FOOD & AGRICULTURE QUARTERLY

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editor's note

-JAY LEVINE

Welcome to our first FAQ of 2019. Last year was quite an active year in food and agriculture; choosing what to present was quite a challenge! That said, we hope that you will be pleased with our choices. Starting us off is Allen Carter's summary on the eggs antitrust class action trial. While very few antitrust cases actually go to trial, even fewer antitrust class actions go to trial. Certainly an interesting case with a number of unique aspects; and [Spoiler Alert] Porter Wright successfully represented the largest defendant. Next, we have a very interesting article from Devan Flahive concerning how the Bureau of Land Management decided to deal with the wild horse population in the Western part of the United States. As you will see, the decision affects not only wild horses but livestock farmers as well. Our next article comes to us via the *Ohio Agricultural Law Blog*, where Ellen Essman, a Senior Research Associate at Ohio State, discusses whether the type of nuisance suits that have been brought against Smithfield in North Carolina could be maintained in Ohio and what Ohio farmers should be aware of as these issues start to appear in other parts of the country. Jetta Sandin follows with a status report on many of the antitrust cases involving agricultural and food processors. And last, but certainly not least, Will Sjoberg from our International Trade Practice provides an update on our current (and ever-changing) trade laws, and in particular, how they impact soybean farmers.

I would like to take this opportunity to wish everyone a spectacular New Year and an outstanding 2019!

Jay Levine
Editor

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Special thanks to Ellen Essman, *Ohio Agricultural Law Blog* and The Ohio State University Agricultural & Resource Law Program.

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Egg producers prevail in a rare jury trial involving Sherman Act Claims

ALLEN CARTER

A group of egg producers prevailed at trial against a class of direct purchasers that alleged the nation's largest egg producers violated the federal antitrust laws by collectively trying to reduce the supply of eggs in the country. A class of direct purchasers of shell eggs had filed its original complaint in 2008 against 17 defendants: 14 egg producers and three agricultural cooperatives. The class had been certified to represent all individuals and entities that purchased shell eggs produced from caged birds in the United States directly from the defendants during the class period from Sept. 24, 2004, to Dec. 31, 2008. The class claimed damages in excess of $1 billion, an amount that was to be trebled if the class prevailed. During the course of nearly 10 years of litigation, most of the original defendants reached settlement agreements with the class, leaving only three egg producers to defend their conduct at trial. The case was tried before a jury in May and June 2018 over the course of 27 trial days in the United States District Court in the Eastern District of Pennsylvania.

The class argued the defendants were part of a price-fixing scheme consisting of three types of supply control activities; each of which they alleged were conducted by egg producers through the leading egg industry agricultural cooperative, the United Egg Producers (UEP), and an agricultural cooperative engaged in egg exports, the United States Egg Marketers (USEM). Most prominently, the class argued that the egg industry's standard-bearing animal welfare program, the UEP Certified Program, was actually a sham designed to control and limit the egg supply. Second, the class argued that USEM's egg export activity was designed to reduce domestic egg supply. Third, the class argued that UEP's cyclical management recommendations were designed to reduce egg supply during seasonal periods when the industry traditionally suffered low demand and collapsing prices. The class argued that three activities were combined to reduce domestic egg supply, and thereby, raise domestic shell egg prices.

The court had previously determined that UEP's Certified program would be adjudged under the rule of reason. The "rule of reason" required the jury to determine whether there was any concerted effort on the part of the defendants, and if so, the jury had to determine whether the benefits to competition from that concerted activity outweighed the harm to competition. Pre-trial, the plaintiffs elected to have all of the alleged unlawful conduct judged under that same standard. Additionally, plaintiffs had to prove that the class was injured by the defendants' actions. The court had ruled that the trial would be bifurcated, trying liability issues first, and thus, evidence related to damages was only to be presented after, and if, the jury found a violation of the Sherman Act had occurred.

With respect to the animal welfare program, the class complained most forcefully about three aspects of the animal welfare program:

- Cage-space provisions that required companies seeking certification to provide hens a minimum amount of square inches of space per bird
- A limitation on the practice of co-mingling birds of different ages known as back-filling
- A requirement that a company maintaining the animal welfare certification must provide 100 percent of the birds in its care with, at a minimum, the care delineated in the certified program's guidelines

The class alleged that those three provisions of the animal welfare program operated together to reduce the size of the national flock of egg-laying hens. The logic being if there are less hens in cages, then there are less eggs; if there are less eggs relative to a steady demand, then prices rise.

The defendants argued that there was no concerted effort to reduce the national flock size, and that the competitive benefits of their conduct outweighed any alleged harm to competition. With respect to the animal welfare program, the defendants argued and submitted evidence that retailers, consumers and animal activists had demanded the animal welfare program and had been involved in its development. The defendants presented evidence that the animal welfare program and the challenged provisions were based on the recommendations of a group of prominent animal welfare scientists. The defendants also argued and submitted evidence that the implementation of animal welfare standards was inevitable because of ongoing legislative initiatives, and that the program was narrowly tailored to achieve its animal welfare goals. Further, the defendants argued and presented evidence that the program did not reduce the size of the national flock, and instead, egg producers simply built new space to house the hens displaced by the cage-space standards. With respect to USEM's export program, defendants argued and submitted evidence that egg producers sold eggs into international markets because it was the best price producers could get at the time. With respect to the management recommendations, the defendants argued and submitted evidence that they never agreed with, or followed, the recommendations.

The jury agreed with the defendants, finding that two of the three defendants did not engage in any concerted effort to implement the aforementioned programs, and that the competitive benefits of those programs nevertheless outweighed any alleged harm to competition.

The case was the first to be tried in on-going multi-district litigation pending in the Eastern District of Pennsylvania. A number of cases involving large grocery chains that opted out of the class have consolidated and are expected to receive a trial date soon. The defendants' motion for summary judgment against another group of opt-outs bringing parallel claims for egg products, i.e. liquid, dried or frozen eggs that have been removed from their shells, is also pending after the court's original grant of summary judgment in favor of the defendants was reversed by the Third Circuit Court of Appeals. A putative class of consumers had also brought suit but the court had refused to certify that class and ultimately the suit was dismissed, with prejudice. ■

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In the interests of full disclosure, Porter Wright Morris & Arthur LLP represented the largest egg producer at trial.

Competition on the range triggers litigation: Wild horses vs. livestock

DEVAN FLAHIVE

Huge swaths of open rangeland in the western United States are the subject of an ongoing tug-of-war between groups representing the livestock industry and those seeking to preserve herds of wild horses. Through the acquisition of grazing permits, ranchers can rely on rangeland owned and managed by the federal government to sustain their livestock and, by extension, their livelihood.

Access to public lands is vital to western agricultural economies because private land is scarce, expensive and often already put to use for forage or otherwise unavailable for livestock grazing. These same public lands are home to wild horses that compete with livestock for forage and water.

In managing public lands across 10 western states, the federal Bureau of Land Management (BLM) must balance rangeland health with wild horse populations and the rights of ranchers holding grazing permits. The issue is that wild horse populations are collectively more than 200 percent above the population limits set in BLM land-use plans and rising. When wild horses are overpopulated in areas shared with cattle or sheep, grazing permitees cannot utilize their full allotment of forage and must eliminate livestock in order to avoid wholly depleting rangeland resources.

The BLM has a statutory obligation to remedy rangeland ecological imbalances. Under the Wild Free-Roaming Horses and Burros Act of 1971 (WHA), the BLM is required to compile and maintain current inventories of wild horses and burros on given areas of the public lands. Inventories are used both to designate appropriate herd management areas (HMAs) and to determine the corresponding wild horse population range that such HMA can support. Where an overpopulation exists in a given area, the BLM has wide discretion in how it addresses that overpopulation, although the statutory duty to remove excess wild horses is clear. Courts have interpreted the WHA to mandate that the BLM act expeditiously (i.e. as soon as logistically possible) to remove excess wild horses once the agency determines that an overpopulation exists in a given area and action is necessary to remove that overpopulation. The BLM has made such a triggering determination regarding wild horse overpopulation in an area known as the Caliente Complex, which consists of an estimated 911,892 acres of public lands in Nevada. The BLM had concluded in a 2008 Final Resource Management Plan encompassing the Caliente Complex that there was not enough forage and habitat for any wild horses. A 2018 Final Environmental Assessment for the Caliente Complex Wild Horse Gather implements the BLM's decision to round up and permanently remove all wild horses from the Caliente Complex.

But, on June 28, 2018, two wild horse advocate groups and the Western Watersheds Project filed a legal challenge in D.C. federal court to this decision, alleging that the BLM has illegally chosen grazing over wild horse protection in violation of the WHA. This case—styled *American Wild Horse Campaign v. Zinke*—illustrates how the BLM is caught between the proverbial "rock and a hard place." Past litigation between livestock groups and the BLM demonstrates the former's frustration with delayed action in removal of excess wild horses. Yet, the complaint in *American Wild Horse Campaign v. Zinke* paints a picture of bureaucratic favoritism to livestock grazing on public lands, as the BLM continues to allow cattle and sheep to remain in the Caliente Complex. Because the BLM is obligated to administer public lands for "multiple use," the court will have to decide whether the agency's decision to eliminate wild horse use, while permitting grazing on the same public lands, violates federal law. This litigation is poised to have profound financial ramifications for ranchers that graze their livestock on these arid Nevada rangelands. As of mid-November, the defendants have submitted a certified index to the administrative record: documents from the Caliente Field Office relevant to the BLM's challenged decision.

The American Wild Horse Campaign is also one of the groups that filed a recent federal lawsuit in Oregon, *Kathrens v. Zinke*. The suit seeks to halt research by the BLM into a permanent sterilization technique for wild mares roaming federal rangelands. The claims in that case are grounded in the First Amendment and the Administrative Procedures Act. On Nov. 13, 2018, in a win for the plaintiffs, U.S. District Judge Michael Mosman granted Plaintiffs' Motion for a Preliminary Injunction, ordering that the BLM could not undertake the sterilization procedure at issue under further court order. Defendants have until Jan. 25, 2019, to respond to the Complaint. ■

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This article originally appeared on The Ohio State University Agricultural & Resource Law Program's blog, Ohio Agricultural Law Blog.

North Carolina's Smithfield lawsuits: Could Ohio farmers face similar results?

ELLEN ESSMAN

Over the last several months, three nuisance cases have been decided against Smithfield Foods in federal court in North Carolina. The juries in the cases have found Smithfield's large farms, with thousands of hogs, and the odor, traffic, and flies that come along with them, to be a nuisance to neighboring landowners. Smithfield has been ordered to pay hefty damages to the neighbors, and more cases against the company remain to be decided. Given the outcomes of the cases that have been decided thus far, farmers and landowners in Ohio might be wondering how Ohio law compares to North Carolina law as pertains to agricultural nuisances.

Ohio's Right-to-Farm law

Many states, including both Ohio and North Carolina, have "right-to-farm" legislation, which in part is meant to protect agriculture from nuisance lawsuits such as those filed against Smithfield. While nearly every state has a right-to-farm statute, they do differ in language and how they go about protecting agriculture.

Ohio farmers have right-to-farm protection in two parts of the Revised Code. ORC Chapter 929 establishes "agricultural districts." Generally, in order to place land in an agricultural district, the owner of the land must file an application with the county auditor. Certain requirements must be met in order for an application to be accepted. Slightly different rules apply if the land in question is within a municipal corporation or is being annexed by a municipality. If the application is accepted, the land is placed in an agricultural district for five years. The owner may submit a renewal application after that time is up.

Being part of an agricultural district in Ohio can help farmers and landowners to defend against civil lawsuits. ORC 929.04 reads:

> *In a civil action for nuisances involving agricultural activities, it is a complete defense if:*
> - *The agricultural activities were conducted within an agricultural district*
> - *Agricultural activities were established within the agricultural district prior to the plaintiff's activities or interest on which the action is based*
> - *The plaintiff was not involved in agricultural production*
> - *The agricultural activities were not in conflict with federal, state, and local laws and rules relating to the alleged nuisance or were conducted in accordance with generally accepted agriculture practices*

The ORC's chapter on nuisances provides additional protection for those "engaged in agriculture-related activities." Under ORC 3767.13, people who are practicing agricultural activities "outside a municipal corporation, in accordance with generally accepted agricultural practices, and in such a manner so as not to have a substantial, adverse effect on public health, safety, or welfare" are typically exempt from claims of nuisance due to farm noise, smells, etc.

North Carolina's Right-to-Farm law

Much like Ohio, North Carolina farm land can be part of an "agricultural district." North Carolina's preservation of farmland law is meant to protect agricultural land—land that is part of an agricultural district is must be used for agriculture for at least 10 years. However, unlike Ohio's law, North Carolina does not specifically spell out that land in agricultural districts will be protected from nuisance suits when the landowner follows the rules of the agricultural district. North Carolina's law does state that one of the purposes of agricultural districts is to "increase protection from nuisance suits and other negative impacts on properly managed farms," but unlike Ohio, it does not explicitly state that being part of an agricultural district is a defense to a nuisance lawsuit.

North Carolina also has a statute which specifically spells out the right-to-farm. In response to the recent jury decisions, however, North Carolina has changed its right-to-farm law. The original law read:

> *(a) No agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality outside of the operation after the operation has been in operation for more than one year, when such an operation was not a nuisance at the time the operation began.*
>
> *(a1) The provisions of subsection (a) of this section shall not apply when the plaintiff demonstrates that the agricultural or forestry operation has undergone a fundamental change. A fundamental change does not include any of the following:*
>
> - *A change in ownership or size.*
> - *An interruption of farming for a period of no more than three years.*
> - *Participation in a government-sponsored agricultural program.*
> - *Employment of new technology.*
> - *A change in the type of agricultural or forestry product produced.*

The original law did not protect agricultural operations if their actions were negligent or improper.

Following the first decision against Smithfield, the North Carolina legislature overrode the Governor's veto to implement amendments to the state's right-to-farm law. In the amendments (sections 106-701 and 106-702), the legislature substantially changed the language of the law, making what constitutes a nuisance much more explicit and dependent on certain factors. What is more, the new version of the law places limits on when plaintiffs can recover punitive damages for a private nuisance action.

A comparison of the Ohio and North Carolina's sections of legislation promoting the "right-to-farm" shows how different the two states are. Ohio's legislative language makes it obvious that the meaning of the law is to protect agriculture from nuisance suits—by specifically stating that being in an agricultural district is a complete defense to nuisance, and that otherwise, agriculture is generally exempt from nuisance suits. North Carolina's law concerning agricultural districts does not specifically state that being in such a district is a defense to nuisance, instead, it simply expresses the hope that districts will "increase protection from nuisance suits." Furthermore, while North Carolina's original right-to-farm law stated that agricultural operations do not "become a nuisance" due to changed conditions in the community, that language is not very specific. Ohio's agricultural district language lays out exactly what must be done to have a complete defense against a nuisance lawsuit; North Carolina's language in multiple parts of the General Statutes does not have the same degree of specificity.

Permit as a defense to nuisance

In addition to the right-to-farm law, under ORC 903.13, those owning, operating, or responsible for concentrated animal feeding facilities in Ohio have an affirmative defense to a private civil action for nuisance against them if the CAFO is "in compliance with best management practices" established in their installation of a disposal system or operation permits. North Carolina does not appear to have similar language protecting permitted farms in its General Statutes.

Other factors that may come into play

In the lawsuits against Smithfield farms, the lawyers for the plaintiffs (neighboring landowners) have continuously asserted that Smithfield has "means and ability" to "reduce the nuisance from existing facilities" by ending the use of "lagoon and sprayfield" systems at their farms. Plaintiffs stress that not only is Smithfield Foods, Inc. a large, wealthy, multinational company, but that they have also changed their lagoon and sprayfield practices outside of North Carolina. In lagoon and sprayfield systems, all waste is collected in an open-air lagoon and then sprayed on fields as fertilizer. The practice was first banned for new construction in North Carolina in 1997, and in 2007, the state permanently banned the practice for newly constructed swine facilities. Although many of the facilities in question were opened before any ban on the construction of lagoon and sprayfield facilities, the plaintiffs contend that changes made in other states mean Smithfield can afford to change in North Carolina. The ban on new lagoon and sprayfield systems in North Carolina, and evidence that Smithfield has used different practices to reduce the smell from the farms in other states, likely helped the juries in the cases that have been tried to date find that the farms are a nuisance to their neighbors. The above argument is something operators of livestock facilities in Ohio should be aware of. Although Ohio has not specifically banned lagoon and sprayfield systems like North Carolina has, the ability to change the system could still potentially be used to argue nuisance. Ohio operators are supposed to follow best management practices and the Natural Resources Conservation Service's Field Office Technical guide when applying and storing manure, which include ways to reduce odor from manure and other applications, as well as reducing other types of nutrient pollution. Following such guidelines would likely help operators in any argument against nuisance. ■

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Current antitrust suits for food and agriculture

JETTA SANDIN

Generally speaking, competitors in a market are prohibited by our antitrust laws from working together. But our laws make an exception for farmers and allow them, under certain circumstances, to come together and work cooperatively to market and sell their goods. This exception is known as the Capper-Volstead Act. If the farmers do not follow the requirements of the law to a T, they can find themselves entangled in very long, and very expensive, litigation, facing treble damages. Currently, there are several long running agricultural antitrust cases involving issues of supply management programs, the status of integrated producers, inadvertent inclusion of non-producer entities as members and other cooperative behaviors. This article provides a brief overview of some of these cases and where they stand.

Cranberries

In 2012, Ocean Spray, an agricultural cooperative made up of cranberry growers, was sued by a group of independent cranberry growers and some of its own members that belong to its "B Pool." The B Pool came about in 2006 when Ocean Spray split its members into two groups: A Pool and B Pool. According to plaintiffs in *Winters v. Ocean Spray Cranberries, Inc.*, No. 1:12-cv-12016 (D. Mass.), the manner in which the members of these two pools are compensated for their cranberries put the two groups at odds with one another. The plaintiffs allege that the operations of Ocean Spray's B Pool and its cranberry concentrate commodity auction violate Sections 1 and 2 of the Sherman Act, the Capper-Volstead Act, a 1957 Consent Decree and Massachusetts' unfair trade practices laws.

While many of the claims have been dismissed as the result of two rounds of summary judgment motions, the B Pool members' monopsonization claim has survived, as have as some state law claims. The case is currently pending before the U.S. Court of Appeals for the First Circuit on interlocutory appeal. Ocean Spray is seeking review of the lower court's rulings regarding the applicability of Illinois Brick, which is a doctrine that precludes indirect purchasers from suing under federal antitrust laws.

Mushrooms

Mushroom growers and one of their cooperatives have defended a supply management program since 2006 when they were first sued for alleged antitrust violations in Pennsylvania federal court, In re *Mushroom Direct Purchaser Antitrust Litig.*, No. 2:06-cv-00620 (E.D. Pa.). Plaintiffs claimed that, starting in 2001, the cooperative and its members agreed to increase prices and reduce supply by, among other things, purchasing mushroom farms and reselling the land with restrictive deed covenants preventing its use as mushroom farms. The mushrooms plaintiffs argue that such conduct is not protected by Capper-Volstead because the Act does not protect pre-production supply management activities, monopolization of trade, or suppression of competition with non-members.

Additionally, plaintiffs alleged, and the court agreed, that the cooperative and its members are not Capper-Volstead protected because at least one member of the cooperative was not a true "farmer" under the definition of the Act. The alleged non-farmer defendant was the sister corporation of an actual farmer and had the same ownership as the non-farmer entity. However, the court found that because, among other reasons, the owner signed the cooperative membership form in the name of the non-farmer entity (which defendants argued was by mistake), neither the cooperative nor its members were protected by the Capper-Volstead Act.

Defendants' filed a motion asking that plaintiffs' antitrust claims be judged under the rule of reason, and at the same time, the plaintiffs filed a cross-motion for partial summary judgment, asserting that the defendants have engaged in a per se illegal horizontal conspiracy to fix prices and restrict supply. In May 2015, the Judge ruled that the price-fixing claims would be subject to "rule of reason" analysis while the "supply restriction" claims were per se illegal. Trial has tentatively been set for May 2019.

Cooperatives Working Together program

In September and October of 2011, complaints were filed in the Northern District of California against Agri-mark, Inc., Dairy Farmers of America, Inc. (DFA), Dairylea Cooperative Inc., Land O' Lakes, Inc., and National Milk Producers Federation. The plaintiffs in these cases attack the Cooperatives Working Together (CWT) program. The CWT utilized both a herd retirement program and the export assistance program aimed at improving farm-level prices. The lawsuits all allege that the CWT program constituted a conspiracy to reduce the supply of dairy cattle and thereby artificially raise the price of milk in violation of the antitrust laws. Plaintiffs claim that pre-production supply management — retiring cows before they could produce milk — was not protected conduct under the Capper-Volstead Act. Dairy farmers have already agreed to settle the indirect purchaser claims, i.e., claims by people who purchased milk and milk products at the grocery store, for $52 million. No trial date has been set for this action.

Similar cases were filed and ended up in the Southern District of Illinois, where they remain pending. In September 2015, a separate case was filed in the Middle District of Florida based upon allegations that are substantially the same as those in the previously filed case. The parties in this case have finished discovery and are currently awaiting summary judgment rulings. The case is set for a trial the first half of 2019.

Dairy Farmers

In the last 10 years, multiple antitrust class action lawsuits have been filed against Dairy Farmers of America, Inc. (DFA), a national milk marketing cooperative, as well as against Dean Foods Company, and various alleged co-conspirators in federal courts in Vermont, Tennessee, California, Mississippi and Illinois. Unlike in the lawsuits involving the CWT program, the plaintiffs in these cases are farmers who sold milk through DFA and its affiliates. Plaintiffs allege that DFA conspired with purchasers of milk to reduce the price paid for milk to the farmers. Various defendants and cases have settled, but several cases remain.

115 farmers have opted-out of the class action and filed a complaint alleging monopolization and restraint-of-trade claims under the Sherman Act. The central allegation is that through various acquisitions and agreements with other dairy companies (such as Dean and National Dairy), DFA has reduced the

market prices available to independent dairy farmers for their milk and has forced farmers to join or remain in DFA. The discovery phase of the case recently closed, and motions for summary judgment are due to be filed on or before January 11, 2019. A hearing on the motions for summary judgment has been scheduled for April 9, 2019.

Eggs

In 2008, direct and indirect egg purchasers filed antitrust class actions alleging that 16 egg farmers and two of their cooperatives engaged in a conspiracy to raise the price of shell eggs and egg products by reducing supply. In re *Processed Egg Products Antitrust Litig.*, No. 08-md-02002 (E.D. Pa.). Several direct actions by other plaintiff groups followed. *See Allen Carter's article on page 4.* Plaintiffs argued that pre-production supply management is not protected under the Capper-Volstead Act.

Plaintiffs also contested the Capper-Volstead Act status of the cooperatives because at least one of the defendants was allegedly not a farmer. The court agreed, in part, with plaintiffs and ruled that one of the two cooperatives involved was not a Capper-Volstead protected organization because one of its members was not a farmer/producer, potentially exposing certain defendants to hundreds of millions of dollars in alleged damages.

Since the litigation's inception, several defendants have settled with certain plaintiffs, paying over $136 million. The three defendants that remained in the direct purchaser class action defended the case before a jury starting in May 2018 and won. The direct purchasers that opted-out of the class action await a trial date. Five defendants remain in at least one of the actions. All indirect purchaser actions were voluntarily dismissed on July 17, 2018.

Broilers

In the most recent case, September 2016, a putative class of direct purchasers of broiler chickens filed suit in federal court in Chicago against 13 of the largest domestic broiler processors for alleged violating Section One of the Sherman Act beginning in January 2008 when the processors purportedly started to jointly reduce broiler production in order to raise prices, *Maplevale Farms, Inc. v. Koch Foods, Inc.*, No. 1:16-cv-08637 (N.D. Ill.). According to the complaint, the named defendants controlled 90 percent of the U.S. broiler market. During the period of the purported broiler reductions, broiler market prices rose approximately 50 percent while at the same time, feed costs — a primary expense in raising broilers — fell approximately 20 to 23 percent. Plaintiffs contend this dramatic rise in prices is directly attributable to the defendants' purported conspiracy to reduce broiler supply.

The case is based on statements that processors made at various industry meetings and public and private communications starting in 2008, in which individual processors allegedly encouraged the rest of the industry fall in line and reduce supply. Plaintiffs claim that defendant Argi Stats aided the alleged conspiracy by providing producers detailed information about the broiler producers' businesses and facilities, allowing the broiler producers to identify easily one another's costs and prices. The complaint identifies over 40 purported supply reductions by defendants between January 2008 through August 2012. Finally, to enforce the purported conspiracy, the complaint alleges that defendants policed each other and made sure all companies were complying with the production cuts through the use of a private agricultural statistics and data collection company. Three additional direct purchaser class actions were filed in September and October 2016, as well as an indirect purchaser class action in September. Chicken farmers have also initiated their own case against the processors.

Direct purchaser have settled with Fieldale Farms Corp., for $2.25 million. Some state law claims have been dismissed, but defendants' motions to dismissed were generally denied. Most of the remaining cases have proceeded to the discovery phase. ■

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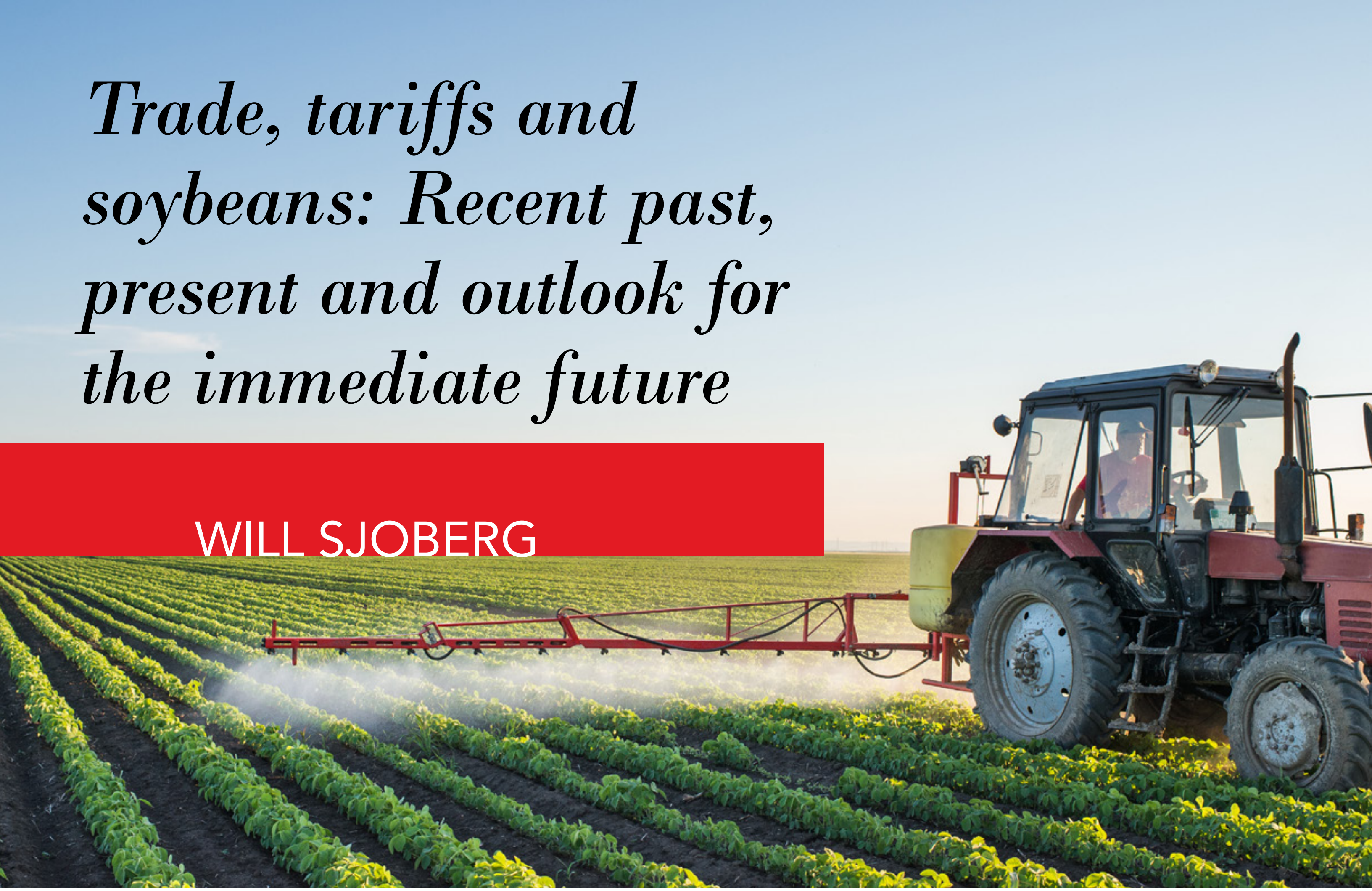
Trade, tariffs and soybeans: Recent past, present and outlook for the immediate future

WILL SJOBERG



In a previous Food & Agriculture Quarterly, we described what the trade landscape would look like should the United States withdraw from the North American Free Trade Agreement (NAFTA) and promised to address the issue of whether such a withdrawal would affect U.S. soybean farmers, particularly Ohio soybean farmers. Since that article was published, so much has happened that the trade landscape it is hardly recognizable. It is therefore even more important to examine trade and tariff issues facing soybean farmers in the context of today's trade landscape. Before doing so, however, it is important to review soybean's place in United States trade.

In 2017, the United States produced and exported soybeans valued at $41.0 billion and $21.5 billion, respectively. The top three export destinations for U.S. soybeans were China ($12.2 billion), Mexico ($1.6 billion) and Japan ($0.9 billion). In 2017, the United States exported soybeans valued at $0.2 billion to Canada. In terms of Ohio soybeans, its farmers produced soybeans valued at $2.4 billion, thereby making soybeans Ohio's number one cash crop, but only 0.5 percent of total U.S. soybean production (by quantity). Also in 2017, Ohio exported soybeans valued at $1.8 billion. The top three destinations for Ohio soybeans were China ($0.7 billion), Mexico ($0.4 billion) and Bangladesh ($0.2 billion).

NAFTA/USMCA and soybeans

On Nov. 30, 2018, the United States signed the United States Mexico Canada Agreement (USMCA), which the parties intend to replace NAFTA. According to the United States, USMCA improves NAFTA in the following areas: automotive rules of origin, dispute settlement, currency manipulation, labor, dairy and sunset (i.e., termination). Unlike NAFTA, USMCA provides a 16-year term, i.e. "sunset," with a review after six years. Additionally, the Canadians have agreed to partially open their market to U.S. milk exports. Other than these changes, the rules of origin and duties on agricultural goods in USMCA remain virtually unchanged from NAFTA, including those pertaining to soybeans.

Given the relative importance of Mexico and, to a lesser extent, Canada to U.S. soybean farmers, it would initially appear that those farmers had $1.6 billion at risk in the NAFTA/USMCA negotiations. As set forth below, that was not necessarily the case.

First, if USMCA is terminated, the worst case would result in Mexican imports of U.S. soybeans only being partially affected by a tariff increase and Canadian imports not being affected at all. Mexico's Most Favored Nation (MFN) tariff is zero for imports of soybeans during the period January through September (subheading 1201.9001. Harmonized Tariff Schedule (HTS)) and 15 percent for the remainder of the year (subheading 1201.9002, HTS). Because Mexico divides its tariff lines for soybeans on a seasonal basis, from January to September and from October to December 2017, Mexico imported soybeans valued at $1.3 billion (1201.9001, HTS) and $0.5 billion (1201.9002, HTS), respectively. Of the $1.3 billion in soybeans that entered Mexico at a zero tariff under subheading 1201.9001, HTS, 88 percent originated in the United States, nine percent in Brazil, and five percent originated in Paraguay. Of the $0.5 billion in soybeans that should have entered Mexico under subheading 1201.9002, HTS, at a 15 percent MFN tariff, 100 percent of the U.S.-origin soybeans entered at a zero tariff pursuant to NAFTA. Canada's MFN tariff is zero for imports of soybeans. In 2017, Canada imported soybeans valued at $0.3 billion. Of that amount, the United States accounted for 71.8 percent and India accounted for 23 percent.

Second, if USMCA is terminated, U.S. soybeans would likely remain in the Mexican and Canadian markets at or close to the levels achieved when NAFTA and the USMCA were in effect. The United States, in addition to being the world's largest source of soybeans (2017), followed by Brazil and Argentina, is also Mexico's and Canada's largest source of soybeans. Nonetheless, the past NAFTA/USMCA negotiations had some in Mexico considering a "Plan B," in which Mexico accelerates trade deals and establishes new buyer-seller relationships with countries like Brazil and Argentina. In 2017, the value of Mexican soybean imports from Brazil and Argentina was $0.1 billion and $0, respectively. Putting politics aside, the only advantage countries like Brazil or Argentina could hope to achieve is the elimination of the 15 percent MFN tariff applicable to entries during October through December. Given the MFN tariff levels and the statistics set forth above, most would question whether disrupting established supply chains would be worth the effort.

Third, if USMCA was terminated, the price of soybeans imported from Canada or Mexico would not increase because the U.S. MFN tariff on soybeans is zero. As an aside, in 2017, the United States imported soybeans from Canada and Mexico valued at $.07 billion and $0.0002 billion, respectively.

Section 232 and Soybeans

On May 31, 2018, President Donald Trump signed two presidential proclamations that imposed a 25 percent and a 10 percent duty on imports of certain steel and aluminum, respectively, from all countries pursuant to section 232 of the Trade Expansion Act of 1962 (section 232 duties). While few things are farther from soybeans than steel and aluminum, some of the affected countries may not necessarily agree. The president's basis for imposing these tariffs was that imports of certain steel and aluminum threatened to impair the national security of the United States. Certain countries and groups of countries, including Canada, Mexico, the European Union and China, disagreed with the president's legal basis. Because countries may change both the product subject to retaliatory tariffs and the rate of such tariffs, pursuant to the World Trade Organization's Safeguard Agreement, they imposed retaliatory tariffs, some of which pertained to agricultural products, as the examples in the below table demonstrates.

Country/ Union	Agricultural Products Used for Retaliation	Rate
Canada	Maple sugar, strawberry jam, cucumbers and coffee	10%
Mexico	Pork, cheese apples, potatoes and cranberry juice	20-25%
Euro-pean Union	Sweetcorn, kidney beans, corn, rice, orange juice, cranberry juice and tobacco	25%
China	Variety of fresh fruits, dried fruits and nuts	15%

Regarding the section 232 duties and various countries' retaliatory responses, the United States replaced some countries' steel and aluminum duties with quotas or tariff rate quotas, i.e., Argentina, Australia, Brazil and South Korea. Unlike the foregoing countries, the United States did not "settle" with Mexico, Canada, the EU or China. Mexico and Canada's wish that some type of settlement would be included in USMCA is currently unfulfilled. The EU's wish that the United States and the EU would begin working towards zero tariffs and zero subsidies on non-automotive goods – presumably made more attractive by an EU incentive that it would purchase U.S. soybeans and liquefied natural gas and, in the process, resolve the 232 issue – is also not progressing, although the United States increased its exports soybeans to the EU by 251 percent compared to the same period the year before. *See Appendix on page 19.*

Section 301 and soybeans

Effective July 6, 2018, President Trump imposed a 25 percent duty on $34 billion of certain goods originating in China, pursuant to section 301 of the Trade Act of 1974. The primary basis for which was China's alleged theft of U.S. intellectual property and Chinese government policies supporting the same. As a result, China imposed 25 percent retaliatory tariffs on goods equaling $34 billion. Included in the list of goods on which China imposed its retaliatory tariffs are U.S.-origin soybeans.

Largely due to the Chinese retaliatory action, the U.S. government reported unit export prices decreasing by 15 percent from May to September 2018. *See Appendix on page 19.* Notwithstanding that the volume of U.S. soybean exports to China, its largest export market, decreased by 44 percent compared to the January to September period the year before, total U.S. soybean exports increased by just over one percent in the same comparison period. *See Appendix on page 19.* As supported by the data, existing export customers, except China, are buying more soybeans, and new country customers are entering the market due to lower prices. The most notable new customer is Argentina, the world's third largest soybean producer and a country that imported only 250 metric tons (MT) of U.S.-origin soybeans in 2017. Beginning in June, Argentina imported 446,000 MT of soybeans through September. Some experts believe that Argentina and other countries that are responsible for increased U.S. soybean exports are looking to take advantage of the increased price of soybeans in China.

The Southern Hemisphere's soybean harvest occurs from February to May and the Northern Hemisphere's harvest occurs from September to December. That means China will have to go in search of supply when its southern suppliers cannot meet fourth quarter demand. That demand and lower prices are the reason why the volume of total U.S. exports have remained relatively stable since China imposed its retaliatory duties.

While lower U.S. soybean prices may spur exports, what does that mean for the U.S. soybean farmer? According to some reports, the Chinese tariffs have caused the market price of U.S. soybeans to fall to $8.40/bushel. Compared to a $9.70/bushel break-even price for producing soybeans in the United States, that market price cannot sustain the U.S. industry.

What's the solution?

Caught in a situation through no fault of their own, U.S. farmers have little short-term choice but to continue to produce, sell and export soybeans at prices lower than they would be without China's retaliation. In the long term, should the situation remain unchanged, there are options other than shifting soybean acreage to alternative crops.

The United States Department of Agriculture forecasts that global soybean and products trade should rise "rapidly" over the next 10 years. Additionally, there are other opportunities for U.S. soybeans that may also include new markets. For example, high oleic soybean oil is being used to replace some of the oil lost due to trans-fat labeling. U.S. consumption of soybean meal is forecasted to grow at a rate of two percent per year for the next five years. Biodiesel uses more than five billion pounds of soybean oil per year or about 25 percent of U.S. production. Last, the global aqua-feed market is growing at a rate of 10 percent per year and soybean-protein concentrate is considered to be essential for that growth to continue. All of the foregoing options beg the question: can U.S. farmers hold out until those options and others replace the demand lost in the trade war with China? The answer, of course, depends on the individual farmer and, as important, the president. ■

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Appendix

US EXPORTS OF SOYBEANS, 1201,90, HTSUS (2017-2018 JAN-SEP)										
2017	**JAN**	**FEB**	**MAR**	**APR**	**MAY**	**JUN**	**JUL**	**AUG**	**SEP**	**TOTAL**
					FAS Value ($000s)					
Canada	$13,738	$12,555	$14,732	$12,235	$11,642	$11,055	$8,893	$11,964	$9,882	$106,696
Mexico	$91,934	$108,444	$154,797	$147,288	$99,473	$134,378	$156,301	$144,860	$107,011	$1,144,485
NAFTA	$105,672	$120,999	$169,529	$159,523	$111,115	$145,432	$165,194	$156,824	$116,893	$1,251,181
EU	$276,891	$117,382	$116,251	$165,039	$119	$64,829	$172,216	$78,082	$81,255	$1,072,065
China	$1,765,895	$1,053,261	$482,083	$264,371	$151,402	$131,464	$191,580	$455,426	$1,091,374	$5,586,855
All Countries	$2,840,805	$1,824,180	$1,285,968	$955,650	$573,861	$683,631	$863,337	$1,127,866	$1,700,339	$11,855,638
					QTY (000s MT)					
Canada	35	31	38	33	30	31	24	33	27	283
Mexico	261	307	568	434	282	402	611	794	433	4,092
NAFTA	296	338	606	467	313	433	635	827	460	4,375
EU	683	290	299	451	0	184	489	215	216	2,829
China	4,382	2,600	1,230	687	385	354	527	1,224	2,876	14,264
All Countries	7,016	4,460	3,220	2,459	1,451	1,786	2,319	2,990	4,465	30,165
				$/MT						**WT AVG**
Canada	$393	$400	$388	$367	$382	$360	$371	$362	$366	$378
Mexico	$352	$354	$273	$339	$352	$334	$256	$182	$247	$293
NAFTA	$357	$358	$280	$341	$355	$336	$260	$190	$254	$299
EU	$405	$404	$389	$366	$592	$352	$352	$363	$376	$380
China	$403	$405	$392	$385	$393	$371	$363	$372	$380	$392
All Countries	$405	$409	$399	$389	$396	$383	$372	$377	$381	$393
2018	**JAN**	**FEB**	**MAR**	**APR**	**MAY**	**JUN**	**JUL**	**AUG**	**SEP**	**TOTAL**
					FAS Value ($000s)					
Canada	$13,363	$12,347	$12,409	$11,061	$8,268	$11,228	$12,500	$12,244	$31,083	$124,504
Mexico	$120,869	$73,248	$157,871	$118,128	$167,915	$189,812	$145,372	$137,692	$132,274	$1,243,181
NAFTA	$134,233	$85,595	$170,280	$129,189	$176,183	$201,041	$157,872	$149,936	$163,357	$1,367,685
EU	$209,851	$147,973	$89,620	$108,852	$156,214	$216,991	$235,413	$326,426	$233,413	$1,724,753
China	$1,201,642	$795,102	$408,380	$152,876	$208,718	$100,868	$85,102	$23,902	$24,472	$3,001,062
All Countries	$2,168,117	$1,621,270	$1,283,244	$876,216	$1,216,227	$1,256,802	$1,255,509	$1,205,395	$1,122,466	$12,005,246
					QTY (000s MT)					
Canada	36	33	32	29	22	29	36	34	94	345
Mexico	316	185	402	281	405	485	401	383	363	3,221
NAFTA	353	218	434	310	426	514	437	418	456	3,566
EU	564	383	234	272	388	589	644	921	705	4,700
China	3,210	2,093	1,045	407	533	271	234	68	67	7,928
All Countries	5,763	4,213	3,239	2,167	2,991	3,256	3,427	3,368	3,237	31,660
				$/MT						**WT AVG**
Canada	$368	$370	$384	$381	$384	$388	$351	$357	$331	$361
Mexico	$382	$396	$393	$421	$415	$391	$362	$359	$365	$386
NAFTA	$381	$392	$393	$417	$414	$391	$361	$359	$358	$384
EU	$372	$386	$384	$400	$403	$368	$366	$354	$331	$367
China	$374	$380	$391	$376	$392	$372	$364	$352	$363	$379
All Countries	$376	$385	$396	$404	$407	$386	$366	$358	$347	$379