

DOJ Losses Cast Shadow Over Chicken Price-Fixing Trial

By **Celeste Bott**

Law360 (September 15, 2023, 6:45 PM EDT) -- The first civil jury trial in massive consolidated litigation accusing the nation's largest chicken suppliers of fixing prices is set to kick off in Chicago federal court Monday, and antitrust experts say they'll be watching to see what both sides have learned from the U.S. Department of Justice's recently fumbled criminal probe over the same alleged conduct.

The case was initially launched in September 2016, when private plaintiffs sued the nation's largest broiler chicken producers, and since then, the case has grown to include plaintiffs at nearly every point in the supply chain, from grocery stores to restaurants to consumers.

They claim the defendants raised the price of broiler chickens by unlawfully agreeing to work together to reduce supply between 2008 and 2009, and again between 2011 and 2012. The plaintiffs are largely separated into three classes: direct purchasers, commercial and institutional indirect purchasers, and end users.

Jury selection began Sept. 12, and the empaneled jurors are set to hear opening arguments on Monday. Numerous poultry producers including Tyson Foods have either been dismissed from the case or settled with the chicken buyers, leaving Sanderson Farms as the sole defendant facing jurors as of Friday afternoon.

Looming large over the civil case, however, are several criminal cases brought by the DOJ that fizzled out last year with a string of acquittals and mistrials after a guilty plea from Pilgrim's Pride and cooperation from Tyson Foods, antitrust attorneys told Law360.

Five chicken industry executives were acquitted of criminal antitrust charges following two mistrials, and the DOJ ultimately dismissed charges against nine other people who allegedly participated in the scheme, along with charges against Claxton Poultry and Koch Foods.

In total, federal prosecutors charged 14 people with participating in the scheme without winning a single conviction and secured a guilty plea from only one of the companies it accused of being involved.

For these civil plaintiffs to be more successful, they must establish a causal link between the exchange of data and the increase in chicken prices, not just the exchange itself, said Carl Hittinger, the national team leader of BakerHostetler's antitrust and competition practice.

"The key thing in these cases is that the exchange of sensitive information isn't enough to show a

conspiracy. They must show that the exchange of the information resulted in fixed prices," Hittinger said. "If the government wasn't able, with all their resources and capabilities, to convince a jury there was evidence of actual price-fixing ... I really wonder how strong the evidence is of the harm of actual price-fixing, let alone conspiracy."

But it will be worth watching to see if the plaintiffs present evidence no one else has used or a new theory of the case, he said.

"So they talked to each other and communicated with each other. What was done with that information? Was it given to decision-makers who used it to fix prices? How was I, as a consumer, harmed by these conversations?" he said.

The DOJ showed contact and communication, but the purchasers will have to do more to win at trial, according to Hittinger.

"It just didn't resonate with the jury that these were bad guys. Corporations can violate the law, well-known corporations that people know, that people buy products from. But you have to show these guys went rogue, went off the rails," he said. "The jury has to feel at the end of the day that something bad happened."

Hittinger noted the case was already whittled down considerably on summary judgment, when presiding U.S. District Judge Thomas Durkin shaved seven defendants and two theories of liability from the litigation ahead of trial.

Six non-settling chicken producers — Perdue Farms Inc., Fieldale Farms Corp., Case Foods Inc., Foster Poultry Farms, Wayne Farms LLC and Claxton Poultry Farms — will not be part of the trial, with Judge Durkin concluding the plaintiffs' evidence of an agreement was too weak to go before a jury.

Judge Durkin also handed agricultural statistics company Agri Stats Inc. a pretrial win in the sprawling case, saying the evidentiary record doesn't support accusations the company provided the chicken producers with confidential information, such as their competitors' sales, that would have helped inform the alleged price-fixing scheme.

Lisa Phelan, a partner at Morrison Foerster LLP and a former chief of the DOJ Antitrust Division's National Criminal Enforcement Section, pointed out that the plaintiffs initially alleged a 15-year conspiracy, but Judge Durkin narrowed the scope of alleged anti-competitive conduct to 2008, 2009, 2011 and 2012, driving the potential damages down.

"It might show why Sanderson is willing to fight," she said. "Now that the scope is narrowed, there's a lot less at stake."

This trial can serve as a warning to companies that historically shared information before the DOJ and FTC changed their policies last year, as it's no longer permissible to share information through a third party like Agri Stats, Phelan said.

"This case illustrates there's no kind of sharing that [enforcers] might not go after," she said.

And it's one worth watching given the size of the industry, the dollar value involved, and the fact that the product at issue is something many people purchase and consume, according to Phelan.

"Everyone buys chicken," she said. "This is something that everyone understands, and it's pretty easy to grasp why if prices were being rigged on chicken, everyone in America would probably be outraged."

The direct purchaser plaintiffs are co-led by attorneys from Lockridge Grindal Nauen PLLP and Pearson Warshaw LLP.

The commercial and institutional indirect purchasers are co-led by Cotchett Pitre & McCarthy LLP and Gustafson Gluek PLLC.

The end-user plaintiffs are co-led by Hagens Berman Sobol Shapiro LLP and Cohen Milstein Sellers & Toll PLLC.

Law firms representing direct action plaintiffs include Sperling & Slater PC, Sherrard Roe Voigt & Harbison PLC, Kenny Nachwalter PA, Polsinelli PC, Kaplan Fox & Kilsheimer LLP, Cera LLP and Lifvendahl LLC.

The case is In re: Broiler Chicken Antitrust Litigation, case number 1:16-cv-08637, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Lauraann Wood, Matthew Perlman and Bryan Koenig. Editing by Philip Shea and Emily Kokoll.