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FEDERAL JURY FINDS TYSON FRESH MEATS, INC. IN VIOLATION OF PACKERS AND STOCKYARDS ACT

— by Roger A. McEowen* and Neil E. Harl**

On February 17, 2004, a federal jury in Montgomery, Alabama, returned a $1.28 billion verdict against Tyson Fresh Meats, Inc. (Tyson)[1] in a class action lawsuit alleging that Tyson (formerly Iowa Beef Processors (IBP)) manipulated the price for fed cattle through the use of long-term contracts (known as captive supply cattle) in violation of the Packers and Stockyards Act.[2] If the jury verdict stands and the case is upheld on appeal, the jury's verdict will have significant implications for the future structure of the livestock industry.

Background of the case

The *Pickett*[3] case was filed in the federal district court for the Middle District of Alabama in July of 1996 alleging anti-competitive practices by IBP, at the time the world's largest beef packer. In late 2001, the case was certified as a nationwide class action lawsuit on the issue of whether IBP's use of "captive supply" cattle (cattle acquired other than on the open, cash market) violates Section 202 of the PSA.[4]

Packers and Stockyards Act (PSA)

The PSA,[5] enacted in 1921, is very broad in scope and regulates both packers and stockyards.[6] The PSA would not likely have been adopted by the Congress if livestock marketing and the distribution of meat products did not present problems which were not sufficiently addressed by the existing antitrust laws of general application.[7] Enforcement of the PSA is either by a civil action,[8] initiated by the person aggrieved by the alleged violation of the PSA, or by an action taken by the Secretary of Agriculture upon request of the Attorney General.[9] Jurisdiction is in the federal district court.[10]

The PSA provides, in pertinent part, that:

> "It shall be unlawful for any packer with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or…
>
> (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose of with the effect of manipulating or controlling prices, or of creating a monopoly

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in the acquisition of , buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce…."[11]

In *Pickett*,[12] the plaintiffs claimed that Tyson's store of livestock (via captive supply) allows Tyson to avoid reliance on auction-price purchases in the open market for most of their supply. Tyson then uses that leverage, the claim is, to depress the market prices for independent producers on the cash and forward markets in violation of the PSA.[13]

The Jury's Findings

The jury unanimously found that (1) there was a single national market for cattle; (2) Tyson's use of captive supply had an anticompetitive effect on the cash market for fed cattle; (3) Tyson had no legitimate business reason or competitive justification for using captive supply; (4) Tyson's use of captive supply proximately caused the cash market price for fed cattle to be lower than it otherwise would have been; and (5) Tyson's use of captive supply injured each member of the class. The jury then found that Tyson's use of captive supplies from February 1, 1994 through October 31, 2002 damaged the cash market for fed cattle in the amount of $1,281,690,000.

Tyson's Post-Trial Motion and the Proper Legal Analysis

On February 25, Tyson filed a motion for Judgment as a Matter of Law or for a New Trial. In the motion, Tyson argues that the plaintiffs failed to provide evidence sufficient for the jury to find against them on any of the points on which the jury was instructed. In the motion, Tyson claims that it lacks the market power to influence the price paid for fed cattle, and that plaintiffs failed to establish the elements for a case under Section 2 of the Sherman Act.[14] However, under PSA, a plaintiff need not prove the existence of market power in the classic antitrust sense.[15] PSA only requires proof of an adverse effect on price, or market manipulation.[16]

While courts have used the Sherman Act as a guide for deciding PSA cases involving Section 202,[17] the courts have also recognized that Section 202 of the PSA proscribes practices that the Sherman Act would not bar.[18] The PSA's distinctiveness is that the PSA is focused on monopsony power – a relatively high level of concentration among purchasers and many unorganized sellers.[19] In contrast, the Sherman Act focuses on monopoly – concentration among sellers into a market.

The key question in *Pickett*[20] is the appropriate standard to be utilized in evaluating whether the provisions of the PSA have been violated. The statutory language and the congressional history of the PSA,[21] as well as prior caselaw,[22] indicate strongly that the PSA governs activity not prohibited under the Sherman or Clayton Acts.[23] Thus, a Sherman Act rule of reason analysis seems inappropriate in determining proscribed conduct in a PSA context. Instead, under the PSA, the test for improper behavior is necessarily multi-dimensional. Key to a determination of the presence of improper behavior is (1) the degree of concentration among buyers; (2) the extent of regional dominance by one packer (or few if collusion is present); (3) the utilization of practices or devices that, in such a setting, could be anti-competitive in effect; and (4) the extent to which legitimate business practices are served that could not be served by alternative approaches to procurement of the raw material involved that do not have the effect of manipulating prices.

Implications for the Future

Pickett[24] is, perhaps, the most important case ever decided under the PSA. The case has potentially far-reaching implications for the livestock industry. If the case survives Tyson's post-trial motion and is upheld on appeal, the second phase of the case will involve injunctive relief. The injunctive phase of the case will involve a determination of the permanent structural changes in the marketing of fed cattle necessary to bring the industry into compliance with the PSA.

FOOTNOTES

1 Pickett, et al. v. Tyson Fresh Meats, Inc., No. 96-A-1103-N (M.D. Ala., certified as class action on Dec. 26, 2001).

2 7 U.S.C. § 181 *et seq.*

3 See note 1 *supra*.

4 7 U.S.C. § 192.

5 *Id.*

6 The PSA was described by its sponsors as "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. 1801, 4783 (1921); H.R. Rep. No. 77, 67th Cong., 1st Sess. 2 (1921).

7 The problems addressed by the PSA are peculiar to the livestock industry. Those problems dated back to the late 1880s. For example, on May 16, 1888, the U.S. Senate authorized an investigation of the buying and selling of livestock to determine if the major packers were manipulating prices. The investigation was conducted over a two-year period and indicated that the major packers were engaging in unfair, discriminatory and anticompetitive practices by means of price fixing, agreements not to compete, refusals to sell and the like. See Stafford v. Wallace, 258 U.S. 495, 499 (1922).

8 7 U.S.C. § 209(b).

9 Section 6 of the Federal Trade Commission Act (15 U.S.C. § 46) is incorporated into the PSA by § 402 of the PSA. 7 U.S.C. § 222.

10 7 U.S.C. § 209(b).

11 7 U.S.C. § 192.

12 See note 1 *supra*.

13 See 7 U.S.C. § 192.

14 15 U.S.C. § 2. Under Section 2 of the Sherman Act, the offense of monopoly requires possession of monopoly power in the relevant market and willful acquisition or maintenance of that power. Tyson, in its motion, bases much of its argument on the notion that the plaintiffs

have failed to establish that the national market for fed cattle is national, that regional price differentials occur and, as such, Tyson does not have sufficient market power to influence the price paid for fed cattle.

[15] Arguably, under the PSA (unlike the Sherman Act), it is irrelevant whether the market for fed cattle is national. The key is whether a regionally dominant packer utilizes buying practices that have the effect of manipulating prices.

[16] 7 U.S.C. § 192.

[17] *See, e.g.,* Armour & Co. v. United States, 402 F.2d 712, 722 (7th Cir. 1968).

[18] *See, e.g.*, De Jong Packing Co. v. United States Department of Agriculture, 618 F.2d 1329, 1335 (9th Cir. 1980); Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968); Swift & Co. v. United States, 308 F.2d 849, 853 (7th Cir. 1962).

[19] An important feature of monopsony is regional dominance that is heavily influenced by shipping costs to access other competitive markets (i.e., packers).

[20] See note 1 *supra*.

[21] See notes 6-7 *supra*.

[22] See notes 17-18 *supra*.

[23] The Sherman Act is codified as 15 U.S.C. §1 et seq. The Clayton Act is codified as 15 U.S.C. §12 et seq.

[24] See note 1 *supra*.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ANIMALS

COUNTY FAIR. The plaintiff worked at a concession stand at a county fair run by the defendant. As the plaintiff walked from the concession stand towards a fair exit, the plaintiff passed the barns used for housing, but not showing, livestock. A horse drawing a buggy was being returned to the barns when it became spooked by a loud popping sound and ran into the plaintiff. The plaintiff filed a claim for negligence against the defendant which argued that Iowa Code § 673.2 barred the suit. The trial court granted summary judgment to the defendant, ruling that the statute immunized county fair sponsors from injuries to spectators. The plaintiff argued that the statute did not apply because the plaintiff was not a spectator at the fair and was not aware of the risks of the domesticated animal activities at the fair. The court held that the plaintiff was a spectator because the plaintiff was not a horse activity participant but was in the vicinity of the horse activities. However, the court held that there was an issue of fact whether it was reasonable to expect that the plaintiff would be aware of the risks of runaway horses just from walking in a pedestrian walkway at a county fair. If a fact finder found that a reasonable person would not be aware of such a risk, the statute would not apply to immunize the defendant from suit. **Hynes v. Clay County Fair Ass'n, 672 N.W.2d 764 (Iowa 2003)**.

BANKRUPTCY

FEDERAL TAX

DISCHARGE. The debtors, husband and wife filed their 1998 federal income tax return on March 17, 1999. On April 8, 2002, the debtors filed for Chapter 7 and sought to have the 1998 tax debt declared dischargeable because they filed their return more than three years before they filed their bankruptcy petition. The court held that Section 507(a)(8)(A)(i) refers to a date more than three years after a return was last due. Because the 1998 tax return was last due on April 15, 1999, the Chapter 7 petition was filed within three years of the date when the 1998 return was last due and the taxes were not dischargeable. ***In re*** **Reine, 301 B.R. 556 (Bankr. W.D. Mo. 2003)**.

TAX LIEN. The debtor had owned a car dealership with the debtor's father. When the father died, the father's shares in the dealership passed to the debtor. The father's estate had unpaid federal estate taxes and elected to pay these taxes in installments. The estate executed a lien on the father's shares as part of the agreement to allow installment payments of the taxes. Four years later, the son sold all of the assets to an unrelated company in exchange for the hiring of the debtor as a consultant. the IRS argued that the lien should cover the proceeds of the sale of the dealership assets. The court held that the estate tax lien was created by statute and could not be extended under any theory of equity; therefore, the lien was restricted to the shares of stock in the dealership and could not be used to cover the proceeds of the sale of the company's assets. ***In re*** **Roth, 301 B.R. 451 (Bankr. W.D. Penn. 2003)**.

CONTRACTS

ARBITRATION CLAUSE. The plaintiff meat processor had recruited the defendants, hog farmers, to raise hogs under contracts exclusively for the plaintiff. The plaintiff provided the hogs, feed and medication and the farmers housed and fed the hogs. Title to the hogs remained with the plaintiff at all times. When the price of pork declined, the plaintiff cancelled many of the contracts and the defendants sued for fraud, deceit and promissory estoppel. The plaintiff filed a motion to stay the litigation and to compel arbitration under arbitration clauses in all of the contracts. The defendants