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Does the Packers and Stockyards Act Require Antitrust Harm?

Herbert Hovenkamp*

The Packers and Stockyards Act¹ (PSA) was enacted in 1921. Congress was plainly influenced by the 1919 publication of a Federal Trade Commission Report on the meatpacking industry.² Consistent with the FTC's jurisdiction and concerns, the Report dealt with deceptive and unfair practices as well as practices that were believed to violate the antitrust laws. The language of the PSA does much the same, mixing the two. The relevant provision states that:

It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

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¹ 7 U.S.C. §§191-229b. On the PSA and its history, see William E. Rosales, Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and its Modern Awakening, 2004 Wis.L.Rev. 1497; Christopher R. Kelley, An Overview of the Packers and Stockyards Act, 2003 Ark.L.Rev. 35. For conflicting views on use of the PSA as an antitrust alternative, see Peter Carstensen, *The Packers and Stockyards Act: A History of Failure to Date*, 4 CPI Antitrust J. (Spring 2010); Michael E. Sykuta, *Concentration, Contracting and Competition: Problems in Using the Packers and Stockyards Act to Supplement Antitrust*, 4 CPI Antitrust J. (Spring, 2010); Geoffrey Manne and Joshua Wright, A First Principles Approach to Antitrust Enforcement in the Agricultural Indus., 4 CPI Antitrust J. (Spring, 2010); GAO, Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices (U.S. General Accounting Office, Sep. 2000). In 2010 the Justice Department and Department of Agriculture conducted joint workshops on competition and agriculture. For transcripts, papers and summaries, see <http://www.justice.gov/atr/public/workshops/ag2010/index.html#overview>.

² Report of the Federal Trade Commission on the Meat-Packing Industry (1919).

- (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
- (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or
- (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, *if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly*; or
- (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article 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*; 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; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article; or (3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.³

The italicized portions of subsections (c), (d) and (e) of the statute include “restraint” and “monopoly” language, some of which resembles language contained in Clayton Act provisions.⁴ By contrast, subsections (a) and (b) appear to be tort-like provisions that are concerned with unfair practices and discrimination, but not with restraint of trade or monopoly as such. They do not contain an explicit requirement of competitive harm or threat of monopoly.

While subsections (c), (d), and (e) use antitrust-like language they may in fact reach somewhat further than the antitrust laws. First, their scope is not limited to

³ 7 U.S.C. §192 (emphasis added).

⁴ Sections 2, 3 and 7 of the Clayton Act all contain provisions limiting their coverage to situations where the effect of the stated practice “may be” substantially to “lessen competition” or “tend to create a monopoly.” Section 2 was subsequently broadened by the Robinson-Patman Act to reach specific injures to disfavored purchasers. See 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶¶2331-2340 (2d ed. 2005).

practices that would constitute single firm monopolization under §2 of the Sherman Act.⁵ The provisions also use “restrain[] commerce” language that reflects Sherman Act §1’s concerns about reduced output and higher prices.⁶ However, unlike §1 of the Sherman Act, one can violate subsections (c), (d), or (e) unilaterally. That is, they do not require an agreement or conspiracy, although subsections (f) and (g) additionally make clear that conspiracies to engage in these same practices are also prohibited. Second, while the antitrust-like language of these subsections recalls the “lessen competition” or “tend to create a monopoly” language of the Clayton Act, the provisions apply to a broader range of behaviors than the Clayton Act proscribes. The substantive provisions of the Clayton Act are limited mainly to price discrimination and related practices,⁷ exclusive dealing and tying,⁸ and mergers.⁹

Finally, the PSA includes a private action provision that enables private plaintiffs injured by a violation to recover “the full amount of damages sustained in consequence of such violation.”¹⁰ The private action provision also states that its remedies are in addition to any other common law or statutory remedies, which presumably include both federal and state antitrust laws.¹¹ However, by its terms the PSA allows only single, not trebled, damages.

⁵ 15 U.S.C. §2. See 3, 3A & 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, chs. 6 and 7 (3d ed. 2007).

⁶ 15 U.S.C. §1.

⁷ 15 U.S.C. §13. See 3A ANTITRUST LAW ¶745 (primary-line violations, proscribed mainly by original §2 of the Clayton Act) and Ch. 23 (secondary line provisions, reached by 1936 Robinson-Patman amendments).

⁸ 15 U.S.C. §14. See 9, 10, 11 ANTITRUST LAW Chs. 17 and 18 (3d ed. 2011, forthcoming).

⁹ 15 U.S.C. §18.

¹⁰ 7 U.S.C. §209(a).

¹¹ 7 U.S.C. §209.

As a matter of simple statutory construction it seems quite clear that subsections (a) and (b) are simple tort-like provision, not monopoly or antitrust-like provisions, because they do not contain the “restraining commerce” or “creating a monopoly” language that sub-sections (c), (d) and (e) contain. Further, the separate provisions are linked with the word “or,” which indicates that each provision standing alone can be the basis for a violation. It is also worth noting that § 5 of the Federal Trade Commission Act, passed a few years earlier than the PSA, prohibited “unfair methods of competition” and “unfair or deceptive acts or practices.”¹² The FTC Act provision separately recognizes concerns of competitive harm and the harms caused by fraud, deception, or unfair practices where no monopoly or cartel is in contemplation.

Notwithstanding this apparent statutory clarity, the Circuit Courts have overwhelmingly read an injury to competition requirement into subsections (a) and (b) of the PSA as well. In part they have relied on Supreme Court decisions declaring that the PSA resembles an antitrust provision.¹³ However, all of those statements are very general and refer to the PSA as a whole, not to its individual sections.¹⁴

¹² 15 U.S.C. §45(a).

¹³ See *Mahon v. Stowers*, 416 U.S. 100, 106 (1974) (per curiam); *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922).

¹⁴ E.g., *Stafford*, 258 U.S. at 513. Indeed, Justice Taft’s description of the PSA appears to refer to both anticompetitive and deceptive practices. See *id.* at 514-515:

The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil, which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission

The private PSA suits have involved situations that are almost certainly not antitrust violations. For example, in *Terry* the plaintiff was a chicken grower with a contract to raise chickens for Tyson Farms, a large processor.¹⁵ Terry alleged that Tyson refused to permit Terry to verify the weighing of Terry's chickens, accounted for them at too light a weight, and eventually terminated Terry's contract in retaliations for his efforts to organize growers against Tyson and also for his complaints to the United States Department of Agriculture. While a conspiracy among multiple processors to underweigh chickens would be actionable under §1 of the Sherman Act, unilateral underweighing would not appear to be an exclusionary practice and, in any event, there was no claim that Tyson was a monopolist. The Sixth Circuit dismissed the complaint

men, on the one hand, and the packers and dealers, on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce. The shipper, whose live stock are being cared for and sold in the stockyards market, is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men.

Justice Taft concluded that the PSA "treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East." *Id.* at 516. In accordance with *Stafford* and the legislative history, courts have understood that the PSA was intended to combat unfair and deceptive trade practices and other evils in addition to monopolization. *See Spencer Livestock Comm'n Co. v. USDA*, 841 F.2d 1451, 1455 (9th Cir. 1988) (quoting H.R. Rep. No. 85-1048 and noting that the PSA "was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics"); *Van Wyk v. Bergland*, 570 F.2d 701, 704 (8th Cir. 1978) ("One purpose of the Act is 'to assure fair trade practices'") (quoting *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1337 (8th Cir. 1971)); *United States v. Donahue Bros.*, 59 F.2d 1019, 1023 (8th Cir. 1932) ("One of the purposes of this act was to protect the owner and shipper of live stock, and to free him from the fear that the channel through which his product passed, through discrimination, exploitation, overreaching, manipulation, or other unfair practices, might not return to him a fair return for his product."). In keeping with these broader purposes of the PSA, this Court has found that conduct with no apparent effect on competition can violate various provisions of the PSA. *See Parchman v. USDA*, 852 P.2d 858, 864 (6th Cir. 1988) (sale of misweighed cattle).

¹⁵ *Terry v. Tyson Farms, Inc.*, 604 F.3d 272 (6th Cir. 2010).

after concluding that subsections (a) and (b) reached only practices that had an antitrust-like impact on competition.¹⁶

Clearly antitrust violations were among the array of practices that the FTC had in mind when it wrote its 1919 Report and that Congress was considering when it passed the PSA two years later. Just as clearly, however, its concerns were not limited to antitrust violations, as the exclusion of an explicit competitive harm requirement in Sections (a) and (b) makes it clear. In a case such as this we would not use highly

¹⁶ Other decisions include *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (unilateral conduct, defendant allegedly made preferable contracts to other growers than plaintiff, court held there must be proof of injury or likelihood of injury to competition); *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1230 (10th Cir.2007) (unilateral conduct, defendant implemented unfavorable conditions to a class of growers, court held that there existed a genuine issue of fact summary judgment was not appropriate but that competitive injury must still be shown) ; *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir.2005), cert. denied, 547 U.S. 1040 (2006) (unilateral conduct, defendant engaged in captive supply transactions with cattle producers, plaintiff must show defendants conduct adversely affect competition); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir.2005), cert. denied, 546 U.S. 1034 (2005) (unilateral conduct, defendant had entered into growing contracts with plaintiff who then claimed retaliation and improper weighing, court held that plaintiff must show adverse effect on competition); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir.1999) (unilateral conduct, defendant allegedly entered into marketing agreements between processor and feedlots violated the PSA, court held the agreement did not violate the act); *Philson v. Goldsboro Milling Co.*, Nos. 96-2542, 96-2631, 164 F.3d 625, 1998 WL 709324 (4th Cir. Oct.5, 1998) (unilateral conduct, plaintiffs complained of defendants weighing procedures who then allegedly terminated the contracts with plaintiffs in retaliation, court held that lower courts evidentiary findings and jury instructions concerning their PSA claims affirmed); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir.1995) (unilateral conduct, plaintiffs complained that defendants turkey handling practices violated the PSA, court upheld jury finding/awarded damages of violations of the PSA by defendant); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir.1985) (concerted action by defendants, officer of Department of Agriculture filed an administrative complaint against two dealers who agreed not to compete against each other, court upheld cease and desist order concerning this conduct); *DeJong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir.1980), cert. denied, 449 U.S. 1061 (1980) (concerted conduct, Packers and Stockyard Administration alleged that defendants had conspired to force auction stockyards to change their sale terms to place more risk on the seller rather than the packer, court affirmed violation and findings of the administration); *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir.1976) (unilateral and concerted conduct, plaintiffs complained that defendants sold them bad hams thus violating their contracts and the PSA; plaintiffs did not state a claim as the business practices did not adversely affect competition).

generalized statements about “monopoly,” made with reference to the PSA as a whole, undermine clear statutory language.