Published on *The National Law Review* https://natlawreview.com

Pork Price-Fixing Complaint Dismissed: Class Plaintiffs Will Amend

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Chief Judge Tunheim recently dismissed, with leave to amend, the class complaints in *In Re Pork Antitrust Litigation*. The *Pork* case— filed in the District of Minnesota against Tyson, Hormel, JBS and other major pork producers—alleged a conspiracy beginning in 2009 to inflate artificially the price of pork sold in the United States. While the court was "unwilling to force Defendants into significant and costly discovery without plausible allegations that they engaged in the conduct alleged," Judge Tunheim provided the class plaintiffs with a guide to cure the deficiencies of their respective complaints.

The *Pork Antitrust Litigation* is one of several recent antitrust cases lodged against "Big Food" producers. Like the *Broiler Chicken* antitrust suit pending in the Northern District of Illinois, the allegations in *Pork* involve the defendants' use of a benchmarking service to exchange sensitive business data and coordinated production cuts aimed at raising prices industry-wide. Both the *Chicken* and *Pork* complaints chronicle Big Food CEOs' practice of publically calling for production cuts as evidence of a conspiracy.

Because conspiracies are clandestine by nature, plaintiffs often lack direct evidence of the cartel. Antitrust law therefore allows plaintiffs to plead the existence of a conspiracy by inference when circumstances exist that signal-concerted action, or in the words of the United States Supreme Court, "evidence that tends to exclude the possibility of independent action."

Specifically, plaintiffs must allege that defendants engage in parallel conduct and that certain "plus factors" exist, making it more likely that the parallel conduct is the result of a collusive behavior. Judge Tunheim ruled that although the *Pork* plaintiffs demonstrated that the U.S. pork market endured supply contractions during the alleged conspiracy period, with the exception of defendant Smithfield, they failed to adequately allege that individual defendants decreased production, or that these market-wide periods of reduced output were a result of conscious "parallel conduct" by the defendants.

On this point, the court distinguished the sufficient allegations of parallel conduct in *Chicken*. Judge Tunheim noted that the *Chicken* complaints specified the individual companies responsible for

production cuts and the timing of the cuts, which, in turn, provided the needed support for the theory that the defendants acted in concert.

Judge Tunheim stated that he did “not believe that those deficiencies cannot be cured.” The class lawyers confirmed their intention to amend and the next iteration of the complaint will almost certainly include more detailed allegations on defendant-specific production cuts that the Court previously found lacking.

National Law Review, Volume IX, Number 254