Buyer Power and Antitrust

Report of the Food & Agriculture Panel

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Facilitator: Douglas O'Brien, Senior Staff Attorney, the National Agriculture Law Center

Resources:
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Peter Carstensen, University of Wisconsin Law School
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Rapporteur: Norman Hawker

The facilitator, Mr. O'Brien, opened with a short history of the relationship between agriculture and the development of antitrust laws. Small ranchers and farmers were the first to seek enactment of antitrust laws, and the goals of antitrust laws, at least as originally understood, reflect differing approaches to the evolving concerns of these ranchers and farmers overtime:

- The Sherman and Clayton Acts: to affect the power of the powerful

- The Capper-Volstead Act: to increase the power of the seller

- The Packers and Stockyards Act and the Perishable Agricultural Commodities Act: to limit the behavior of the actors in the marketplace, but accept the existence of their power

Mr. O'Brien then introduced the panel members. Mr. Stumo addressed the case of *Pickett v. Tyson Fresh Meats, Inc.*; Professor Carstensen the operation of monopsony power in agriculture markets; Mr. Small his case against the Maine's wild blueberry processors on behalf of farmers.

Stumo: The plaintiff cattle owners in *Pickett v. Tyson Fresh Meats, Inc.*, ("*Pickett*") won a jury verdict of $1.28 billion under the Packers and Stockyard Act ("PSA") for anticompetitive acts occurring during the period from 1994-2002. PSA is a "public utility like" statute. It has a producer focus, but the consumer benefit is relevant. *Picket* involved an unfair competition style of claim. Under the PSA, packers cannot undertake courses of action to manipulate price. The jury found that Tyson had used captive supplies of cattle to lower the price structure in the "bid/ask" market for cattle. On February 17 the *Pickett* jury came back with its verdict in favor of the plaintiff. On April 23 the judge granted the defendant's Rule 50 motion on grounds that the plaintiffs had failed to prove that the defendant's conduct was without any pro-competitive

effect.[1] In addition to the inherent difficulty of proving a negative, this ruling seems inconsistent with the rule of reason applied to most other types of monopolization cases. Professors Peter Carstensen, Roger McEowen and Neil E. Harl filed an amicus brief on behalf of the Organization for Competitive Markets ("OCM") ") and approximately 50 farm, ranch and consumer organizations in the *Pickett* appeal. A copy of the brief is available at OCM's website: http://competitivemarkets.com/ocm1.html

Carstensen: The Packers and Stockyards Act ("PSA") takes the view that farmers have rights. The February 17 Federal Trade Commission/Department of Justice Workshop on Horizontal Merger Guidelines examined the different incentives with respect to monopsony:[2] monopsony prices may be easier to agree upon, monopsony coconspirators may be easier to seek out, and, therefore, monopsony has different implications for antitrust law. More specifically:

1. Collusion can be more inclusive. How are you going to cheat - raise prices?
2. The risk of retaliation for the exercise of unilateral power is lower.
3. Whenever there is a public market that is used as a vehicle for determining prices in private transactions, there is an incentive to manipulate the public market. For example, Kraft has a strong incentive to dampen the public market cheese price in order to get lower private contract prices.
4. Arbitrage opportunities are limited.
5. Market shares needed are much less to ensure monopsony power.
6. The impact of where the harm hits is different.

So a different metric is needed for abuse of buyer power.

Small: The plaintiffs in the Wild Blueberries case[3] received a smaller verdict than the plaintiffs in *Pickett.*[4] There are 800 growers of wild blueberries in Maine. Many lose money. Processors have started growing their own wild blueberries. There are ten processors, four of whom account for 90% of the production. Many growers hire processors who deduct the cost of their work from what they pay the growers for the berries. One effect is that the grower is forced to sell to the processor who did the work. Harvest occurs in August. Blueberries have 48 hours to be processed before they rot. Consequently, processors buy in a very local market. Once frozen, the blueberries can be sold worldwide. The price paid to the grower is a total unknown except for the largest growers. The field price is announced by the processors about six weeks after delivery, and payment could be delayed even further. Essentially, processors back out the field price from their own sales price. The case involved two conspiracies: (1) to fix prices and (2) not to compete. Despite political pressure, wild blueberries are an important part of the Maine economy, the plaintiffs prevailed in what could be describe as a true David versus Goliath story.

Members of the audience engaged in a lively discussion with the panelists which raised the

1 Pickett v. Tyson Freshmeats, Inc., 315 F. Supp. 2d 1172 (M.D. Ala. 2004).

2 That is, the differences between monopoly and monopsony.

3 *See* Pease v. Jasper Wyman & Son, 845 A.2d 552 (Me. 2004).

4 "Cohen, Milstein, Hausfeld & Toll partner Daniel Small won a $56 million verdict last week in a price-fixing class action against three blueberry processing companies in Maine." Jenna Greene, *Blueberry Hill*, Legal Times, Nov. 24, 2003, at 14.

following points and questions, with an number of concerns expressed about the use of the Capper-Volstead Act to immunize co-operatives from antitrust liability:

• Historic laws and systems are out of date and need to be revised. The Department of Agriculture has the power to facilitate the working of the markets and won't use it to stop opportunism and manipulation. Some of these markets are thin with the result that as little as three half-hour trading sessions may set nationwide prices. Both the Clinton and the Bush administrations are to blame. Competition policy should guide decision-making, but antitrust law can't do it alone.

• Co-operatives ("co-ops") (1) can perform a productive function, a way to get around bottlenecks, *e.g.*, grain elevators, but (2) they can also be cartels - quasi labor union arrangement - which is okay if the purpose is to create countervailing power, but in many instances this cartel function is no longer appropriate.

• We need to rethink what we want these markets to be and authorize intervention where co-ops overcharge. We need to expand the power of the Secretary of Agriculture to regulate co-ops.

• A lack of transparency in the operations of co-ops creates significant problem in determining when and where intervention is appropriate. We need to find out more about what these co-ops are up to.

• State laws may be defining what is a co-op. Distinctions seem to be drawn between traditional co-ops and "value added" co-ops, which are really processors.

• Blueberry co-ops were effective at creating countervailing power.

• We should be very concerned about how the Capper-Volstead Act exemption has been used strategically, *i.e.*, to support mergers to monopoly. The problem seems especially acute when co-ops purchase non-co-op processors. Maybe the exemption should be limited so as to prohibit conduct remedies but allow structural remedies under traditional antitrust laws.

• It may be that once an organization achieves monopoly status, it no longer qualifies as co-op. Similarly, the Maryland & Virginia case[5] suggests that once a co-op obtains a monopoly, it becomes subject to antitrust law.

• Vicky Woeste's book[6] provides useful background on Capper-Volstead Act, including its relationship to the antitrust case against Sun-Maid.

• Tremendous concentration exists in the retail, processing and the dairy industry itself. There is no consumer benefit from this three tier concentration. Downstream market power gets reflected back up.[7]

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5 Maryland and Virginia Milk Producers Association, Inc., v. United States, 362 U.S. 458 (1960).

6 Victoria Saker Woeste. The Farmer's Benevolent Trust: Law and Agricultural Cooperation in Industrial America, 1865–1945 (1998).

7 The work of Richard J. Sexton, U.C. Davis, was mentioned in support of this point.

- Consumer groups are sympathetic to antitrust intervention. The spread between the price to the farmer and the price to the consumer increases over time. Agriculture is an area where gains from antitrust enforcement could be made because the power disparity is so huge.

- The agriculture sector needs a brokerage interface similar to the stock market.

More questions and comments would have been considered but for the lack of time. The discussion demonstrated an extraordinarily high level interest in the applicability of antitrust law to problems of buyer power in the food and agriculture sectors of the economy.