

A Road Map For Future Food And Ag Antitrust Litigation

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A recent string of opinions issued by the court in *In re: Processed Egg Products Antitrust Litigation* — or “the Eggs case,” as it’s colloquially referred to — likely will shape the course of antitrust litigation in food and agriculture for years to come. The Eggs case has been pending in the Eastern District of Pennsylvania since 2008 and involves allegations that producers of eggs and processed egg products conspired to reduce the nation’s egg supply. The case includes a direct purchaser plaintiff class, an indirect purchaser plaintiff class, over a dozen opt-out plaintiffs that are primarily large grocery retail chains and major food processors, most of the largest egg producers in the country, and their cooperative. The size, scope and scale of the case and the legal issues make it the template for similar complex antitrust litigation in food and agriculture.



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In the last decade, the food and agriculture industry has been a favorite target of antitrust class action litigation. These include cases in the mushrooms, potatoes, eggs and dairy industries. The purchasers of food and agriculture products in these cases typically claim that producers, marketers and other industry entities unlawfully conspired with each other to control or limit the supply of their respective products, and thereby raise prices in violation of Section 1 of the Sherman Act. The rulings in these cases are being closely watched because they address, or are expected to address, many critical issues that may impact food and ag companies potentially facing future claims based on similar theories of Section 1 liability. The Eggs litigation is perhaps the leading trailblazer among these cases.



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In July 2015, the defendants in the Eggs case individually and collectively filed several summary judgment motions, as well as motions to exclude testimony of the plaintiffs’ various experts. The plaintiffs cross-filed their own dispositive motions on discrete issues, and the parties later submitted post-hearing briefs. These briefs represent the culmination of an eight-year course of litigation, and their outcome will answer many of the key questions in the case.

In the last two months, the court has started to rule on these motions, issuing highly consequential rulings at a rapid pace. In fact, the court has issued eight rulings since July and four this month — a pace not often seen at the summary judgment stage in large antitrust class actions. Although several, important summary judgment motions filed by each remaining defendant as to their respective liability remain to be ruled upon, the current flurry of opinions suggests more are on the horizon.

Because the briefing on these motions remains almost entirely under seal, these recently issued

opinions (and those to come in the near future) offer a critical window into the legal arguments and evidence in the Eggs case. More importantly, they provide unique insight about how food and agriculture companies can defend against claims that they were part of a conspiracy to reduce the supply of their products.

Courts may individually analyze each business practice making up an alleged conspiracy, even where plaintiffs allege an overarching per se unlawful conspiracy: The plaintiffs in the Eggs case alleged that defendants, under the auspices of two industry groups, reduced the supply of shell eggs through the implementation of three interrelated programs. On July 9, the court issued a groundbreaking opinion granting in part the defendants' partial summary judgment motion on certain discrete legal issues.

First, the court found that it was permissible to compartmentalize the legal analysis of each category of alleged conduct or of each alleged program for purposes of application of per se or rule of reason analysis. In doing so, the court *rejected* the plaintiffs' argument that their allegations must all be evaluated under the same legal standard because they relate to a singular overarching conspiracy to artificially reduce supply that they contend is per se unlawful.

Second, the court found that the legality of the primary component of the plaintiffs' alleged supply-reduction conspiracy *must be analyzed under the rule of reason*. The court explained that the plaintiffs had presented zero evidence that the challenged business practice constituted an express agreement among competitors to restrain supply, and the record contained evidence indicating that the program provided certain procompetitive benefits. Key to the court's ruling was that the industry group's programs did not establish a limit on production and therefore allowed participants in the program the freedom to expand production to take advantage of the higher prices that supply reduction might produce. The court also relied heavily on evidence that egg supply actually increased during the alleged conspiracy period.

Third, the court found that the plaintiffs had not waived their claims under rule of reason because they had not exclusively pled a per se theory nor expressly disavowed the rule of reason, despite having made strenuous arguments in favor of finding per se liability.

Defendants should be prepared for the plaintiffs' theory of the case to evolve, even in the later stages of litigation: Nowhere is this more evident than in the very name of the case being discussed: In re: Processed Egg Products Antitrust Litigation. As the case name suggests, the plaintiffs' claims initially focused on "products" made with eggs (such as pancake mix). The plaintiffs later expanded the scope of their conspiracy to include shell eggs, thereby increasing the size of their alleged damages. However, in September 2015, the court denied class certification for an egg products subclass. In doing so, the court carved out the very products that were originally the core of the alleged conspiracy — processed egg products.

The alleged markets and class definitions are not the only aspects of these cases that evolve. The plaintiffs' legal theories and evidence may not crystallize until much later in the case. In denying one of the plaintiffs' Daubert motions, for example, the court in Eggs explained that the direct evidence of an agreement that the plaintiffs intended to use at trial "appear[ed] to be somewhat of a moving target," even at the summary judgment stage.

Plaintiffs may have trouble excluding the possibility of independent action in future cases: In the Eggs case, plaintiffs had alleged corollary agreements not to expand production capacity beyond the core industry programs. The court found that the plaintiffs had failed to present sufficient evidence of the

existence of such agreements. This likely will impact how plaintiffs plead similar cases in the future.

The Eggs plaintiffs had relied exclusively on statements by industry officials cautioning participants to avoid expansion and evidence that some defendants did not expand production. According to the court, this evidence fell far short of foreclosing the possibility that any defendant's decision to not expand was undertaken independently. The court also found that the plaintiffs had not established sufficient plus factors supporting a theory of conscious parallel behavior. Consequently, plaintiffs pursuing any such theory or inference of agreement will require more than just industry pronouncements about supply levels or production capacity.

Retaining experienced industry and economics experts early in the case may prove to be a game-changer: In one ruling, the court denied a motion by the plaintiffs to exclude the testimony of a defendant's expert who opined that one defendant acted in its self-interest during the conspiracy period by expanding production. The court characterized the plaintiffs' argument as premature. The court explained that, even if plaintiffs intend to present only *direct* evidence of a conspiracy at trial, defendants may present *circumstantial* evidence tending to show that any given defendant did not agree to the alleged conspiracy. According to the court, expert testimony regarding a defendant's economic self-interest or whether its production levels expanded is admissible to rebut plaintiffs' allegations that the defendant entered into a supply-reduction conspiracy.

In a separate ruling denying another one of the plaintiffs' Daubert motions, the court doubled-down on this view. In that ruling, the court allowed a different defendant's expert to testify that this defendant's decision to join an allegedly anti-competitive industry-wide program was motivated by economically rational, independent business reasons. The court explained that such expert testimony was important for purposes of this litigation because it sought to address how the plaintiffs' experts failed to adequately address this in their reports, ruling that such evidence is highly relevant to the fact finder's ultimate determination as to whether the defendants engaged in unlawful, concerted action.

Plaintiffs in these cases often try to knock out key portions of an economics expert's testimony, including on grounds that the economist has no independent knowledge of a particular food and agriculture industry. However, the court's recent rulings in Eggs may provide support for the argument that an economics expert may opine that one defendant reacts to economic or market forces differently than another defendant because it undermines the plaintiffs' argument that all defendants, when faced with price and supply pressures, responded uniformly by joining the alleged conspiracy.

Where there are numerous defendants in the same industry, each defendant will likely retain at least one expert of its own to testify about its economic self-interest in addition to retaining any shared experts. Therefore, counsel for any defendant in these types of cases would be well-advised to interview experienced experts early in the case in order to secure for his or her client the most qualified expert available.

Understanding the sources of supply and distribution chain of the products at issue can help trim the case. Although the court in the Eggs case previously denied class certification to purchasers of egg products, the six entities that sought to represent the class were still pursuing their claims as private litigants. Until last week, that is.

On Sept. 6, the court granted summary judgment in favor of the defendants and dismissed all claims based on purchases of egg products from the defendants. The court ruled that the plaintiffs' theory sought "umbrella damages," which are damages for overcharges paid to nonconspirators on the theory

that the nonconspirators' prices were inflated by the defendants' illegal activities. The court explained that such damages cannot be recovered by antitrust plaintiffs in the Third Circuit.

The plaintiffs' theory was that the defendants conspired to reduce the supply of eggs and that this raised the price of eggs, and consequently, raised the price of egg products made with eggs. However, the plaintiffs were unable to present any method for distinguishing between egg products made with defendant-produced eggs and egg products made with eggs produced by nonconspirators. In rejecting the plaintiffs' argument, the court distinguished cases where the defendants were vertically integrated producers that produced both the raw material component and the finished downstream product. In the Eggs case, the court found that the alleged conspiracy and misconduct took place entirely in the production of eggs — not at the (downstream level) production of egg products.

Therefore, depending on the complexities and nuances of a defendant's or industry's supply chain and depending also on the evidence available, it may be difficult for plaintiffs to pursue damages for purchases of certain downstream products from alleged members of a supply-reduction conspiracy.

Conclusion

The recent rulings in the Eggs case provide an important road map as to how courts will consider industry-wide price-fixing and supply-reduction claims, particularly in the food and agriculture field. Defendants will be able to use this road map to carve down and possibly defeat future analogous claims. For their part, plaintiffs surely will take the rulings into account as well, as they have done during the pendency of the Eggs case and other ongoing food and agriculture cases, to refine their own legal theories in response. On balance, however, the recent rulings in Eggs appear to provide precedent more favorable for future defendants in similar cases than for future plaintiffs.

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Disclosure: The authors previously represented a defendant that has since been dismissed in In re: Processed Egg Products Antitrust Litigation, and they have represented clients that were defendants and third parties in other food and agriculture antitrust litigation referenced in this article.

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