CPI COMPETITION POLICY INTERNATIONAL

The CPI Antitrust Journal
April 2010 (2)

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I. INTRODUCTION

Congress adopted the Packers and Stockyards Act[2] ("PSA") in 1921 to achieve two goals that antitrust law and state market regulation had failed to achieve.

First, Congress sought to ensure that the practices of buyers and sellers in livestock (and later poultry) markets were fair, reasonable, and transparent. This goal can best be described as market facilitating regulation. The underlying concept was to create a broadly defined standard and confer on the Secretary of Agriculture expansive rule making authority[3] to implement these policies. This goal is the basis for the first two provisions of the statute:

> It shall be unlawful for any packer or swine contractor 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
>
> b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect….[4]

This goal received some sporadic enforcement in the period when livestock were largely sold at stockyards,[5] but with the radical changes in the industry starting in the later 1950s when modern transportation moved livestock to direct purchases, the Secretary ceased to provide any relevant regulations despite recurring problems in the operation of livestock markets. Indeed, poultry markets disappeared entirely and were replaced by a very different form of contractual farming. Both hog and beef markets are increasingly at risk from similar pressures resulting from self-interested strategic conduct by buyers and equally self-interested strategic responses by sellers. The result is a cycle of increased dysfunction in these markets.

The second objective of the PSA was to supplement the antitrust law's prohibitions on monopoly and conspiracy by creating a second layer of comparable law that the Secretary of Agriculture would enforce through cease and desist orders.[6] This function was never pursued and

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[2] Packers and Stockyards Act (7 U.S.C. § 181 et seq. as amended).

[3] *See*, 7 U.S.C. §228)

[4] 7 U.S.C. §202 (a) and (b) (emphasis added).

[5] This regulation, however, rested primarily on 7 U.S.C. §§201 to 217a that provide for specific regulation of stockyards.

[6] Hence, the statute declares that it is unlawful for any packer to:

remains another monument to Congressional misperception of legal and administrative reality. The Secretary of Agriculture was never given and still lacks the resources, staffing, and inclination to enforce antitrust type claims against the industry. The Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") are better positioned to enforce the general laws governing competition. Regrettably, both agencies have shown greater (FTC) and lesser (DOJ) unwillingness to deal with buyer power issues.[7]

This comment focuses on the market-facilitating function of the PSA and its current status. Where there are serious problems of market failure effective regulation can often remedy the problem and restore economically desirable competition. Unfortunately, the Secretary has — up to now—failed to provide an appropriate market facilitating set of regulations. In addition, in the past decade the courts have, largely in response to private actions, significantly restricted the interpretation of the statute thus further impairing its capacity to protect and enhance market processes.

II. THE NEED FOR MARKET FACILITATING REGULATION

Many markets face serious dysfunctional forces. They may come from a basic lack of information, a failure to have easily understood and implemented standards for contracting, persistent informational differences between buyers and sellers, structural differences (e.g., many sellers and few buyers), or other risks of strategic conduct. Even if these failures are not remedied, the markets will still operate but with markedly less efficiency and social utility. Laws can intervene to reduce the dysfunctions through regulations that address effectively the causes of market failure.

There are notable and relatively successful examples of this kind of intervention. The Securities and Exchange Commission, despite its regulatory failures with respect to some recent market practices and practitioners, has over the last 80 years regulated the public market for securities with substantial success. Compared to the practices of the pre-1930 era, the current market processes involve a substantially better, as well as highly regulated, system for the public purchase and sale of securities. The Commodities Futures Trading Commission has been somewhat less successful, but it too seeks to achieve the same fundamental goal of market facilitation.

Livestock and poultry are relatively perishable commodities. They need to be processed within relatively narrow windows of time if their producers are to earn reasonable compensation.

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c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has *the tendency or effect of restraining commerce or of creating a monopoly*; 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 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; 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 . . . ." 7 U.S.C. §202 (c) to (e) (emphasis added).

[7] *See*, Peter Carstensen, Comments for the United States Departments of Agriculture and Justice Workshops on Competition Issues in Agriculture, *available at*: http://www.justice.gov/atr/public/workshops/ag2010/comments/255253.pdf

In addition, mature animals do not travel long distances well. Hence, most processing needs to be relatively proximate to the locations in which the animals are "finished" by the farmers. The least mobile are chickens; they must be processed within about 100 miles of where they are raised. Cattle and hogs can travel somewhat farther, but the longer the distance the greater the shipping cost and the greater the risk of serious damage to the animals. This means that if there are relatively few nearby buyers for these outputs, those buyers have a clear economic incentive to manipulate their buying practices to reduce the prices that they pay and exploit producers.

The data show that the buying side of the various livestock and poultry markets range from highly concentrated (beef) to significantly concentrated (pork) to less nationally concentrated but regionally very concentrated (poultry). This means that buyers have the opportunity and incentive to exploit their position in the market. Moreover, buyers, operating outside an anonymous commodity exchange, have the discretion to decide whether they will buy from any particular seller. This confers a uniquely powerful position. Hence, reducing the number of alternative buyers to four or fewer results in the creation of significant buyer power.[8] This is a lower level of concentration than would be a source of concern in a seller-side market.

While it would be better for market purposes if there were more buyers—who could then compete for sellers in ways that would remove many (but probably not all) incentives to exploit transactions—it is still possible to use law and regulation to limit the capacity of large buyers to exploit their position to the detriment of sellers and the market process over time. This was a major goal of the PSA.

III. THE FAILURE OF THE PSA AS THE BASIS OF MARKET REGULATION

The PSA had, as one of its primary objectives, that the secretary of agriculture would facilitate the market for livestock and poultry through appropriate market regulations. Regrettably, but not surprisingly, in the last 70 years the secretaries, representing both political parties, have failed to create appropriate regulations that would reduce the power of the large buyers to manipulate and exploit the market.

Instead, livestock and poultry markets remained dysfunctional. Repeatedly, their failures are exposed.[9] Chicken integrators (processors) have repeatedly misled and exploited the farmers who raise the chickens. The beef packers, by discriminating among feeders, have imposed billions of dollars of losses on disfavored parties. The beef packers have also manipulated market prices in a variety of ways to the detriment of producers. The hog business has similarly seen repeated incidents of exploitation by the use of contracts and preferences.

Advocates for reform have repeatedly documented these problems and requested action. But the secretaries of agriculture and the special interests, including some farm organizations representing favored participants in the process, have until now frustrated any effective market facilitating regulation. Congress has, it should be noted, intervened in specific areas to provide

[8] I have elsewhere developed this analysis and its implication for policies governing the use of buyer power: *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination among Suppliers*, 53 ANTITRUST BULL. 271 (2008); *Buyer Cartels versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 WILLIAM & MARY BUS. L. REV. 1 (2010).

[9] The short length of this comment precludes lengthy discussion of the data supporting the conclusions set forth in this paragraph. Extensive documentation is available at, *inter alia*, the web site of R-CALF (http://www.r-calfusa.com/) and in the comments submitted in connection with the DOJ-USDA workshop, Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy, *available at* http://www.justice.gov/atr/public/workshops/ag2010/index.htm#publiccomments/.

some statutory regulation of both poultry and hog contracting.[10] Despite these statutory efforts, there are still no national rules governing access to hog and cattle markets. Poultry integrators have similarly been free to impose whatever terms and conditions they wished on the farmers who raised their chickens.

Only in 2010 has the Department of Agriculture made any movement toward the development of market-facilitating regulation. The current Secretary and the PSA Administrator have indicated that they will come forth with regulations aimed at facilitating the more efficient and fair operation of these markets.

IV. JUDICIAL DESTRUCTION OF PRIVATE ACTIONS TO ENFORCE PSA

In 1976, Congress amended the PSA to provide for a private cause of action if the farmer is harmed as a result of conduct that involves either "unfair preference" or "unjustified discrimination" by the buyer.[11] Hence, even if the secretary of agriculture did not develop appropriate regulations, the common law process using these general terms might have developed a set of principles that would facilitate the fair and efficient operation of markets.

Such has not been the case. Until relatively recently there was little private litigation under the PSA. This is probably the consequence of the general change in the hog and cattle industries in which the development of interstate highways and refrigerator trucks has made it possible to move the slaughter process into rural producing areas and have the meat shipped to buyers even at long distances. For some time, roughly from the early 1960s to the 1980s, the result was sufficient competition in the market for hogs and cattle so that farmers were not adversely affected by the potential dysfunctions of the market. Poultry was a different story with integrators consolidating the industry and vertically integrating so that farmers became at best "hired hands" paid to feed and house the integrators' poultry. More litigation came out of poultry raising as a result, but even that litigation was sporadic and did not produce generalized standards.

In the last decade or so, several attempts to get the courts to interpret the terms of the PSA in ways that would limit the ability of buyers to engage in manipulated and discriminatory practices have been litigated. Those efforts have been consistently unsuccessful.

Two cases provide paradigmatic examples. In *Pickett v. Tyson*,[12] the evidence showed, without dispute, that farmers excluded from contract sales and forced to sell in auction markets for cattle received lower payments despite having animals of equal or better characteristics. This would seem to present a clear case of discrimination. However, the Eleventh Circuit held that because there were plausible economic efficiency arguments for processors to use contracts of some sort any contractual discrimination was lawful regardless of whether there was an alternative way to accomplish the primary economic objectives of contracts without the same discriminatory effect. Thus, the court elected to empower the buyer to act as he saw fit regardless of the consequences for excluded farmers.

This result is very troublesome for two reasons. First, the court ignored the basic facts that showed the impact of discrimination on excluded farmers. The price difference over the period covered by the suit was estimated in the billion-dollar range. Second, the court, despite its claim

[10] *See*, 7 U.S.C. §§ 197a - 197c (poultry) and §§ 198-198b (hogs).
[11] *See*, 7 U.S.C. § 209(a).
[12] Pickett v. Tyson Fresh Meats, 420 F.3d. 1272 (11th Cir. 2005).

that it was using an antitrust type of analysis, failed to use the well-known antitrust standard that looks for less anticompetitive (harmful) alternatives whenever any conduct has adverse effects even if it has some legitimate function. The effect of this decision was to require a plaintiff to show that particular conduct lacks any plausible business justification regardless of its harmfulness or the existence of reasonable alternatives. The implication for future litigation is that "unjust discrimination" will be very hard to prove.

The second line of cases require that the plaintiff proves that the conduct at issue has had an "adverse effect" on competition. The requirement means that the plaintiff must define a relevant economic market and show that the harms of which the plaintiff complains are both systemic and have some adverse effect on overall efficiency. This is a truly daunting task for an individual farmer who is the victim of a particular discrimination or unfair preference.

The most recent example of this reasoning comes in the case of *Wheeler v. Pilgrims Pride*.[13] The plaintiffs, three chicken farmers, complained that the owner of the company—who also raised chickens—got an "undue preference" because the company paid for his chickens on a very different basis. Without reaching the merits of the claims, the Fifth Circuit, *en banc*, by a 9 to 7 vote, held that the chicken farmers could not even try to prove their claim because they had not alleged that the preference had had an anticompetitive effect on the market for chickens.

The *Wheeler* decision is profoundly flawed. First, it inserts words ("an adverse effect on competition") into the statutory language (quoted earlier) where no such terms exist and where those terms are in fact used in other sub-sections of the same provision.[14] The statutory wording would seem, therefore, explicitly to preclude this interpretation. Second, the court implicitly has interpreted the requirement of "competitive effect" as necessitating proof of a market and an impact on output or price overall in that market. Other less burdensome definitions of adverse competitive effect exist. Indeed, the Supreme Court in interpreting antitrust law has, in various contexts, looked at the specific conduct to determine that it has or is likely to have an adverse effect on competition and so allowed the case to proceed.[15]

V. THE WAY FORWARD

In sum the current state of the law is such that the PSA provides no protection for farmers from buyer discrimination or preferences. The current head of the PSA administration in the USDA has declared that he plans to establish regulations that will police these markets. The current judicial interpretations of the PSA may make this a daunting task. Still, given the long term failure of the antitrust agencies to appreciate the risks to producers from concentrated buying markets, their consequent failure to block mergers in livestock and poultry processing markets (among other agricultural product markets), and their related failure to block mergers among retail grocery chains that also create buyer power, the only remaining hope for farmers and ranchers is that the Secretary of Agriculture will, in fact, finally adopt rules that create a legal structure for the marketing of these commodities that will facilitate fair, open, and efficient transactions whether the means are long-term contractual relations or transactional markets. The task is not an easy one substantively (putting the legal issues to one side for the moment). But it is plausible that, with some reasonably critical thinking and careful drafting, rules can be created

[13] Wheeler v. Pilgrims Pride, 591 F.3d 355 (5th Cir., en banc, 2009).

[14] *See, supra* note 4.

[15] *See*, e.g, Klors v. Broadway-Hale Stores, 359 U.S. 207 (1959); FTC v Indiana Federation of Dentists, 476 U.S. 447 (1986).

that would make markets in livestock and poultry work at least as efficiently as those in corporate securities and commodity futures.