

Chicken Price-Fixing Case Pared Down As Trial Approaches

By **Lauraann Wood**

Law360 (July 3, 2023, 9:30 PM EDT) -- An Illinois federal judge has shaved seven defendants and two theories of liability from a massive consolidated antitrust case that is otherwise headed to trial in September over claims that broiler chicken producers including Tyson Foods engaged in an unlawful price-fixing scheme.

U.S. District Judge Thomas Durkin said Friday that although the plaintiffs have presented weak evidence of a price-fixing agreement among Tyson Foods Inc., Pilgrim's Pride Corp., Sanderson Farms Inc. and eight other broiler chicken producers, the economic evidence supporting their claims is strong enough to present to a jury. But they may only pursue their supply reduction theory at trial because they don't have enough evidence supporting their theories that early breeder-hen slaughtering and Georgia Dock price inflation played a role in the alleged scheme, Judge Durkin said.

Beyond the plaintiffs' economic evidence, "there are numerous examples of supposed competitors regularly exchanging sensitive production data with each other," Judge Durkin said. "A jury could find that such conduct is not the behavior of active competitors," he added.

Six 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, which is slated to begin in mid-September. Judge Durkin granted summary judgment to those companies on Friday, saying the plaintiffs' evidence of an agreement is even weaker and thus insufficient for trial against those producers despite the economic evidence against them.

Some documented communications in the plaintiffs' evidentiary arsenal mention those six producers. But none of the communications include statements by or from them, so the evidence can't support an inference that they joined any price-fixing conspiracy, Judge Durkin said.

"This difference is subtle yet critical," the judge said, adding that the plaintiffs have had years to bolster the weight of their evidence. Still, "nothing has come of their discovery efforts with respect to these six producer defendants," he said.

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 that the company provided the chicken producers with confidential information, such as their competitors' sales, that would have helped inform the alleged price-fixing scheme.

Evidence on that front suggests instead that Agri Stats' communications with the chicken producers stayed within the realm of generic advice, Judge Durkin said. Without more, "it is unreasonable to infer that they also facilitated communication about a supply reduction conspiracy," he added.

Representing Foster Farms, Carmine Zarlenga of Mayer Brown LLP said in a written statement that he is "extraordinarily thankful for the willingness and courage of Foster Farms and its General Counsel Randy Boyce to allow us to fight this litigation aggressively all along the way, and that we did, culminating in a decisive summary judgment" for their client.

Representatives for the other parties didn't immediately respond Monday to a request for comment.

The case was initially launched in September 2016 when private plaintiffs sued the nation's largest broiler chicken producers over price-fixing allegations. Since then, the case has grown to include plaintiffs at nearly every point in the supply chain, from grocery stores to restaurants to end-user consumers. They claim the defendants raised the price of broiler chickens by unlawfully agreeing to work together to reduce the bird's 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. However, several plaintiffs, including grocers Publix Super Markets Inc. and The Kroger Co., have opted out of proceeding as part of a class and are instead pursuing their claims as direct-action plaintiffs.

The case is moving along two tracks, the second of which includes plaintiffs that intend to pursue late-addition bid-rigging claims alongside their other price-fixing claims. The case's so-called "track one" plaintiffs have agreed to forgo the bid-rigging claims, according to Judge Durkin's order.

The plaintiffs on track two are waiting for a dismissal decision from Judge Durkin. He said on Friday he will address that "in due course."

The litigation has led to settlements large and small from several chicken producers that were named in the suit. The most recent of those deals include Harrison Poultry Inc.'s agreement last week to pay \$2.8 million to the commercial and institutional plaintiffs and an \$8 million settlement with Simmons Foods Inc. that received Judge Durkin's initial blessing earlier this month.

The U.S. Department of Justice also looked into allegations of anti-competitive conduct in the broiler chicken industry, and revealed its investigation in 2019 when it obtained a discovery stay from the court overseeing the private litigation.

That probe has netted a guilty plea from Pilgrim's Pride, which will pay a \$107.9 million criminal fine. Tyson Foods is also cooperating with investigators and applying for leniency. Koch Foods and Claxton Poultry Farms, among others, were indicted on antitrust charges, but the charges were later dropped.

However, the DOJ's pursuit of criminal charges against some of those companies' former executives has been less successful. For example, five executives from Pilgrim's Pride and Claxton Poultry were acquitted of the DOJ's price-fixing charges in July 2022 after two previous juries deadlocked in their deliberations.

That case had formerly included 10 defendants, but a judge called the DOJ's antitrust head before him to explain why it should be tried again after the second mistrial. He agreed to let the trial go on, but

the DOJ also dropped half of the defendants and was seen as facing long odds in the third go-round.

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 Cara Salvatore. Editing by Kristen Becker.