AMERICAN MEAT INSTITUTE **Backgrounder**

Competition in the Livestock and Meat Industry: What the Courts Have Said

USDA's Grain Inspection and Packers and Stockyards Administration (GIPSA) on June 18 unveiled a long awaited proposed rule (the Proposal) that would establish, among other things, criteria regarding undue or unreasonable preferences or advantages, as mandated by the Title XI of the Food, Conservation and Energy Act of 2008 (Farm Bill). The Proposal, however, extends well beyond the Congressional mandate in several important areas.

Specifically, the Proposal would create distinct disincentives for packers to continue many of the marketing programs that have evolved over the past 15-20 years through relationships between livestock producers and packers. These partnerships are important because meat products today bear brands and with brands come consumer expectations. Packers enter into supply relationships with livestock producers to get the number and types of animals they need to provide certain products that are consistent from purchase to purchase.

An aspect of the Proposal that will have a chilling effect on the use of these marketing agreements is the view posited by the Grain Inspection, Packers and Stockyard's Administration (GIPSA) is the breadth and vagueness of the proposed regulatory criteria with respect to what would be "unfair."

For example, proposed section 201.210(a)(8) would prohibit "[A]ny act that causes competitive injury or creates a likelihood of competitive injury." The definition of "Likelihood of Competitive Injury" is as far reaching as it is vague. In that regard part of the definition includes the following:

> *"wrongfully depressing prices paid to a producer or grower below market value or impairing a producer's or grower's ability to compete with other producers or growers or impairing a producer's or grower's ability to receive the reasonable expected full economic value from a transaction in the market channel or marketplace"*

That definition raises many questions, including:

- *Is offering a marketing agreement to one producer and not another impairing a producer's or grower's ability to compete with other producers or growers?* In other words, if Farmer A raises pigs according to certain animal welfare standards that your customer prefers, while Farmer B does not, is it unjust to offer an incentive to Farmer A for making the extra effort and investment?

- *Does having a marketing agreement with one producer impair the ability to compete of a different producer who doesn't want such an agreement?* If a packer needs a steady supply of cattle and Farmer A wants to contract with you so that he can use his contract as collateral for a bank loan while Farmer B on principle prefers the spot market, is the agreement with Farmer A by its very nature impairing Farmer B's income?

- *What constitutes "reasonable expected full economic value?"* Who decides what that phrase means? What is reasonable? And how is economic value determined? How are expectations to be determined?

The uncertainty created by this standard and definition is heightened by the fact that the Proposal would lower the legal standard necessary for a disgruntled producer to sue successfully if that producer believed he had been treated unfairly. Specifically, proposed section 201.3(c) provides that

> *"A finding that the challenged act or practice adversely affects or likely to adversely affect competition is not necessary in all cases. [C]onduct can be found to violate section 202(a) and/or (b) of the Act without a finding of harm or likely harm to competition."*

Simply put, this proposed rule would make it easier for a trial lawyer to bring a P&S case and win than under today's legal standard. That is so because this proposed rule conflicts directly with the judicial precedent established in 11 decisions from eight different appeals courts in the following cases, all of which have found that proving harm or likely harm to competition is a necessary element to successfully proving a Packers and Stockyards Act violation:

- *Philson v. Goldsboro Milling Co. (4th Circuit)*
- *Wheeler v. v. Pilgrim's Pride Corp. (5th Circuit)*
- *Terry v. Tyson Farms, Inc. (6th Circuit)*
- *Pac Trading Co. v. Wilson & Co. (7th Circuit)*
- *Jackson v. Swift Eckrich (8th Circuit)*
- *Farrow v. United States (8th Circuit)*
- *IBP, Inc. v Glickman (8th Circuit)*
- *De Jong Packing Co. v. U.S. Dept of Agric. (9th Circuit)*

- *Been v. O.K. Industries (10th Circuit)*
- *London v. Fieldale Farms (11th Circuit)*
- *Pickett v. Tyson Fresh Meats, Inc. (11th Circuit)*

In some of these cases GIPSA was a party to the case and in several others GIPSA filed Amicus briefs. In every case, however, the interpretation of the law that GIPSA has proposed in the regulation has been soundly rejected by the courts.

In fact, the two most recent courts to address spoke directly to USDA's arguments and its efforts to seek different answers from different courts -- with some notable admonitions.

> *"The Government has appeared here as amicus to contend that the courts have had the PSA wrong and that it should be construed to make unfair practices unlawful without regard to competition. … We conclude that an anti-competitive effect is necessary for an actionable claim under the PSA in light of the Act's history in Congress and its consistent interpretation in the courts." Wheeler v. Pilgrim's Pride Corp. (December 15, 2009) (Emphasis added)*

> *"The tide has now become a tidal wave … all told, seven circuits – the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits – have now weighed in on this issue with unanimous results." Terry v. Tyson Farms (6th Circuit -- May 10, 2010)*

> *"Ultimately, Terry and USDA would have this court deviate from the course taken by the seven other circuits that have spoken on this issue, thus creating a conflict. We decline to do so. … the rationale employed by our sister circuits is well –reasoned and grounded on sound principles of statutory construction. … We therefore join these circuits and hold that in order to succeed on a claim under section 192(a) and (b) … a plaintiff must show an adverse effect on competition." Terry v. Tyson Farms (6th Circuit -- May 10, 2010) (Emphasis added)*

Given the legal history on this issue, USDA's proposals are much like the child who doesn't like the answer he gets from Dad and so he asks Mom. When Mom says no, he goes to Uncle Joe and then to Aunt Flo and finally, he just ignores the litany of no's he's received and just does it anyway.

In short, this aspect of the Proposal involves an executive branch agency refusing to abide by the repeated holdings of multiple federal appellate courts, which is contrary to how our system of government is supposed to work. The practical effect of USDA's refusal would be to destroy relationships built over decades that have improved the quality and variety of meat available to consumers. GIPSA needs to heed the court rulings and listen to the view of the majority of producers, and the packers, who are is saying unequivocally: "This rule hurts, not helps."

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