

Conspiracy For One, Liability For None In Egg Antitrust MDL

By **Bryan Koenig**

Law360 (June 15, 2018, 5:43 PM EDT) -- A Pennsylvania federal jury cleared three egg producers Thursday in multidistrict litigation alleging they conspired to fix egg prices, finding that only one of the three participated in an antitrust conspiracy and that there was no liability for that participation because it wasn't an unreasonable restraint of trade.

R. W. Sauder Inc., Rose Acre Farms Inc. and Ohio Fresh Eggs LLC had been the last three egg producers of around a dozen defendants left in the decade-old high-stakes case after the others settled for about \$150 million with a class of direct purchasers — including supermarket chains and major retailers like Wal-Mart along with small restaurants and other businesses — to resolve accusations of inflating the price of shell eggs by reducing the supply of hens.

The jury concluded that Sauder and Ohio Fresh Eggs were not involved in any antitrust conspiracy. Rose Acre, a much larger shell egg producer as the U.S.' second-biggest, was found to have participated in a conspiracy, but it still didn't matter thanks to a litmus test imposed by the judge.

The judge had rejected a "per se" illegality test, where an antitrust conspiracy alone would have been enough for liability, and instead required the purchasers to meet the "rule of reason" test requiring actual negative impacts on trade. The jury found none, meaning it never got to the question of whether the plaintiffs were injured; they'd claimed more than \$1 billion in damages, which could have yielded a verdict tripled to \$3 billion, according to counsel for Rose Acre.

An attorney for the purchasers, Stephen R. Neuwirth of Quinn Emanuel Urquhart & Sullivan LLP, told Law360 that options for appeal are being considered. "We do think that this case should have been decided under the per se standard rather than the rule of reason," Neuwirth said Friday.

The direct purchasers claim that through their membership in industry group United Egg Producers and participation in its certification program for treatment of hens, including concerning cage spacing, the defendants either participated in or encouraged programs that reduced supply. Additionally, they allege that the companies' participation in an export program for the cooperative U.S Egg Marketers was intended to increase domestic egg prices.

The case began in 2008, when egg product purchasers accused major egg producers of using the United Egg Producers certification program to execute a price-fixing conspiracy that limited the supply of eggs and increased prices.

The program imposed exact cage space requirements, completely prohibited backfilling — the practice of adding young hens to the cages of aged birds — and ensured that the facilities of producers in the program complied with the guidelines, according to court documents.

A class of egg shell purchasers was certified in 2015, and in August 2017, the producers lost their decertification bid, court records show. But after more than a month of trial and seven days of deliberations, the jury sided with the producers.

“It was a hard-fought battle against worthy opponents but we felt we had the merits on our side and were confident and pleased that the jury saw it that way as well,” an attorney for Sauder, Christine C. Levin of Dechert LLP, said in an emailed statement.

An attorney for Ohio Fresh Eggs, Joseph M. Callow Jr. of Keating Muething & Klekamp PLL, called the verdict a “great result,” arguing it’s clear the jury didn’t believe the plaintiffs’ economic theory for the case, which had centered in large part on the animal welfare requirements the purchasers had claimed were designed only to deflate supply. If the plaintiffs do appeal, Callow told Law360 that he was confident of Ohio Fresh Eggs’ chances.

“The court spent a lot of time on this case,” Callow said.

Attorneys for Rose Acre, Donald M. Barnes and Jay L. Levine of Porter Wright Morris & Arthur LLP, said Friday that the producer maintains that there was no agreement to reduce the supply of eggs. Barnes further said he was glad his client had been “finally vindicated” after “10 years of trench warfare.”

The direct purchaser plaintiffs are represented by Stephen R. Neuwirth of Quinn Emanuel Urquhart & Sullivan LLP, Ronald J. Aranoff of Wollmuth Maher & Deutsch LLP, Mindee J. Reuben of Lite Depalma Greenberg LLC, Stephen D. Susman of Susman Godfrey LLP, Michael D. Hausfeld and Jeannine Kenney of Hausfeld LLP, and Stanley D. Bernstein of Bernstein Liebhard LLP.

Rose Acre Farms is represented by Donald M. Barnes, James A. King and Jay L. Levine of Porter Wright Morris & Arthur LLP.

R.W. Sauder is represented by Christine C. Levin, Steven A. Bizar and Julia Chapman of Dechert LLP.

Ohio Fresh Eggs is represented by Joseph M. Callow Jr. of Keating Muething & Klekamp PLL.

The case is In re: Processed Egg Products Antitrust Litigation, case number 2:08-md-02002, in the U.S. District Court for the Eastern District of Pennsylvania.

--Additional reporting by Brandon Lowrey and Sophia Morris. Editing by Jack Karp.