified in changing its formula to better estimate the lean percent of hog carcasses.[59]

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[52] 148 Fed. Appx. 760, 2005 WL 1349857 (11th Cir. June 8, 2005).

[53] 148 Fed. Appx. 762, 2005 WL 1400259 (11th Cir. June 15, 2005).

[54] 7 U.S.C. § 2301.

[55] Ga. Code Ann. § 16-14-4 (2004).

[56] 397 F.3d 1285.

[57] 9 C.F.R. § 201.99(a) and (e).

[58] *Excel*, at 1298-99.

[59] *Id.* at 1293.

It is interesting to compare Excel's approach to the "business justification" defense to that in the *Pickett* case discussed above. Where the Eleventh Circuit in *Pickett* went to great lengths to analyze possible business justifications that would legitimize the use of captive supplies, the Tenth Circuit was satisfied that USDA found the act to be anti-competitive without going into possible business justifications. One of the major distinctions between the two cases is that USDA is enforcing a regulation in *Excel*, where the cattle feeders in *Pickett* are stating their own claim based on the statute.

(iv) Schumacher v. Tyson Fresh Meats

Yet another major PSA case is just beginning to wind its way through the courts. In *Schumacher v. Tyson Fresh Meats*,[60] the jury found that three of the largest beef packers violated PSA when they took advantage of USDA price reporting errors to pay cattle feeders a lower price. In early 2001, USDA discovered that it had been misreporting prices of boxed beef, an important variable in packers' decisions on what to pay producers for live cattle. A class of cattle producers brought suit against the four largest beef packers claiming that the packers knowingly used these inaccurate reports to pay producers lower prices for live cattle.

The verdict form makes clear that the jury found a violation of PSA,[61] but does not make clear the exact nature of the violation.[62] Nevertheless, the briefing subsequent to the verdict generally indicates that plaintiffs focused their case on PSA's prohibition against market manipulation. The verdict form indicates the jury found that the plaintiffs proved "by a preponderance of the evidence, that the violation in question had adverse or negative effects on competition in the sale and purchase of fed cattle."[63] Based on the finding of a PSA violation, the jury found the packers were responsible for the following damages: $4 million for Tyson Fresh Meats, Inc.; $3 million for Cargill Meat Solutions; and $2.25 million for Swift Beef Co. The packers in this case have renewed their motion for summary judgment. The briefing on this latest motion appears to have been completed in late May.

If the case is eventually considered by the Eighth Circuit, it will be significant for a number of reasons. It will provide the Circuit an opportunity to determine whether and how a plaintiff must prove injury to competition. The case will also likely feature an analysis of 7 USC § 202(e), which prohibits manipulation of prices.

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[60] Verdict, No. CIV 02-14027 (D.S.D. April 12, 2006); *see also* 2006 WL 47504 (D.S.D Jan. 5, 2006) (considering each party's challenges to expert testimony) and 221 F.R.D. 605 (D.S.D. 2004) (certifying the class).

[61] Verdict, No. CIV 02-14027 (D.S.D. April 12, 2006) ¶ 1.

[62] The Verdict form seemingly refers to a question that considers specific PSA violations, but the question number is blank, and this author could not find such a question on the verdict form. *Id.* ¶ 2.

[63] *Id.*¶ 5.

2. Proposed Legislation to Amend the Packers and Stockyards Act

a. Captive Supply Reform Act

A bill supported by Senators and Representatives in the upper Midwest would regulate how packers contract for livestock.[64] The legislation prohibits marketing agreements unless the contracts set a firm price and the date of delivery, and limit the number of animals under the contract to 40 cattle or 30 hogs. Proponents of this legislation argue that these provisions would make it more difficult for packers to manipulate the market with captive supplies.

b. Competitive and Fair Agricultural Market Act of 2006

The Competitive and Fair Agricultural Market Act of 2006, a comprehensive competition bill, would rewrite the Agricultural Fair Practices Act and amend PSA.[65] The legislation would create a new office within USDA to enforce AFPA, PSA, "and any other Act the Secretary determines to be appropriate,"[66] as well as require that all agribusinesses with annual sales of over $100 million file an annual report to the Secretary on its corporate structure and alliances with other agribusinesses.[67]

In the rewrite of the AFPA, the legislation deletes the exemptions discussed earlier and includes a list of prohibited practices that goes beyond activities that hinder organizational activity. The legislation would also require that processors of essentially all agricultural commodities bargain in good faith with farmers[68] and provide a cover page that discloses a number of material provisions within the contract, such as responsibility for environmental damage and the applicability of state law and venue.[69] The legislation provides a number of specific protections to producers in contracts, such as a production contract lien and the requirement that processors compensate producers for improvements required during the life of the contract.[70] As to enforcement, the legislation provides for attorneys' fees and that jurisdiction and venue must be where the farmer resides.[71]

The amendments to PSA provide USDA administrative enforcement authority in poultry.[72] In terms of the need to prove competitive injury, the legislation states that "[a] person affected by an unfair practice under section [192] shall not be required to prove predatory intent, competitive

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[64] S. 960, 109th Cong. (2005); H.R. 4257, 109th Cong. (2005).

[65] S. 2307, 109th Cong. (2006). The legislation is largely based on the competition title from the Chairman's Mark of the 2002 Farm Bill.

[66] *Id.* § 101 (new § 101 in AFPA).

[67] *Id.* § 101 (new § 102 in AFPA).

[68] *Id.* § 101 (new 201(b)(8)).

[69] *Id.* § 101 (new 201(c)).

[70] *Id.* § 101 (new 203).

[71] *Id.* § 101 (new 205).

[72] *Id.* § 201.

injury, or likelihood of injury."[73] The legislation would also change enforcement by providing for attorneys' fees and the authority to appoint outside counsel.

3. Mandatory Price Reporting

After the hog price collapse of 1998 and 1999 and in the wake of skyrocketing captive supplies, a number of upper Midwestern states passed versions of laws that required packers to report livestock prices to the state, which in turn would make the prices public. Congress pre-empted these laws when it passed the Livestock Mandatory Price Reporting Act in late 1999, which required the reporting of cattle, hog, and lamb prices.[74] After nearly six years, the Livestock Mandatory Price Reporting Act sunset in September of 2005.[75] Two weeks before the Act lapsed, the Senate passed a one-year extension of the Act with no changes,[76] while the House passed a five-year extension with some changes to the reporting of hog prices.[77] Proponents of the Senate bill wanted the shorter extension so that Congress had time to consider recommendations for changes to the law from a then-expected Government Accounting Office (GAO) Report. GAO has subsequently filed the report and generally recommended that USDA improve the transparency and accuracy of the reports, as well as improve enforcement of the law.[78] Congress is still considering whether to amend the lapsed law to include which, if any, of the recommendations made by GAO.

D. Improve Enforcement

1. USDA OIG Report

On January 10, 2006, USDA Office of Inspector General (OIG) released an audit report entitled "Grain Inspection, Packers and Stockyards Administration's Management and Oversight of the Packers and Stockyards Programs" (PSP).[79] In general, OIG criticized PSP for lacking the institutional framework to conduct effective investigations and create agency policy. The OIG focused on PSP's inability to track investigations, weak management control and lack of decisions on policy.

As to competition and complex litigation, the report noted in its summary that "[s]ince PSP is not performing competition and complex investigations, no referrals were being made to the Office

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[73] *Id.* § 205.

[74] The Act is codified at 7 USC §§ 1635 to 1637b. At least some states that had mandatory price reporting laws, such as Iowa, included a provision that repealed the law if the federal government passed a similar law. 1999 Iowa Acts, ch. 88 § 11. A question remains whether other state laws may have become enforceable once the federal law lapsed.

[75] P.L. 106-78, § 942, 113 Stat. 1188 (Oct. 22, 1999).

[76] S. 1613, 109th Cong. (as passed by Senate, Sept. 13, 2005).

[77] H.R. 3408, 109th Cong. (as passed by House, Sept. 14, 2005).

[78] GAO, *Livestock Market Reporting: USDA has Taken Some Steps to Ensure Quality, but Additional Efforts are Needed*, GAO-06-202 (Dec. 9, 2005).

[79] USDA OIG, *Grain Inspection, Packers and Stockyards Administration's Management and Oversight of the Packers and Stockyards Programs*, Report No. 30601-01-Hy (Jan. 2006).

of General Counsel (OGC) for formal administrative action. In February 2005, PSP referred one competition investigation to OGC. The most recent referral prior to February 2005 was November 2002, more than two years earlier. OGC filed no administrative complaints against market participants for anti-competitive practices since 1999 due to the lack of referrals by PSP."[80]

The Report also hearkened back to similar critiques made by OIG in 1997[81] and by the GAO in 2000.[82] The report found that although PSP implemented some of the advice offered in these reports, such as a restructuring of the field offices and hiring of more expert staff, many of the recommendations had not been implemented. In particular, the report stated that PSP failed to effectively use its newly-hired economists and legal specialists to improve the effectiveness of the investigations.[83]

2. Arbitration Legislation

One legislative approach to affect the enforcement of competition laws is to prohibit mandatory arbitration clauses in livestock and poultry contracts. Such legislation has been introduced in the Senate.[84] The legislation expressly allows for arbitration in cases where both parties agree to it after the dispute arises. The legislation mirrors language that was included in the Senate version of the 2002 Farm Bill, but was taken out during conference.

III. CONCLUSION

In both the litigation and legislative arenas, efforts continue to address concerns related to increased consolidation and vertical integration. A number of PSA cases have wound their way through courts of appeal, with results primarily making it more difficult for private actors to successfully prove a violation. Meanwhile, the considerable number of legislative attempts has rarely yielded real political traction. Nevertheless, concerns of bargaining disparities will continue to mount with increased market concentration, concerns that will continue to spur litigation and legislation.

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[80] *Id.* at ii.

[81] USDA, OIG, *Agency Efforts to Monitor and Investigate Anti-Competitive Practices in the Meatpacking Industry*, Report No. 30801-01-Ch (Feb. 1997).

[82] GAO, *Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices*, (GAO/RCED-00-242) (Sept. 2000).

[83] USDA OIG, *Grain Inspection, Packers and Stockyards Administration's Management and Oversight of the Packers and Stockyards Programs*, Report No. 30601-01-Hy (Jan. 2006), at 17-18.

[84] S. 2131, 109th Cong. (2005).