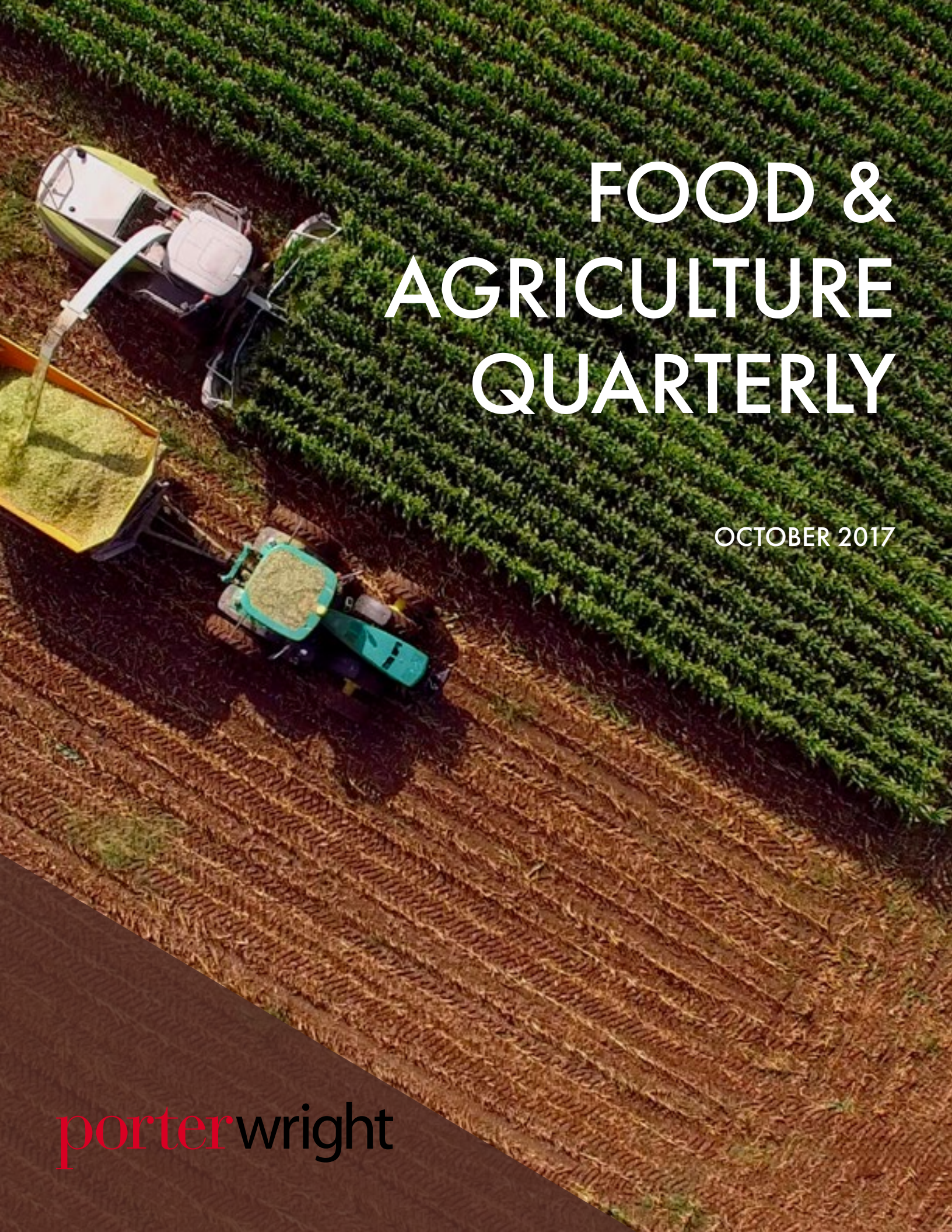

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editor's note

- JAY LEVINE

Welcome to our inaugural issue of *Food & Agricultural Quarterly* (FAQ). This new, industry-focused publication was designed to focus on the key issues food and agriculture industry stakeholders are facing – regardless of whether you are a small, family-owned farming operation or international food producer.

In our first issue, we bring together three rather diverse articles. First, Emily Taylor describes the phenomenon of urban farming, and the challenges facing such would-be agrarians. Next, Devan Flahive provides us with an update on the USDA food labeling program as it relates to genetically-engineered products. Finally, I'll walk you through the latest on a slew of antitrust class actions recently brought against major poultry processors.

We hope you enjoy the publication, and we urge you to send us your thoughts about topics you would like us to address in future issues!

Jay Levine
Editor

Helping urban agriculture to thrive

Local governments play a key part in aiding prospective urban farmers

EMILY TAYLOR

"Eating with the fullest pleasure – pleasure, that is, that does not depend on ignorance – is perhaps the profoundest enactment of our connection with the world." – Wendell Berry

While urban agriculture itself is a time-honored tradition, it has enjoyed a recent resurgence due to rising demands for local foods and an increasing popular interest in where our food comes from. Notwithstanding this surge in popularity, aspiring urban farmers face a number of obstacles before they can establish their own urban farms.

The rise of urban farms

Most urban agriculture projects are part of a broader cultural phenomenon often referred to as the "alternative food movement." This group includes farmers' markets, farm-to-fork restaurants and dining experiences, community gardens and other local-centric agricultural projects. At the heart of the success of these efforts is one unifying theme: people are paying more attention to the food they are eating and providing to their families. Consumers often are willing to pay more for food they perceive as possessing certain benefits, such as nutritional content or environmental sustainability. While the urban agriculture movement will never supplant modern industrialized agricultural production, it is on track to continue to supplement it in significant ways well into the future.

The resurgence of urban agriculture, however, has revived the traditional governance conflicts between rural and urban living. The largest obstacles facing many would-be urban farmers are the applicable zoning and nuisance ordinances, many of which may make it unlawful to practice urban farming. Many local zoning and nuisance codes were created during an era of urban planning that strived for, or even glorified, separation of uses, both as between urban and rural, and residential and commercial.

Governance for growth

Given the renewed interest in urban farming, there are tools governments can use to aid their prospective urban farmers. First, local governments can make changes to existing municipal codes. Municipal codes can be revised to make it clearer where certain types of urban agriculture can be practiced, under what conditions and the appropriate sizes of such operations. Localities that want to balance urban farming with maintaining the urban nature of the area can place limits on permissible lot sizes, the number of livestock that can be kept and the types of structures that can be built. Of course, permitting urban farming calls for some additional environmental regulation, including irrigation runoff, use of pesticides and provisions for sanitation.

Second, state governments can provide municipal authorities with the ability to lower property taxes on certain properties being used for urban agriculture as a way to incentivize and attract more urban farming in an area. This can be especially beneficial for localities with an abundance of vacant urban lots, usually the case in more historic neighborhoods that sit just outside the urban core of development.

Finally, state and local governments can exercise authority to appropriate and acquire land, usually private or vacant lots, for urban agricultural purposes. For example, in 2009 the Ohio General Assembly amended its Land Reutilization Program to create land bank corporations, permitting local governments to acquire non-productive land via tax foreclosure and implement procedures for reutilization of those lands. Governments wary of directly acquiring land can enter lease agreements with private property owners to reserve land for community gardens.

While most of the successful tools for incentivizing and facilitating urban agriculture are found at the state and local levels, federal tools also exist to support urban farming. These can include grants for private, local and state research projects, subsidies to purchase produce at farmers' markets and funding for educational community outreach.

The struggle between the ideals of rural and urban living will no doubt persist, and combining the two in urban farming will continue to challenge both regulators and those wishing to engage in urban farming. A combination of federal, state and local initiatives all can play a role in helping urban agriculture take meaningful roots in more traditionally urban locales, while accommodating the concerns of true urban living.

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GE Labeling Law update

From digital labeling to organics overlap

DEVAN FLAHIVE

Despite the U.S. Food and Drug Administration's declaration that genetically engineered foods are neither more or less safe than non-genetically engineered foods, the "Frankenfood" debate led multiple states to enact laws relating to the labeling of bioengineered food. Passage of the Federal Bioengineered Food Disclosure Standards Act (GE Labeling Law), however, relieved food manufacturers of the need to comply with a patchwork of different regulations by prohibiting states from establishing any disparate requirement relating to the labeling or disclosure of bioengineered food.

Digital or electronic labeling

The GE Labeling Law, which went into effect on July 29, 2016, mandates labeling of genetically engineered (GE) foods for human consumption by (1) on-package text or symbol; or, potentially, (2) digital or electronic methods, including but not limited to a QR code

or website link. Recognizing the technological requirements associated with digital/electronic labeling methods, the GE Labeling Law required the USDA to conduct a study on consumer access to inform its rulemaking.

When the USDA had not released this study by the statutorily-imposed deadline of July 29, 2017, the Center for Food Safety filed a lawsuit in California federal court alleging that electronic/digital labeling is inherently discriminatory to minority, low-income and elderly consumers, as well as Americans who live in rural areas. In response to this lawsuit, the USDA made public the results of the study. The study — undertaken by consulting firm Deloitte — concluded that, although researchers directly observed key technological challenges, such challenges could be overcome through appropriate implementation. Additionally, 62 percent of study respondents did not voice challenges that might impact their access to information in a digital link. The Secretary of Agriculture must still solicit and consider comments from the public on the study before determining the efficacy of the electronic/digital disclosure option and whether such option will have to be replaced with an alternative due to insufficient consumer access to bioengineering information.

Overlap with Organic Foods Production Act

The USDA's GE labeling regulations are slated for issuance in 2018. Recognizing overlap between the GE Labeling Law and provisions of the Organic Foods Production Act, the USDA has issued a Policy Memorandum clarifying its intent to maintain consistency between the two sets of regulations. Both the USDA organic regulations and the GE labeling regulations include definitions relating to bioengineered products, but none of the proposed rules for bioengineered food disclosure require modifications be made to the USDA organic regulations.

As a practical matter, the GE labeling regulations are narrower in scope than the organic regulations. For example, the GE Labeling Law exempts a food from being considered "bioengineered" solely because it is derived from an animal that consumed feed from, containing or consisting of a bioengineered substance. Conversely, compliance with organic certification entails that operations have verifiable practices in place to avoid all contact with GMOs, including genetically engineered feed, seeds and crops. Further, the GE labeling law provides that simply because a food is not required to bear the applicable disclosure, that does not mean the food is considered, in fact, 'not bioengineered,' 'non-GMO' or any other similar claim. With respect to the USDA's organic labeling policy, however, compliance with organic regulations is sufficient to make a claim regarding the absence of bioengineering in the food.

The USDA's proposed regulations are still on the horizon. Thus, key definitions that will trigger the GE Labeling Law's application, such as thresholds for GE ingredients, remain undetermined.

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Antitrust litigation heats up against poultry processors

Growers, distributors and consumers bring class action claims

JAY LEVINE

"As with many antitrust cases in the agricultural field, the plaintiffs argue that the structure of the industry permits an inference of collusion."

Large poultry processors are under fire from two distinct groups: contract growers and customers. Contract growers have filed class actions against processors claiming that processors conspired to suppress grower compensation, while distributors and consumers alleged that processors conspired to reduce output and raise prices. Because antitrust claims have long plagued the agricultural sector, it is important to review these cases and monitor their claims, successes and failures.

Contract chicken grower litigation

The various class actions filed by contract broiler chicken growers were brought against Tyson, Pilgrim's Pride, Perdue, Koch and Sanderson Farms and were consolidated in the Eastern District of Oklahoma back in June 2017. In these cases, plaintiffs allege a conspiracy among the poultry processors not to compete for broiler grow-out services. This

conspiracy, the plaintiffs claim, dates back to at least 2008 and violates both Section 1 of the Sherman Act — which makes it unlawful to enter into an agreement that restrains trade — and Section 202 of the Packers and Stockyards Act (PSA), which makes it unlawful for any live poultry dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device with respect to live poultry.

Plaintiffs assert the conspiracy actually comprises two alleged agreements: first, an agreement not to poach each other's growers, and second, an agreement to share information through Agri Stats, an independent data aggregator and benchmarking service. The latter, according to the plaintiffs, was the mechanism through which defendants colluded to suppress grower compensation. Plaintiffs' PSA claims focus solely on the non-public data exchange of grower compensation rates, mechanical aspects of grow-out houses, broiler weights, transportation costs, bird mortality, broiler growth rates and production rates for grow-out houses.

As with many antitrust cases in the agricultural field, the plaintiffs argue that the structure of the industry permits an inference of collusion, including the fact that demand for broiler grow-out services is inelastic. Plaintiffs also argue there are high barriers to entry and exit the broiler market, especially as these processors have high fixed costs associated with establishing a broiler complex and a distribution network capable of delivering broilers to grocery chains or wholesalers. The plaintiffs argue they are at the processors' mercy as the growers cannot easily leave the business once they have contracted to provide grow-out service because of the substantial financial investments they have made that are tied to broiler-specific equipment and facilities.

As expected, the defendants have moved to dismiss the lawsuit, claiming the complaint does not adequately plead an antitrust or PSA claim. Briefing on motions to dismiss will conclude on November 22, 2017.

Distributor and consumer class actions

In contrast to the above, the various class actions consolidated in Chicago against the major poultry processors (14 defendants in total) were brought by food distributors (Direct Purchaser Plaintiffs), commercial and institutional entities that purchased from the distributors (Indirect Purchaser Plaintiffs) and consumers (End-User Plaintiffs). These cases allege that the processors engaged in a supply management scheme that reduced output and raised market prices for processed chicken. The complaints allege a conspiracy to coordinate output and limit production by: (1) allocating markets for contracting growers, (2) restricting the supply of broilers through breeder flock reduction and early slaughtering, (3) manipulating a broiler price index, and (4) using alleged co-conspirator Agri Stats to circulate competitively sensitive data and as a mechanism for monitoring behavior of cartel participants. According to Plaintiffs, these coordinated steps were taken with the intended and expected result of increasing prices of broilers in the U.S.

As with the growers' cases, the defendants have moved to dismiss these actions. Amidst that briefing, on August 18, 2017, the Court preliminarily approved a settlement between

direct purchaser plaintiffs and defendant Fieldale Farms, pursuant to which Fieldale Farms also will provide substantial cooperation. The date of a Final Approval Hearing concerning the Fieldale Farms Settlement Agreement has not yet been set.

Bottom line

Consolidated agricultural markets are especially prone to lawsuits alleging violations of the antitrust laws, and vertically-integrated companies are vulnerable to claims brought by both their upstream suppliers and downstream customers. The more concentrated agriculture markets become, the more sensitive market participants must be to collaborating activities, such as information exchanges.

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