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Title: Legal and Economic Issues with the Courts' Rulings in *Pickett v. Tyson Fresh Meats, Inc.,* a Buyer Power Case

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Abstract:

In the historic cattle trial, *Pickett v Tyson Fresh Meats, Inc.*, Plaintiff cattlemen alleged that Tyson/IBP used captive (contracted) supplies of cattle ready for slaughter to manipulate the cash market, in violation of the 1921 Packers & Stockyards Act (PSA). After a five week Trial in Federal Court, the Jury found Tyson/IBP guilty on all counts and assessed actual damages of $1.28 billion, which applied to a large but unspecified number of cattle, likely 10-50 million head.

Justice for Plaintiff cattlemen was short, as the Trial Judge set aside the Jury's verdict—a rare but not unprecedented legal action—and entered summary judgment for Tyson. The Eleventh Appellate Court subsequently sided with the Trial Judge. In 2006, the United States Supreme Court denied without comment Plaintiff's Petition to rehear the case, thus ending legal activities in *Pickett v Tyson* and effectively killing similar legal action pending under the same Trial Judge against two other major beef packers, Excel (Cargill) and Swift (ConAgra). Together the three packers account for over 70% of fed cattle slaughter.

In essence *Pickett* was filed under the PSA, tried under Sherman and Clayton antitrust law, and overturned, in part, under the Robinson-Patman Act, with the Trial Court and the Appellate Court implicitly appointing themselves as fact-finders. This is not how the American judicial and legislative system is supposed to function.

The Courts gave a narrow and extreme interpretation to the antitrust rule of reason and to the meaning of "unfair" in the PSA. The PSA as well as the Sherman and Clayton Acts may be greatly weakened if not essentially repealed if the Courts' Opinions in Pickett come to dominate case law.

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KEYWORDS: Market Power, Buyer Power, Vertical Relations, Enforcement Agencies, Economic Analysis, History of Antitrust, Price-fixing

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Legal and Economic Issues with the Courts' Rulings in
***Pickett v. Tyson Fresh Meats, Inc.*, a Buyer Power Case**

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"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." Thomas Jefferson, 1789.

Introduction

Plaintiff cattlemen alleged in *Pickett v Tyson Fresh Meats, Inc.*, that Tyson/IBP used captive (contracted) supplies of slaughter cattle to manipulate the cash market, in violation of the 1921 Packers & Stockyards Act (PSA). After a five week Trial in Federal Court, the Jury found Tyson/IBP guilty on all counts and assessed actual damages of $1.28 billion. The damage award applied to a large but unspecified number of cattle, likely 10-50 million head. Punitive damages were not allowed.

Justice for Plaintiff cattlemen was short, as the Trial Judge set aside the Jury's verdict—a rare but not unprecedented legal action—and entered summary judgment for Tyson. The Eleventh Appellate Court subsequently sided with the Trial Judge. On March 24, 2006, the United States Supreme Court denied without comment Plaintiff's Petition to rehear the case, thus ending legal activities in *Pickett v Tyson* and effectively killing similar legal action pending under the same Trial Judge against two other major beef packers, Excel (Cargill) and Swift (ConAgra).

This article emphasizes three significant and troubling legal and economic issues from the historic litigation. First, the lawsuit alleged Tyson violated the PSA, yet the Trial Judge's instructions to the Jury and the Jury Verdict form reflected Sherman and Clayton case law including the antitrust "rule of reason (ROR)." The ROR was not included in the plain language of the PSA but emerged from a 1911 Supreme Court opinion in a Sherman antitrust case. Perhaps more importantly, the Courts incredibly narrow and extreme interpretation of the ROR—not allowing a balancing of pro business benefit with harm to the market—is not consistent with dominant legal or economic thinking.

Second, the Courts endorsed Tyson's argument that a "meeting the competition" defense applied, a defense that is not a part of the language of the PSA or PSA case law, but a muddled legal and incomprehensible economic concept contained in the Robinson-Patman price discrimination legislation and associated case law. The Courts' also ignored a recent Department of Justice (DOJ) statement that a meeting the competition defense conflicts with the goals of the Sherman Act.

Third, the Trial Judge's post-Trial rulings and the Appellate Court's subsequent opinion dwell at great length on their "interpretation" of the facts of the case. At issue is whether the Courts presumptuously inserted themselves above the Jury as fact-finders in the case, contrary to the 7^{th} Amendment to the U.S. Constitution that establishes the Jury as the only fact-finder in civil litigation.

Pickett v Tyson Fresh Meats, Inc. (abbreviated *Pickett*) was first filed in 1996 against Iowa Beef Packers, Inc. (IBP). With litigation well underway, Tyson Fresh Meats, Inc. acquired IBP in 2001. After thrice making its way through the 11th Circuit Court of Appeals over Class certification issues, a Class was finally certified by the presiding Senior Federal Judge on December 26, 2001. The Class was comprised of cattlemen who sold slaughter cattle to Tyson *exclusively* on the cash market.

Lead attorneys representing *Pickett* filed similar lawsuits in Nebraska Federal Court in 2002 against Cargill (Excel), and ConAgra (Swift) beef packers. In an unusual development less than two days after these cases were filed, the Trial Judge in *Pickett* agreed to preside over both. Consequently, the same Federal Judge, the same Plaintiff attorneys and the same Plaintiff economist represented independent cattlemen against the nations Big Three packers. Together these three packers accounted for over 70% of fed cattle slaughter. Having the three cases under the same Trial Judge provided an unprecedented legal opportunity to provide forward-looking injunctive relief[1] desired by Plaintiffs.

Pickett reached trial on January 12, 2004 in United States District Court for the Middle District of Alabama with a Senior Federal Judge from Nebraska presiding. After about three weeks of testimony by Plaintiff witnesses and about one week of testimony by defense witnesses, the Court submitted the case to the Jury. After deliberating most of five days, the Jury found Tyson/IBP guilty on all counts and assessed actual damages[2] of $1.28 billion over the Feb. 1994 through Oct. 2002 period. The damage award applied to a large but unspecified number of cattle, likely 10-50 million head. The Court did not allow punitive damages.

A Brief Antitrust History of the Meat Packing Industry

Allegations of anti-competitive behavior by meat packers have cyclically characterized the cattle industry almost since it evolved from the Chisholm Trail. Cattlemen’s claims that the meat packers were colluding began in the late 1880s. At the time, the Big Five packers (Armour, Cudahy, Swift, Wilson and Morris) operated what became known as the Veeder Pool. Every Tuesday representatives from each company met in the office of Swift’s lawyer, Mr. Veeder, to set price and divide up the market for the week.

In 1902 the U.S. Department of Justice (DoJ) filed charges of conspiracy and restraint against the big packers, resulting in a 1903 injunction against them, with legal activity continuing for about three decades. Despite the injunction, the Veeder Pool continued in one form or another for decades. An extensive and complex investigation culminated with a 1918 Federal Trade Commission (FTC) report to President Woodrow Wilson. It stated,

> *“…(there was) evidence that unlawful combination and conspiracy were practiced by the five largest meat packers, and that collectively they held a dominating or monopolistic power in the meat business. Furthermore, it was made evident that the meat packers were using their enormous power and*

[1] Injunctive relief would likely have involved the Court re-writing legal rules regulating business practices in both the cash and contract markets for slaughter cattle.
[2] The P&S Act allows for actual damages only and does not provide for attorney fees; in contrast, cases under the Clayton and Sherman Antitrust Acts allow for treble damages and attorney fees.

wealth to extend their control into many branches of the food business wholly unrelated to the business of meat and its by-products. … Among the methods of unfair competition used by the big packers of which the Commission found evidence may be mentioned the following: Bogus independents, local price discriminations, short weighing, acquiring stock in competing companies, shutting competitors out of livestock markets, and manipulation of livestock prices.…"

The Federal Government intervened in 1920 with a consent decree under the Sherman Act requiring divestiture of assets by the Big Five. This action was followed in 1921 by Congressional enactment of the PSA[3].

The U.S. Supreme Court affirmed divestiture in 1928. However, in 1930, Swift & Co. and Armour & Co. and their subsidiaries—no longer under the shelter of a consent decree—requested that they be allowed to renege on part of their agreement with the government. Specifically, they petitioned the Court that they be permitted (1) to own and operate retail meat markets, (2) to own stock in stockyard companies and terminal railroads, (3) to manufacture, sell and deal in groceries, (4) to use or permit others to use their distributive facilities in handling such commodities, and (5) for Swift to be permitted to hold interest in public cold storage warehouses and to sell fresh milk and cream. In 1932 the U.S. Supreme Court denied their petition[4].

The Supreme Court's 1932 recounting of the 1920 action against the meat packers reveals the broad scope of antitrust issues[5],

"The charge was that by concert of action the defendants had succeeded in suppressing competition both in the purchase of live stock and in the sale of dressed meats, and were even spreading their monopoly into other fields of trade. They had attained this evil eminence through agreements apportioning the percentages of live stock to which the members of the combinations were severally entitled; through the acquisition and control of stockyards and stockyard terminal railroads; through the purchase of trade papers and journals whereby cattle raisers were deprived of accurate and unbiased reports of the demand for live stock; and through other devices directed to unified control. Having eliminated competition in the meat products, the defendants next took cognizance of the competition which might be expected from what was characterized as substitute foods. To that end, so it was charged, they had set about controlling the supply of fish, vegetables, either fresh or canned, fruits, cereals, milk, poultry, butter, eggs, cheese and other substitute foods ordinarily handled by wholesale grocers or produce dealers. Through their ownership of refrigerator cars and branch houses as well as other facilities, they were in a position to distribute substitute foods and other unrelated commodities with substantially no increase of overhead. Whenever these advantages were inadequate, they had recourse to the expedient of

[3] A 1920 article by Virtue provides an excellent discussion of legal and economic issues leading up to the PSA.
[4] United States v. Swift & Co., 286 U.S. 106 (1932).
[5] *Ibid.*

> *fixing prices so low over temporary periods of time as to eliminate competition by rivals less favorably situated. Through these and other devices there came about in the view of the government an unlawful monopoly of a large part of the food supply of the nation. The prayer was for an injunction appropriate to the case exhibited by the bill."*

Déjà vu. Sixty-four years after the Supreme Court wrote the above, independent cattlemen called for similar injunctive relief, although *Pickett* narrowed alleged illegal behavior to the market for fed cattle.

Concern over collusive packer business practices continued long after the 1920 divestiture. In 1948 the Federal Trade Commission filed an anti-trust complaint accusing the Big Four of continually *"…conducting … operations … along parallel non-competitive lines."* The FTC charges were eventually dropped in 1954 because the court ruled that behavior prior to World War II was irrelevant in the 1950s industry.

Massive structural changes in the meat packing industry began anew about a hundred years after the Veeder Pool was established. Before divestiture in 1920, the concentration ratio or market share of the four largest firms (abbreviated as CR4) totaled about 45%. With the 1920 divestiture and other changes, the CR4 dropped to about 20% until the late 1970s. Then the industry began to consolidate, in part due to ConAgra's acquisition of Swift, Armour, Spencer and Monfort over the period 1976-87, essentially reversing divestiture. The CR4 reached 50% in 1985, higher than what it was before divestiture, then rose to over 80% in the early 1990s. By the mid-1990s, a single packer—Tyson (then IBP)— purchased about 35% of slaughter cattle.

Why Legal Action?

Partial backward vertical integration through captive supply relationships[6] between beef packers and selected feeders began in the late 1980s. Almost immediately some cattle feeders—the sellers—alleged that the large packers—the buyers—were using captive supplies to manipulate the cash market. Some of the most enlightening statements about how captive supplies could be used to influence the cash market were made not by cattle feeders, but by Bob Peterson, who began his career as a cattle buyer and who, as CEO of IBP, was responsible for acquisition of about one-third of fed cattle slaughtered nationally over 17 years.

Peterson emphasized the leverage the packer obtained in the cash market with captive supplies in talks to cattlemen in 1988, just before IBP (now Tyson) had significant captive arrangements. He again emphasized the problems with captive arrangements twice in 1994.

[6] Although the Appellate Court claimed *that "Captive supply is Pickett's pejorative term …"* academic and USDA reports reveal that it was in widespread use prior to *Pickett* and that it was simply a generic reference, not necessarily pejorative, to many kinds of contractual and relationship agreements between a feeder and a packer. Marketing agreements, which had a base price tied to an announced cash market price, comprised about 80% of Tyson's captive supplies. Tyson did not directly own cattle feeding operations, although they did have joint ventures comprising less than 5% of their captive supplies in later years of the Class period.

In a 1988 talk to the Kansas Livestock Association, Peterson maintained,[7]

> *"…our competitors are promoting contracts … and seeking more. These (forward) contracts coupled with packer feeding could represent a significant percentage of the fed cattle during certain times of the year… Do you think this has any impact on the price of the cash market? … you bet! … We believe that it's having a significant impact on the market—on the cash market place.* [8]*:"*
>
> *"…we believe that some of those who are feeding cattle and using forward contracting are creating aberrations within the market place by coming in and out of the market; that is not reflecting the true value of the cash market."*
>
> *"But with the packers in the feeding business and forward contracting, there's going to be a major, major shift against the leverage system."*
>
> *"In my opinion the feeder can't win against the packer in the real fair play if we go into the feeding and the hedging program."*
>
> *"Do you think that if we had a million cattle on feed and we thought cattle were going to get higher we'd kill ours first and wait for yours until last? Or do you think we'd kill yours first and wait for ours until last? Do you think if it's going down we're going to buy yours and wait for ours until last? This is pretty basic. Boy Scouts and Girl Scouts are nice, but when you get back to money in the bank and the facts, I'm telling you the facts."*

In 1994, after IBP had entered into extensive captive supply arrangements, Peterson stated[9]:

> *"… not formula cattle but packer-fed cattle, which can be killed early or late to fill a particular time frame, be it a day or a week grant the packer far greater flexibility to move in and out of the market. On the way down (in price), he kills his cattle first and on the way up, last."*

Peterson's 1994 statement also applies to marketing agreement (also called "formula") cattle as well as packer-owned cattle because the packer generally decides the day of the week on which marketing agreement and other captive cattle were slaughtered. So with captive supplies committed to slaughter in a particular week, the packer can slaughter or acquire them early (late) in the week if they expect price to go down (up). With packer-owned cattle this would simply reduce the price the packer paid for slaughter cattle purchased on the market that week. But with marketing agreement and other captive supplies with a base price tied to the market or to the in-plant average cost, Tyson has a magnified incentive to play this within-week game

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[7] Affidavit of Lee Isaac, dated July 26, 2002, containing the transcript of Bob Peterson's July 1998 speech to the Kansas Livestock Association, pp. 7-8.
[8] From the affidavit of Lee Isaac, July 26, 2002.
[9] Remarks by Robert L. Peterson to the Kansas Livestock Association, December 2, 1994. Peterson made similar statements at a Cattlemen's meeting at IBP headquarters on July 26, 1994

because it affects not only the price paid on the cash market but also reduces the cost of the previously committed captive cattle[10].

Marketing agreements with a base price tied to a cash market price distort buyer incentives. Distorted incentives are apparent to buyers, as is evident from the following statement made by a Tyson cattle buyer to Randy Stevenson[11]:

> *"… an IBP cattle buyer … looked at high quality cattle we had on our show list for sale. The market was about $66/cwt in the cash market, based on live weight. (He) was very complimentary of our cattle's quality. He said his hands were tied and he could not offer more for the cattle, despite their above average quality. (He) said 'In the old days I would have been able to offer $67.50 for these cattle, but now paying more would screw up 20,000 formula cattle.' It was completely clear to me that (the buyer) was telling me paying a higher price for out cattle would influence prices for cattle bought on a formula contract (marketing agreement) basis, off the cash market, before the transaction involving our cattle occurred. We lost money in this deal because IBP would not allow its buyer to engage in competitive bidding."*

Here is the simple arithmetic of marketing agreements. Suppose that the base price for the 20,00 head of formula cattle was the top-of-the-market price. Such contracts exist. Also suppose that another packer—maybe a very small packer--had already established the weekly top-of-the-market price at $66.00. If the Tyson/IBP buyer pays Randy an additional $1.50/cwt ($18/head) for his pen of 1,000 high quality cattle, then the "additional cost" is the extra $18,000 for Randy's cattle, *plus an extra $360,000* on the 20,000 head of formula cattle. Paying Randy an extra buck fifty on 1,000 head would have cost IBP an extra $378,000. Obviously, IBP would not bid $67.50 in a $66.00 market. Looked at another way, offering $67.50 for Randy's pen of high quality cattle would have been the equivalent of offering $117.00/cwt in a cash market without the captive arrangement. Therefore marketing agreements distort buyer incentives.

In 1994 Peterson emphasized the leverage captive supply provided the buyer. He said,

> *"… I told you guys we weren't going to feed cattle. We are going to do what it takes to get the leverage that they got and I don't want you to take it as a threat, but accept it as a promise but I'm not going to sit there and let those guys feed x thousands of cattle, ride the wave up on their volume when they are selling using their own, buy yours on the way up on the wave and maybe taking theirs out first on the way down. Now we don't get that phenomenon but we get leverage off it … that's why we are doing it. Why do you think a … packer is feeding cattle? Same thing, same leverage, he calls it starters. I have to have some starters. It's just the facts."*

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[10] The game is actually more in terms of the day of the week in which cash cattle are obtained, and not necessarily the day of the week in which slaughter occurs.
[11] Affidavit by Randy Stevenson, dated October 11, 2002.

Independent cattlemen maintain that this within-week game played by packers affects the psychology of the market place, and works to the advantage of the packer by creating fear in the mind of the feeder that there would not be a buyer that week[12]. In fact, Peterson's repeated references to this game may have been an attempt to psychologically condition feeders into accepting a lower cash price. When impending captive supply deliveries are high and knowing the within-week game played by Tyson, feeders with cattle ready for slaughter may feel desperate and sell for a lower price than they would otherwise accept; thus captive supplies give Tyson the upper hand playing the psychology of the market.

On July 26, 1994 Peterson stated:

> *"I don't know if we should be proud or ashamed but I'm telling you we started formula pricing. Why did we do it? So we have the same leverage our competition had. And we feed cattle through the process of formula pricing."*
>
> *"Well, we aren't going to change. We will have formula—that is our way of feeding cattle."*

On December 2, 1994, he said:

> *"… I told your industry right here at the KLA convention (in 1988) that if it allowed packers to feed their own cattle, IBP (Tyson) would do whatever was necessary to level the playing field. Ladies and gentlemen, the leveling is called formula and contract buying. Thus far, we have been able to partially offset the leverage our competitors have by the use of formula cattle and contract buying. Will we stop doing it? No. Will we feed cattle? If we have to. As most of you know, our recent purchase of Lakeside Farm Industries in Canada includes a feedyard. I am only trying to tell you one thing. IBP (Tyson) will do whatever is necessary to remain competitive[13]."*

Peterson repeatedly referred to leverage (in the cash market) gained by packers feeding cattle. It should be noted that packer feeding averaged less than 5 percent of total slaughter during 1988-1998 according to GIPSA data, while Tyson's total captive supply increased from about 15% to near 60% of slaughter over the 1994-2002 period. Based on Peterson's claims, this gave Tyson leverage over the packers who were feeding, and also increased market power of packers collectively.

Despite Peterson's claims, USDA's response to independent cattlemen's call for help was to study the matter, which turned into study after study. Frustrated that, in their opinion, USDA/GIPSA was doing nothing other than wasting taxpayer funds to contract with

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[12] Fed cattle are best viewed as a perishable commodity since the optimal window for slaughter is only a couple of weeks long.

[13] To an economist, the word competition has many meanings, which can cause considerable confusion for Judges and others not well trained in economics. Here Peterson was referring to Tyson' actions relative to a rival in an oligopsonistic market; this should not be taken to imply that the resulting market price equals a truly competitive market price

academics for yet another study, a group of independent cattlemen decided to appeal to the Courts for enforcement of the PSA[14]. From the outset, *Pickett* was not ordinary litigation, or even at effort at jackpot justice; rather, it was, in the author's opinion, a genuine American cowboy showdown to the bloody end.

The primary goal of the named plaintiffs in *Pickett*[15] appeared to this author to be forward looking, focused much more on injunctive relief than on monetary damages for past behavior. Plaintiffs could have initiated legal proceedings with an injunctive relief request rather than beginning with litigation over past conduct by Tyson. However, Plaintiffs elected to begin with legal proceedings over past damages, anticipating that this would greatly strengthen their position in a subsequent injunctive relief trial. Had the *Pickett* Jury's decision stood, the next step under the PSA would have been an injunctive relief trial. Not long before the *Pickett* Trial began, perhaps as a portent of things to come, the Trial Judge reportedly told attorneys that he did not know how he could ever impose injunctive relief on Tyson.

Correlation v Causation

Antitrust law generally requires proof of *intent* to control or manipulate prices. In contrast, the P&S Act, under which *Pickett v. Tyson* was filed, has a lower standard in that the plain wording of the Act prohibits *"any course of business … for the* ***purpose or with the effect*** *of manipulating or controlling prices*[16] *…"* Therefore intent of Tyson was not an issue in the case. Rather, the issue was whether the business arrangements collectively referred to as captive supply, had the *effect* of lowering cash price.

Analyses of captive supply reported in the literature generally show a negative relationship between cash price and captive supply (see, e.g., Ward) particularly those based on recent data. Econometric analyses presented by Plaintiffs displayed an incredibly robust negative association of captive supply and cash price[17]. Even Tyson's expert witnesses—one an econometrician and the other an agricultural economist specializing in the fed cattle market--agreed under oath that there was a significant negative correlation between cash price and Tyson's captive supply. Thus an essential economic issue in *Pickett v. Tyson* was whether the negative relationship was due to a causal mechanism, or simply due to correlation. Consequently, the case could have been labeled *Causation v. Correlation* rather than *Pickett v. Tyson*[18].

[14] An interesting parallel with political activities almost a century prior is that, according to Virtue, the packers lobbied to have a study of the meatpacking done not by the Federal Trade Commission, but by the Department of Agriculture. After having this described as a "toothless, clawless method that would accomplish nothing," President Wilson directed the FTC, not the Agriculture Department, to lead the investigation the meat packing industry. (Virtue, pp 628-630)

[15] The list of named plaintiffs was dynamic during the lengthy legal evolution of the case, with individuals added or taken off, depending on class definition and other considerations. The list of named plaintiffs solidified when the Class was certified in December 2001.

[16] Section 202(e) of the Amended 1921 Packers and Stockyards Act. Sections 202(c) and 202(d) also refer to practices with the "purpose or with the effect."

[17] Plaintiffs presented over one hundred regression models estimated with different model specifications and with four data sets, including Tyson's confidential data.

[18] Similarly, much of the recent academic debate about captive supply has been over causality.

Academic debate over captive supply also focused on *Causation v. Correlation*. Early empirical studies of the captive supply issue presumed causation (see Ward for a review) until, in a USDA/GIPSA sponsored study, Schroeter and Azzam (SA) advanced a correlation hypothesis. To SA's credit, they appropriately stated that *"… we argue that the often-observed negative correlation between captive deliveries and price is* ***not necessarily evidence*** *of a causal linkage through which the use of captive supplies causes price to fall."* Nevertheless, some segments of the industry appeared to conveniently interpret the SA hypothesis as a refutation of causation or, worse yet, that any non-causal explanation trumped any plausible causal explanation.

The SA correlation hypothesis was central to Tyson's defense in *Pickett*[19]. In support of causation, Plaintiff's argued several mechanisms[20] of causality, including (a) market power, (b) distorted incentives due to marketing agreements having a base price tied to cash price, (c) preferential deals for selected captive feeders, and (d) use of captive supplies as a bargaining instrument along with information asymmetry favoring the packer over the feeder[21].

USDA/GIPSA commissioned the SA study with specific reference to whether captive supply should be prohibited under USDA's PSA regulatory authority[22]. Unfortunately, perhaps intentionally, GIPSA did not specify an evidentiary standard for the studies or ask the researchers in this or other captive supply studies to "weigh" the evidence.

Emergence of the Antitrust Rule of Reason

After concluding five weeks of testimony, the Trial Judge issued attorneys his draft charge (instructions) to the Jury and a draft verdict form. Reference to antitrust law and the rule of reason materialized in these documents drafted by the Court. Plaintiff lawyers argued to the Court that the draft jury instructions and verdict form reflected not the plain language of the PSA under which *Pickett* was filed, or from case law under the PSA, but reflected considerably stiffer standards established in Sherman and Clayton antitrust law. Plaintiff attorneys were largely unsuccessful in convincing the Court to adhere to what they thought was the plain language and Congressional intent of the PSA[23].

[19] In Post-Trial arguments, defense maintained that they had the *only* "scientific proof" that captive supplies did not cause price to go down.

[20] This is mostly semantics, but Defense referred to these as "theories" while Plaintiffs referred to them as "mechanisms."

[21] The latter mechanism is essentially what Peterson referred to as using captive supplies to gain leverage in the market.

[22] Independent livestock and poultry producers long-standing allegations that USDA was not enforcing the PSA was confirmed, first by a 1997 USDA Inspector General report on needed improvements in GIPSA's ability to investigate anti-competitive behavior, then by a 2000 GAO report critical of GIPSA. After the *Pickett* trial, a USDA Inspector General's report was harshly critical of GIPSA for widespread inaction and misrepresenting its PSA enforcement activities to give the appearance in was enforcing the PSA when it was not.

[23] Arguments by both plaintiff and defense counsel and the Court's position over contested aspects of the jury charge and verdict form are a matter of public record, available in trial transcripts for 2/9/2004

The Trial Court's placing of a PSA case in the context of Sherman and Clayton antitrust law is at the heart of post-trial developments, and merits further consideration. As later recounted by the Appellate Court, *Pickett* alleged violations of the PSA[24],

> *"Pickett and his fellow class members contend that Tyson's marketing agreements[25] violated the Packers and Stockyards Act. The relevant sections of the PSA make it: unlawful for any packer or swine contractor with respect to livestock, meats, meat food production, 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 … (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 …"*

It is enlightening to contrast the plain language of the PSA, as stated above, to the Trial Court's final instructions[26] to the Jury,

> *"The Packers and Stockyards Act forbids a packer from engaging in any 'unfair practice or device.' In the context of this case, 'unfair' is a legal term and has a very specific meaning. The Packers and Stockyards Act is one of the nation's antitrust laws. One purpose of these laws is to preserve our system of free and open competition.*
>
> *You must interpret the term 'unfair practice or device' using what is called a 'rule of reason.' Under that rule, conduct constitutes an unfair practice or device only if it unreasonably suppresses, restrains or destroys competition.*
>
> *To prove that IBP (Tyson) violated the Packers and Stockyards Act, plaintiffs must prove by a preponderance of the evidence that (1) IBP's conduct had an anticompetitive effect on the relevant market, and (2) the conduct had no justification or competitive benefit."*

The Trial Court could have used the plain language of PSA Sections 202(a) and 202(e) in the jury instructions, but chose instead to insert its own antitrust and ROR language. Jury Instruction No. 14, quoted above, contains a bundle of statements that were objectionable to Plaintiffs. First, the Court's exceedingly narrow but concrete definition of "unfair" is seemingly at odds with statements made by USDA/GIPSA, who is charged with enforcing the PSA. A USDA/GIPSA web site states, *"Whether or not a practice is 'unfair' is determined on*

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[24] *Pickett v. Tyson Fresh Meats, Inc.*, United States Court of Appeals for the Eleventh Circuit, No. 04-12137, August 16, 2005.

[25] The Appellate Court narrowed the contested business practice down to marketing agreements rather than captive supply in general. Thus, wording of the Appellate Court's opinion as well as their restatement of the verdict form is in terms of marketing agreements.

[26] *Pickett* v Tyson Fresh Meats, Inc., Civil No. 96-A-1103-N, US Dist Ct MD AL, 2004), Jury Instruction No. 14.

a case-by-case basis after reviewing the evidence[27]*"* yet the Court defined unfair before the Jury, presumably the fact-finder in the case, had deliberated over the evidence.

The Court also restricted the meaning of the word unfair to apply only to anticompetitive behavior, yet recent GIPSA[28] and GAO[29] reports maintain, *"The (PSA) prohibits anticompetitive behavior* ***and*** *unfair trade practices …"* The Deputy Administrator for PSA programs stated to a Congressional Committee[30], *"Engaging in any course of business for the purpose of effect of manipulating or controlling prices, creating a monopoly, or restraining commerce is also a violation of the (PSA) Act."* In the FY03 Budget Request to Congress, the GIPSA Administrator stated, *"GIPSA's … administers the (PSA) to promote fair and open competition, fair trade practices, and financial protection in the livestock, meat packing, meat marketing, and poultry industries. The objective of the (PSA) is to protect producers, growers, competitors, and consumers against unfair, unjustly discriminatory, or deceptive practices that might be carried out by those subject to the (PSA). To meet this objective, GIPSA seeks to deter individuals and firms subject to the (PSA) from engaging in anti-competitive behavior, engaging in unfair, deceptive, or unjustly discriminatory trade practices, and failing to pay livestock producers and poultry growers; and to initiate appropriate corrective action when there is evidence of anti-competitive, trade, payment or financial practices that violate the (PSA)*[31]*."*

Similar statements permeate USDA statements to livestock producers, to the public and to Congress. Thus to the extent that the statements quoted above are correct, the Court ignored not only the plain language of the PSA but also ignored the long-standing interpretation of the PSA by the governmental agency charged with its enforcement. Certainly the Court's very narrow yet concrete definition of what constitutes an unfair practice is in stark contrast to a commonly held belief that a long-standing problem with the PSA was that unfair had not been defined sufficiently well to make the Act enforceable.

A second contentious aspect to the Court's instruction to the Jury is that the PSA is *"one of our antitrust laws,"* even though the plain language of parts of the PSA—such as Sections 202(a-b)—do not specifically refer to anticompetitive behavior. The recent article by Rosales (2005) provides considerable documentation that the PSA was intended to be much more liberal than existing antitrust law. He states[32], *"Case law has recognized that the (PSA) was meant to be broader in scope than previous antitrust legislation."* In a similar vein, Kelly states, *"(The PSA) … fulfills a need for specialized regulation of these (livestock, meat and poultry) industries in recognition of their unique marketing and distribution process … The Act also' is one of the most comprehensive regulatory measures ever enacted*[33]*.' … As remedial legislation, the Act is liberally construed."* Even the American Meat Institute (AMI), self-proclaimed as representing the meat packers, asserted just two years before the *Pickett* trial

[27] www.gipsa.usda.gov/GIPSA/webapp?area=home&subject=lmp&topic=re-swf
[28] See, for example, www.usda.gov/documents/Agricultural_Concentrationd.pdf and www.gipsa.usda.gov/GIPSA/webapp?area=newsroom&subject=landing&topic=cc-ct00
[29] http://www.gao.gov/htext/d06532t.html
[30] Waterfield (2001)
[31] Shipman (2002)
[32] Rosales (2005), p. 13.
[33] Kelly (2002) references Donald A. Campbell (1981).

that[34], *"This Act (the PSA) is an additional layer of fair business practice mandates on meat packers,* ***above and beyond the Sherman Act and the Clayton Act*** *…"* A key difference between antitrust law and the PSA is that Sherman Act violations require proof of "intent" while the PSA has repetitive wording that practices with the *"purpose (intent) or effect"* are violations. Virtue's 1920 discussion of proposed legislation leading up to the PSA also suggests that Congress intended it to be much more liberal than the Sherman and Clayton Acts, and that proposed legislation predating the PSA include the wording "purpose or effect." Nevertheless, the Trial Court placed the PSA in the context of more restrictive antitrust law. Thus, the Court's instruction to the jury that the PSA was simply one of our antitrust laws is an anomaly.

The third contentious aspect is the Court inserting the antitrust ROR into a PSA case. ROR emerged in a 1911 Supreme Court Opinion in *Standard Oil Company v. United States* and *United States v. American Tobacco Company*. The ROR is generally attributed to Chief Justice Edward D. White, who wrote[35],

> *"[The Sherman Act was designed to prohibit] all contracts or acts which were* ***unreasonably restrictive of competitive conditions****, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals."*

Since the Supreme Court action establishing the ROR predated the PSA by only ten years, legislators could have included the Supreme Court's precise ROR wording in the language of PSA. Significantly, they did not. Therefore, those who interpret law based on plain wording of the legislation maintain that case law surrounding the antitrust ROR does not apply to PSA cases because the law does not use that wording or cite the 1911 Supreme Court Opinion. Nevertheless, the Court instructed the jury to apply ROR in *Pickett*, thereby departing from the language of the PSA.

A fourth contentious ROR instruction by the Trial Judge, and perhaps the most troubling, is the word "and" in *"IBP's conduct had an anticompetitive effect on the relevant market,* ***and*** *the conduct had no justification or competitive benefit."* The word "and" departs from dominant case law and mainstream economics because it does not weigh any pro-business justification with any harm to the market. This contentious instruction was reflected in the verdict form,

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[34] Boyle, J. P., AMI Statement of Ag Economists' Debate Over Packer Ownership Ban, 3/13/2002.
[35] As something of an aside, some feel that the ROR greatly weakened the Sherman Act. Historian Schwartz writes, "Yet, while the Court upheld the dissolution (of Standard Oil) ruling, the government had to accept an interpretation of the Sherman Act which greatly reduced that law's effectiveness. The Court ruled that Standard's practices constituted 'unreasonable' restraint of trade prohibited by the Sherman Act, rather than the type of 'reasonable' restraint, which the Act permitted. Thus was born the most curious *obiter dictum* ever indulged in by the Court - the so-called 'rule of reason' in antitrust cases."

which had separate questions dealing with harm to the market and business justification. This issue will be addressed in more detail after presentation of the verdict form.

The Verdict Form

The final Verdict Form issued by the Court asked Jurors to adhere to the Court's written instructions and answer each of the following questions based on the preponderance of evidence[36]:

> *1. That there is a nationwide market for fed cattle?*
>
> *2. That the defendant's use of captive supply had an anti -competitive effect on the cash market for fed cattle?*
>
> *3. That the defendant lacked a legitimate business reason or competitive justification for using captive supply?*
>
> *4. That the defendant's use of captive supply proximately caused the cash market price to be lower than it otherwise would have been?*
>
> *5. That the defendant's use of captive supply injured each and every member of the plaintiffs ' class?*
>
> If the Jurors answered "yes" to each of the above questions, they were also asked,
>
> *6. What amount, if any, do you find that defendant's of captive supply damaged the cash market price of fed cattle sold to IBP during the period from February 1, 1994, through October 31, 2002?*
>
> *7. Did the defendant's use of captive supply depress the cash market price for fed cattle purchased by IBP had an equal percentage for each year of the class period?*

The antitrust ROR has attendant issues of market definition and power[37]. It can be seen, therefore, that questions #1 (scope of the market) and #3 (business justification) on the *Pickett* jury form reflect more of an antitrust flavor than the plain wording of the PSA. Whether Tyson had a legitimate business reason, question #3, was at the center of post-trial legal

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[36] The evidentiary standard is worthy of note, particularly since academic articles and government reports dealing with the captive supply issue have not articulated what standard was used, if any, in arriving at conclusions about effects of captive supply on the market for fed cattle. There are two common legal standards in American jurisprudence, "beyond a reasonable doubt" and "a preponderance of evidence." The appropriate legal standard under the PSA and in civil proceedings under Sherman and Clayton Antitrust Acts is a preponderance of evidence. In *Pickett*, the Court stated in Jury Instructions that *"By a 'preponderance of the evidence' is meant the greater weight of credible evidence. … The greater weight of the evidence means evidence sufficient to make a claim more likely true than not. (Pickett v Tyson Fresh Meats, Inc., Civil No. 96-A-1103-N, US Dist Ct MD AL, 2004), Jury Instruction No. 10)."*

[37] See, for example, http://www.ftc.gov/opp/jointvent/3Persepap.htm

developments. But the Court's greatest departure from dominant case law was in separating business justification (question #2) from harm to be market (question #3). For Tyson to be found guilty, all 12 Jurors had to answer all of the first five questions in the affirmative. Wording of the questions as well as jury instructions therefore prevented the Jurors from weighing harm to the market with any pro-business justification for captive supplies.

Post-Trial Legal Developments

Prior to Trial, the Trial Judge indicated to attorneys that he was not inclined to enter an aggregate damage award (Jury question #6) since no one knew the true size of the Class, but that he was inclined to ask the Jurors for their opinion about damages in order to *"… have some parameter or some concept of what the jury believes to be the damages in this case to the cash market, assuming they find for the plaintiffs….*[38]*"* Shortly after the Jury's guilt verdict and $1.28 billion damage assessment, the Trial Judge lived up to his pre-Trial inclination by declining Plaintiff's motion for him to enter an aggregate damage award. Then, only two months after the Jury verdict came the legal shocker—the Trial Court struck (overturned) the Jury's verdict, a decision that was eventually endorsed by the Appellate Court.

The Trial Court's action centered on the Judge's opinion about Jury question #3. The Jury found Tyson's arguments that they had a legitimate business reason to be pretext, but the Trial Judge disagreed. In overturning the verdict, the Trial Judge, asserted, notably without any specific record citation,

> *"… the trial record is barren of any evidence which would permit the jury to conclude that defendant lacked a legitimate business justification for its use of captive supply. The evidence reveals that captive supply transactions permit defendant to achieve a reliable and consistent supply of fed cattle, allowing it to operate its plants in an efficient manner."*

The Trial Judge's assertion that the record was "barren" of evidence is at odds with the trial record. In an *Amicus Brief* supporting Plaintiffs McEowen, Harl, Carstensen and Stokes (2005), three of whom are law professors as well as economists, state simply, *"The Trial Court's opinion ignored the detailed economic analyses presented in the case."* Plaintiffs maintain that trial transcripts definitively reveal that the record was not barren of evidence but, in fact, that there was a wealth of evidence in the record. Plaintiff witnesses testified about extensive econometric analysis of weekly slaughter cost data showing no relationship between any weekly slaughter cost item and captive supplies, except for the robust negative relationship between captive supplies and the price Tyson paid for slaughter cattle. Plaintiffs also presented to the Jury charts showing that Tyson's captive supply varied considerably from week to week that could be taken by a jury as evidence captive supply was not more "reliable" (i.e. less variable)[39]. The Jury could have even concluded that some of the defense testimony and evidence actually supported Plaintiffs case. For example, the President of Tyson Fresh Foods testified that they could meet *all* of their slaughter needs from the cash market, albeit at a higher price. Defendant witnesses even testified that the number of field buyers had not

[38] Trial Transcript for Jan 13, 2004, pp 159-160.
[39] In fact, the coefficient of variation on Tyson's weekly captive supply slaughter was significantly higher than their weekly cash cattle slaughter over the 455 week long class period.

changed much over the lengthy class period during which captive supply changed dramatically; the jury could have taken this admission as a contradiction of the defense position that captive arrangements reduced Tyson's transaction costs.

The Trial Court had the authority to disallow any or all of the Plaintiff economists' analyses or testimony or disallow defense witnesses' testimony. None was disallowed. However, Post-Trial the Courts obviously turned a blind eye to plaintiffs evidence, including extensive econometric analyses, choosing instead to accept assertions by defense witnesses largely unsupported by quantitative data or analysis.

The Court's Interpretation of ROR in *Pickett*

One of the most profoundly troubling economic aspects of *Pickett* is the Court's lack of balancing any pro-business benefit (Jury question #3) with harm to the market (Jury question #2) under the ROR. Although academic literature and case law show some differences in both legal and economic interpretation of the ROR, a consistent and persistent theme for almost a century is the basic economic argument that any pro-business benefits derived from an alleged anticompetitive practice should be weighed against harm to the market. Economists Blair and Harrison (1993)[40] state,

> *"Under the 'rule of reason,' the practice is a violation if it can be shown that the anticompetitive effects of the agreement outweigh any possible procompetitive effects."*

Judge Posner (2001), a highly respected economist as well as judge, states[41],

> *"The cases now state the test as whether the defendant's (business practice) violates the Rule of Reason, that is, whether* ***on balance*** *it is anticompetitive, bearing in mind that 'anticompetitive' means reduces efficiency*[42]*."*

Horowitz (1999) maintains that there are three parts to the ROR test applied to horizontal restraints in an output market. These three parts, paraphrased for a vertical business practice in an input market, rather than horizontal restrains in an output market, are:

(1) A business practice fails a ROR test if it is not essential to the conduct of business and if an alternative arrangement that is less likely to affect welfare adversely is available. Passing this test is mandatory.

(2) A business practice also fails a ROR test if its likely result is a lower price (to the seller); that is, if it is exclusionary and denies sellers acceptable and competitive higher-price options. Passing this test, too, is mandatory.

[40] Blair and Harrison, p. 99
[41] Posner, p. 265.
[42] Since Posner's book includes standard discussions of economic surpluses, it is obvious that he was referring to aggregate economic efficiency here and not to efficiency for a single firm or subset of firms in the market.

(3) A business practice also fails the ROR test if it lacks clear transaction cost benefits that make the cooperative enterprise more efficient than any one of its competitors or if it lacks potential to enhance welfare in some other way. Passing this test is not mandatory because the restraint's effects might be neutral.

Consider applying to *Pickett* the three-part ROR test as stated above.

Test 1: Neither the Trial Court nor the Appellate Court appeared to give any consideration to whether an alternative to Tyson's captive arrangements existed[43]. McEowen, et al, state, *"… the Trial Court … assumed … that it was irrelevant to the analysis whether the defendant had alternative ways to accomplish its primary goal(s) without engaging in price manipulation[44]."* Thus, the Courts did not employ test (1) above, which Horowitz maintains is mandatory.

Test 2: The Jury unanimously concluded that Tyson's use of captive supplies depressed the cash market. Even the Appellate Court stated[45], *"… there was evidence at trial to support the jury's finding that the use of marketing agreements has resulted in lower prices for cattle both on the cash market and the market as a whole."* Thus, use of captive supplies failed test (2) above.

Test 3: As noted previously, the Trial Court asserted that the record was barren of evidence relating to whether there was transaction cost savings or other legitimate business reasons for engaging in captive supply, an assertion with which plaintiffs strongly disagree. Although the Court applied Test 3, it did so in a questionable way. As stated by McEowen, et al, *"…the Trial Judge, without record citation or detailed economic analysis,* ***assumed*** *some justification for captive supply existed …"*

In summary, Courts as well as economists have generally opined that the ROR requires *weighing* business justification with harm to the market to determine effect of the practice on aggregate economic efficiency. Neither the Trial Court nor the Appellate Court invoked any semblance of weighing, or any semblance of aggregate economic efficiency as measured by the concept of aggregate economic surplus (efficiency).

Meeting-Competition Defense

As noted previously, documented anti-competitive behavior by beef packers began with a written agreement between the Big Five packers to meet weekly in the office of Swift's lawyer, Mr. Veeder, to set price and divide the market for slaughter cattle. Jumping ahead over a hundred years, the first witness called by the defense in *Pickett v. Tyson* was, ironically, none

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[43] Historically cattle buyers made visual inspection of pens of fed cattle to ascertain quality, then bid accordingly. However, essentially all captive supply arrangements made post-slaughter adjustments for quality (called a grid or grade and yield). Advocates of captive arrangements assert that they were necessary to have such quality adjustments. However, Tyson's detailed transaction data show that they kept post-slaughter quality data on most pens of cattle, captive or cash, but did not necessarily give this information to feeders selling on the cash market. Thus, to the extent that cash transactions did not have quality adjustments, it was only because Tyson made it that way.

[44] McEowen, et al, p. 4.

[45] McEowen, et al, pp. 12-13.

other than the head buyer for Swift, accompanied in the courtroom by his boss and two of Swift's lawyers! Head cattle buyers for other packers were on Tyson's witness list, but were not called to testify.

The Trial Court's permission for Swift's head buyer to testify, particularly with similar litigation against Swift pending under the same Trial Judge, suggests an implicit acceptance by the Court of a "meeting the competition defense" before fully examining evidence about possible anti-competitive behavior by either Tyson or Swift.

In overturning the Jury Verdict, the Trial Court endorsed Tyson's "meeting the competition defense,"

> *"The evidence at trial was undisputed that if defendant was unable to offer captive supply arrangements to producers, it would have a much smaller pool of producers from which to buy cattle because those producers wishing to sell cattle via marketing agreements, formula sales, or forward contracts would sell their cattle to defendant's competitors. This would pose problems for the defendant, as it would have fewer cattle to choose from, and the quality and reliability of its cattle supply would likely suffer. Thus, defendant needed to use these sources of supply to be able to compete effectively with Excel, Swift, and other packers."*

A meeting-competition defense originated in the 1936 Robinson-Patman price discrimination Act which, because it was so poorly written, has largely been dismissed as incomprehensible by economists and essentially been declared dead by the legal community. It is therefore puzzling that the Courts would accept such an argument, particularly in a PSA case.

Since the Courts drew upon RPA price discrimination concepts, an interesting legal twist to the *Pickett* saga is that Section 202(b) of the PSA has a price discrimination feature stating that it is illegal to "*make or give any undue or unreasonable preference or advantage to any particular person.*" Yet *Pickett*, filed under 202(a) and 202(e), did not allege price discrimination under Section 202(b). Nevertheless, the Courts accepted a concept from price discrimination legislation as a defense.

Another interesting twist is that the Trial Judge would not allow Plaintiffs' economist to use the phrase "preferential price" in explaining to the Jury than this was one of several causal mechanisms supporting plaintiffs' claims of a sub-competitive price[46]. In contrast, defense witness Mr. Borck was allowed to testify that, *"…(the) attraction to this (type of arrangement) was a preferential price."*

Although the Trial Court placed *Pickett* in the context of antitrust law, the Trial Court as well as the Appellate Court apparently ignored the position of the Antitrust Division of the DOJ

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[46] Defense as well as plaintiff summarization of transaction data for over a million pens of cattle acquired by Tyson/IBP revealed that captive feeders received a substantial quality adjusted premium compared to feeders selling on the cash market. Plaintiffs' argument was that this premium resulted is aggregate supply response by captive feeders, thereby lowering cash price. Plaintiffs also advanced several other causal explanations for the robust negative relationship between captive supplies and cash price.

with respect to a meeting-competition defense. In a memorandum supporting excluding evidence related to a meeting competition defense in a Sherman case in *United States v. AMR Corporation (American Airlines)*, the DOJ position is perfectly clear,

> *"… there is no 'meeting competition' defense under Section 2 of the Sherman Act … a meeting competition defense to Sherman Act monopolization claims clearly would conflict with the goals of the Sherman Act.*[47].

It is peculiar, to say the least, that the *Pickett* Trial Court would accept, and the Appellate Court endorse, Tyson's meeting-competition defense since it is not in the PSA[48] and, as stated by the DOJ, may actually conflict with the goals of antitrust laws.

A meeting the competition defense smacks of "three wrongs make it right", particularly since the Trial Judge was presiding over similar legal action alleging that the so-called competitors, Excel and Swift, were engaging in similar business practices.

Who is the Fact Finder—the Jury or the Courts?

The 7th Amendment to the U.S. Constitution states,

> *"In Suits at common law … the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."*

Thus, Civil law cases like *Pickett*, the Jury is to be the fact finder; Judges are to insure that trials are conducted properly and Judges are to rule on legal issues only in the American legal system.

Numerous post-trial documents by the Courts reveal that, for whatever reason, the Judges were caught up in their own interpretation of the "facts" in *Pickett*. This is apparent from quotations cited previously such as "the trial record is barren of evidence." Placed on the legal scales, the weight of post-trial legal paper interpreting facts seems to far outweigh the weight of paper interpreting law. It is abundantly clear that the Courts turned a blind eve to plaintiffs' evidence; by so doing the Judges placed themselves above the Jury as fact finders. Whether the Courts violated the 7th Amendment is beyond the scope (and jurisdiction!) of this article.

Nonsensical Economic Reasoning

Many statements by both the Trial Court and the Appellate Court manifest poor understanding of economic concepts. Whether blame for this should be placed on plaintiff witnesses, on economists' multi-definition and often times fuzzy jargon, or on the Courts misunderstanding, is moot. A sampling of the Courts misunderstanding of basic economic concepts follows.

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[47] See, for example, *United States v. American Airlines*, Civil Action No.: 99-1180-JTM, Memorandum in Support of United States' Motion in Limine To Exclude Evidence Related to a Meeting Competition Defense (2001).
[48] McEowen, et al, maintain that a meeting the competition defense is inapplicable under the PSA; certainly it is not in the wording of the PSA or in PSA case law.

The Court's instructions to the Jury[49] included the statement, *"IBP claims that prices in the cash market are determined by the forces of supply and demand."* which is also an oft-heard assertion by packers[50]. This statement is essentially meaningless in the context of possible anticompetitive behavior; just because price is determined by supply and demand does not mean that price so determined is truly competitive or fair. Even in textbook models, price in an oligopsonistic market is determined by "supply and demand;" of course, such price is below the competitive price under a broad range of assumptions. Apparently the Court took Tyson's claim to mean that the PSA is not violated if price is determined by supply and demand, effectively gutting anti-competitive features of the PSA.

In overturning the Jury verdict, the Trial Court stated that, *"…plaintiffs' experts failed to develop a model from which such (price impact) conclusions could be drawn."* The Court then tries to rationalize this opinion with,

> *"The Court notes that IBP's (Tyson's) average cattle cost is virtually identical to the USDA average market price, indicating that the defendant paid the same amount for its cattle as the other market participants during the class period[51]."*

Approximate equality of Tyson's cash price with average cash price for the market is essentially a truism because the base price in Tyson's marketing agreements was generally tied to the cash market price. The Court chose to disavow Plaintiffs' testimony and hundreds of regression analyses showing that captive supplies depressed both average cash price and the price paid by Tyson, apparently in the mistaken belief that manipulation of the market by the defendant would result in a divergence of what Tyson paid from the average cash market price.

The Appellate Court stated,

> *"If a packer's course of business promotes efficiency and aids competition in the cattle market, the challenged practice cannot, by definition, adversely affect competition."*

This statement is troubling because both "economic efficiency" and "competition" can have many meanings to economists, as readers of this paper likely know all too well. Since the Judges did not define terms, it is not clear what they actually meant. The Courts assumed that captive supply aids competition, then further assumed that efficiency for an individual firm equated with aggregate economic efficiency. Just because a business practice increases economic efficiency to some market participants does not necessarily mean that aggregate market efficiency will be increased, as is well known in neoclassical economics[52]. It can be

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[49] *Pickett* v Tyson Fresh Meats, Inc., Civil No. 96-A-1103-N, US Dist Ct MD AL, 2004), Jury Instruction No. 12.

[50] Packers made similar claims a century before, "The packers, of course, protest that they are as helpless in the clutch of the 'great law of demand and supply' …, " Virtue (1920), p. 653.

[51] *Pickett* v Tyson Fresh Meats, Inc., Civil No. 96-A-1103-N, US Dist Ct MD AL, Memorandum Opinion, 2004, p 13, fn 3.

[52] With captive arrangements that do not change packer's incentives in the market for slaughter cattle, such as those with a fixed price, a case can be made that to the extent that such arrangements increase individual

shown using very basic economic reasoning that marketing agreements, because they distort packer's economic incentives, will decrease (not increase) aggregate market efficiency as long as any reduced transaction costs (from not haggling over price) is less than the efficiency loss due to sub-competitive prices[53]. Plaintiff economists tried to explain this to the Jury in terms of marketing agreements causing marginal cost of acquiring cattle on the residual cash market to be higher than it would otherwise be, with the resultant effect of a lower cash price. Obviously this explanation was lost on the Courts.

The Circuit Judges' stated view of Tyson's cattle acquisition practices also reveals of their misunderstanding of the marketplace and actually supports Plaintiffs allegation of sub-competitive prices[54],

> *"Tyson contends that, because there are not enough cattle in the market to meet the demands of the entire packing industry from week to week, and because it must purchase 200,000 head of cattle each week to keep its processing plants running at full productive capacity, the company has to struggle to keep a constant supply of cattle coming into its plants. Before 1994 Tyson had to negotiate individually for each pen of cattle it purchased. Its competitors were also negotiating on the same pens of cattle, and the producers were free to accept or reject Tyson's offered price for a pen. If Tyson's offers were rejected for enough pens, the company could not fill its factory for the next week and it would not have enough product to meet its customers' demands."*

Apparently the Circuit Judges endorsed the notion that *"… there are not enough cattle in the market to meet the demands of the entire packing industry from week to week."* To the extent that this was indeed true, it suggests that the price offered by packers was simply sub-competitive. The Appellate Court's claim, rather than being a reason for supporting the Trial Court's decision, lends credence to Plaintiffs' case that marketing agreements are anti-competitive.

Even testimony by Dick Bond, President of Tyson Fresh Foods, on the last day of testimony in the Trial[55], contradicts the Court claim that Tyson could not "fill its factory" without marketing agreements,

> *"Q (from Plaintiff Counsel). Well, let me see if I understand it. Are you saying that there is some price on the cash market that IBP (Tyson) could purchase the cattle that it needs to operate its slaughter plants?*

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economic efficiency in trade, they also increase aggregate economic efficiency. This is not true of marketing agreements, however, because they change packer's incentives (marginal cost of acquiring cattle on the cash market).

[53] See, for example, Taylor's (2005) simple numerical example of how marketing agreements increase marginal cost of acquisitions on the residual cash market.

[54] *Pickett v. Tyson Fresh Meats, Inc.,* United States Court of Appeals for the Eleventh Circuit, No. 04-12137, August 16, 2005.

[55] Parenthetical remarks added.

A. (Bond) If it wanted to go out and bid an extremely high price, it could; but it would go out of business. It has to compete with Excel and Monfort (Swift) and everybody else.
Q. But it is your testimony that at some price it could purchase the cattle it needs to operate its cattle plants?
A. Yes. I'm saying at a high enough price, it could get it."

An interpretation of Bond's statement is that if Tyson engages in price competition with Excel and Swift, then they would then have enough cattle to operate their slaughter plants. Taking this at face value suggests that the Courts legislated against competitive market clearing prices.

The Appellate Court continues,

"On the cash market there is a greater risk that Tyson's buyers will purchase too little cattle for its needs, or too much for its plants to process within the constrictions of the delivery dates."

This claim is simply inconsistent with extensive testimony about Tyson's weekly and daily buying practices. Field buyers called Tyson's head buyer four times daily to report transactions. The head buyer kept a running total of captive and cash commitments for each slaughter facility compared to weekly needs set by the processing division. The head buyer admitted that in these daily calls, he "set" the price field buyers could pay[56]. So if Tyson purchased too many or two few cattle on the cash market, a case can be made that it was the fault of two people—the head buyer and his counterpart in the processing division.

The above statement by the Court is also nonsensical in the context of the partially vertically integrated market in this particular case because it is the captive feeder who decides two weeks in advance the week in which cattle will be slaughtered, while cash cattle are generally acquired only one week before slaughter. Thus, on a weekly basis, Tyson has less control over impending captive commitments than over cash acquisitions[57]. The trial record is replete with evidence to this effect.

The Circuit Judges ended their Opinion captivated, in the author's opinion, by their mistaken assumption that the Plaintiff cattlemen—cowboys[58]—only wanted "independence,"

"Pickett and his fellow class members could have entered into marketing agreements with Tyson. Many of the producers who testified on Pickett's behalf had themselves sold cattle through them. With marketing agreements, producers do lose some of their independence because meat packers get to dictate the date of delivery and adjust the price to the actual yield of the

[56] Trial transcript for February 5, 2004, pp. 3010-3011.
[57] Tyson generally made the decision about the day of the week to slaughter both captive cattle and those acquired from the cash market the previous week.
[58] *Pickett* became known in some circles as "The Cowboy Hat Trial" because plaintiff cattlemen and their supporters who attended the trial wore their hats. This demonstration may not have set well with the Court.

cattle[59]. Some producers find the advantages of marketing agreements worth any loss of independence; it was, after all, producers who came up with the idea of marketing agreements. Other producers, like Pickett, place a higher premium on independence and prefer the cash market. They (Plaintiffs and independent cattlemen) are entitled to their preferences, but they are not entitled to force those preferences on other producers and on the packers."

Few would doubt that most cattlemen, including captive feeders, have a very strong desire to be independent. Nevertheless, the Judges' focus is troubling because independence or being a cowboy was not central to the Trial, was not central to oral arguments in the appeal, and definitely was not central to the legal issues.

The Circuit Judges asserted that it is not acceptable for independent producers to force their preferences on other producers and packers (see above quote). The legal and economic dilemma they seemingly overlooked is that their claim implies that it is acceptable for captive feeders and packers to force their preferences on independent producers.

The Judges also committed, in the author's opinion, the economic fallacy of composition, in that what is good for the individual feeder is not necessarily good in the aggregate[60]. A single producer may benefit from a marketing agreement, but if a large group of feeders have marketing agreements, cash price may be depressed. In fact, some feeders stated in public that they refused marketing agreements because they know that it would be bad for the industry even though it would be to their personal advantage. Another interesting economic aspect to this case is that to the extent that cash sellers were impacted (Jury question#2), feeders with marketing agreements were equally damaged because of the aggregate effect of marketing agreements on cash price[61].

Supreme Court Petition

Plaintiffs filed an *en banc* petition requesting that the full 11th Circuit Court of Appeals hear the case, emphasizing the three Judge Panel's mischaracterization of the case. This petition was denied. Petition was subsequently filed for the U.S. Supreme Court to consider *Pickett v. Tyson.*

Plaintiffs presented two questions to the Supreme Court pertaining to the Courts Opinions. The first question was,

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[59] The Appellate Court's statement that packers get to dictate the date of delivery is only partly true. Generally, the captive feeder commits cattle for slaughter at least two weeks prior to actual slaughter; the packer picks the day of that week. Marketing agreements generally have grade and yield (quality) adjustments as noted by the Court. What the Court fails to note is that Tyson's cash transactions were increasingly on a grade and yield basis. Thus, Tyson's own actions prove that there is an alternative way of having quality adjustments outside marketing agreements or other captive arrangements.

[60] Xia and Sexton (2004) also discuss this fallacy.

[61] For this reason, feeders with marketing agreements were initially included in the Class, but the Appellate Court struck down this Class in 2001.

> *"Whether the rule of reason analysis, and its requirements of (1) a detailed analysis of any anticompetitive business practice within an industry and (2) weighing the anticompetitive practice against any procompetitive benefit derived from that practice, remains valid or, as the Eleventh Circuit—the lone outlier on this question—determined, the rule of reason may be replaced with an inverted quick look analysis that approves anticompetitive practices so long as any procompetitive benefit derives from an anticompetitive practice."*

Plaintiffs' petition also addressed another PSA issue in the second question posed to the Supreme Court,

> *"Whether, as an issue of first impression that will resolve a deepening split among the circuits, a private plaintiff suing under section 202 of the (PSA), must show that a challenged practice has an adverse effect on competition or—consistent with the language of the statute—only that the practice was unfair, intended to manipulate or control prices, or has the effect of manipulating or controlling prices."*

The second issue—whether a plaintiff must show harm to competition under the PSA—was not central to *Pickett v. Tyson*; however, this opinion emerged from 11th Circuit's Opinion in another PSA case, *London v. Fieldale,*[62] shortly before their denial of *Pickett*'s Appeal. London, a contract poultry grower, prevailed at Trial against allegations of PSA violations by his integrator, Fieldale, only to have the conviction overturned by the Appellate Court because *London* did not present evidence of harm to competition[63]. Other Judges and Appellate Courts have ruled otherwise.

Plaintiffs' petition to the Supreme Court was denied without comment on March 24, 2006 thus ending legal action in *Pickett v Tyson*. With the Supreme Court's denial of *Pickett*'s Petition, similar legal action pending against Swift and Excel died.

In our legal system, the United States Supreme Court is expected to resolve inconsistent rulings by lower Courts. With the Supreme Court's denial to hear *Pickett*, inconsistencies in interpretation of the antitrust ROR and in whether Sections 202(a-c) of the PSA requires the plaintiff to show harm to competition, have been magnified. Livestock and poultry producers' legal rights under the PSA are seemingly more muddled that ever before. Inconsistent rulings by Circuit Courts may also frustrate any attempt by USDA/GIPSA to enforce the PSA since different policy may be required in different Federal Appellate Courts.

Closing Arguments by the Economist Representing Plaintiffs

Pickett v. Tyson began, in the author's opinion, in 1996 out of independent livestock producers' frustration that USDA/GIPSA was not enforcing the PSA. In that same year, the Western Organization of Resource Councils (WORC) submitted a petition for rule-making under

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[62] The Appellate Court made similar opinions at the same time in *Glass v. Cagles* and in three other poultry cases.
[63] Attorneys representing London did not present any evidence relating to the issue of harm to competition simply because this had not been an issue in many previous PSA actions on behalf of poultry growers, and was not stated in the plain language of the legislation.

Section 202 of the Packers and Stockyards Act to then Secretary of Agriculture Glickman, requesting that the Secretary and USDA enforce the PSA to stop the present and future harm to producers from what they called abusive market practices of the major packers. Now, ten years later, WORC is still awaiting response by USDA.

The named Plaintiffs as well as several other independent cattle feeders felt that they were putting everything on the line in *Pickett v. Tyson*, anticipating that if they lost the case they might be boycotted by emboldened packers or otherwise put out of the cattle feeding business. Co-lead counsel for independent cattlemen David Domina and Joe Whatley, greatly outnumbered by Tyson's lawyers, convinced a Jury of Peers that captive supply arrangements were anti-competitive.[64] Justice for the cowboys was short as Federal Appellate Judges opined, "*… (Independent cattlemen) are not entitled to force those preferences on other producers and on the packers*[65]*"* thereby implying that other producers and the packers were entitled to force their preferences on independent cattlemen.

By accepting Tyson's meeting-competition defense in *Pickett*, the Courts have further muddled litigation under the PSA by invoking a defense that is not a part of the legislation. Furthermore, according to the Antitrust Division of DOJ, a meeting-competition defense is inconsistent with the goals of antitrust law.

The narrow interpretation of the ROR shown by the Courts in *Pickett*, if it comes to dominate case law, obviously weakens the Sherman and Clayton Acts, but seems particularly restrictive in the context of the PSA which was intended to be much more liberal than Sherman and Clayton antitrust law. As stated by McEowen, et al, *"… the Trial Court's decision (and the Appellate Court's decision) is so extreme in its deference to buyers that it would effectively nullify any protection from price manipulation afforded by the PSA."*

The Appellate Court stated, *"The PSA was designed to promote efficiency, not frustrate it."* A case can be made that the Courts' inconsistent interpretation of the PSA is what is "frustrating" economic efficiency, as fuzzy and uncertain legal rules may lead to behavior that does not maximize aggregate economic surplus (efficiency).

William Rosales (2005) recently maintained that *Pickett v. Tyson "represents an opportunity for the judiciary to reform the meatpacking industry … (and) awaken the P&S Act's intended power to dethrone the economic kings of the meatpacking industry."* Unfortunately, the Courts may have emboldened, not dethroned, the economic kings of the meatpacking industry.

Post-trial legal opinions by the Courts that depart significantly from the plain language of the law and depart from dominant case law, as was the case in *Pickett v. Tyson*, pinpoints another problem; namely, it is difficult to prove what you do not know you have to prove until the opportunity to prove it has passed.

[64] For a fascinating "fictional account" of a Juror, the interested reader is referred to "Julia is a Federal Juror," by David Domina, accessible at http://dominalaw.com/CM/Custom/TOCLiterature.asp
[65] *Pickett v. Tyson Fresh Meats, Inc.,* United States Court of Appeals for the Eleventh Circuit, No. 04-12137, August 16, 2005, p. 33.

Shortly after Tyson Fresh Foods announced their intentions to buy IBP (before Pickett reached Trial), Mike Callicrate, one of the named Plaintiffs in Pickett, had a chance encounter in a restroom with John Tyson, CEO of Tyson Foods. Callicrate introduced himself and said to Tyson that he was a plaintiff in a lawsuit against IBP.*"* Callicrate went on to explain to Tyson that the lawsuit, if successful, could cost his company more than IBP's total market capitalization. Callicrate says that *"Tyson very indignantly responded, You should be suing Wal-Mart [instead of IBP], they are the problem. They tell us what they will pay and we have no choice but to pay you less*[66]*."* Callicrate's response was, *"I would sue Wal-Mart, but because of Illinois Brick*[67]*, I do not have standing in federal court."*

To the extent that allegations in *Pickett* as well as John Tyson's claim are correct[68], the combined effects of market power exertion by large meat retailers and large meat packers are transferred upstream to independent cattlemen, the least powerful in the vertical chain. The Courts' Post-Trial rulings in *Pickett* along with inaction by GIPSA, the regulatory branch of USDA, make it abundantly clear that neither the Courts or USDA have enforced the plain language of the 1921 Packers & Stockyards Act, an Act clearly intended to permanently restore competition to cattle markets after the meat packer cartel of a Century ago.

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[66] http://www.nobull.net/CattlemenLegal/news/13walmarttyson.html

[67] The 1977 Supreme Court Ruling, *Illinois Brick Co. v. Illinois, 431 U.S. 720* denied standing to "indirect" purchasers, or parties not directly impacted by antitrust violations.

[68] Actually there may be something of a balance of power between the dominant meat packers and meat retailers, so John Tyson's claim of being at the mercy of Wal-Mart may be an exaggeration. Nevertheless, it appears easier for Tyson to transfer Wal-Mart dictates down to the less powerful cattlemen that to battle with a major buyer.

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