

BEEF PACKERS ABANDON MERGER AFTER STATES, DOJ FILE SUIT

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In early March of 2008, JBS Beef, SA, a Brazilian beef processor, announced its intention to buy Smithfield Beef Group and National Beef Packing Co., two American beef processors. The U.S. Department of Justice and several state Attorneys General jointly investigated the proposed acquisitions. On October 20, 2008 the DOJ and the states of Texas, Arizona, Colorado, Connecticut, Iowa, Kansas, Minnesota, Mississippi, Missouri, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota and Wyoming filed an action in the United States District Court for the Eastern District of Illinois to block the National acquisition, choosing to let the Smithfield acquisition proceed. On February 23, 2009, JBS and National abandoned the acquisition.

JBS first entered the U.S. beef processing market with its purchase of Swift & Co. in 2007. This acquisition made JBS the third largest beef processor in the United States, ahead of Smithfield and National.

In evaluating the proposed acquisition of National and Smithfield, the government enforcers identified two interrelated product markets: the "upstream" market for the cattle that beef processors purchase from feedlots, and the "downstream" market for processed, or "boxed," beef that the processors sell to supermarkets, restaurants and other beef buyers. For each product market there is a different geographic market; for feed cattle the geographic market is regional, while the geographic market for the sale of boxed beef is national.

Because of significant overlap of National and JBS processing plants in the Southwest and Great Plains upstream markets, the government enforcers found an unacceptable risk that the National acquisition would either give JBS monopsony power in those regions or at least significantly increase the likelihood of increased pricing and output coordination in those already-concentrated markets. Likewise, it appeared that JBS's acquisition of both National and Smithfield would result in a three-firm oligopoly in the national market for the sale of boxed beef, unacceptably increasing the likelihood of price or output coordination in that market as well.

Based on this analysis, the government enforcers filed suit to block the National acquisition. The case was assigned to Judge Elaine Bucklo of the Eastern District of Illinois, who promptly set a scheduling conference when it became apparent that the parties would be unable to agree on the terms of protective and scheduling orders. At the November 25, 2008 conference, Judge Bucklo essentially adopted the government's proposed schedule, which proposed a close of fact discovery in March of 2009 and a close of expert discovery in April of 2009, with trial to follow thereafter.

As written discovery was underway and depositions were about to begin, defendants sought a stay to explore settlement options. The government did not object and the court granted the stay, which was ultimately extended to February 17, 2009. The parties did not reach a settlement by February 17th, so discovery resumed. Two days later, on February 19th the parties announced that they would allow the agreement to lapse on its expiration date of February 23rd.

Tommy Prud'homme graduated undergrad from UT-Austin and law school from Gonzaga University in Spokane, Washington. He worked for the Washington OAG for six years, then moved back to Austin and joined the Antitrust Division. Tommy has worked on many different cases, including Nine West, Mylan, In re Compact Disc, and JBS. Tommy chairs the NAAG Antitrust Task Force Telecommunications Committee.