

Egg producers v. grocery giants

Defense prevails in rare antitrust jury trial.

By LIN RICE + Photo by ROB HARDIN

Antitrust court cases don't usually make it in front of a jury—in most instances, the parties settle out of court. However, a recent win by Porter Wright Morris & Arthur marks the second favorable jury decision for one of the firm's clients in the past two years.

In a case brought before the U.S. District Court for the Eastern District of Pennsylvania, a group of 12 supermarkets alleged that Indiana-based Rose Acre Farms (Porter Wright's client), United Egg Producers, United States Egg Marketers and other egg producers conspired to reduce the supply of eggs on the market, resulting in increased prices for the buyers. Plaintiffs sought about \$1 billion in damages. Following a six-week trial, a jury found for the defendants on Dec. 12.

"The firm's very happy for our client—you don't see this kind of case

"Our client felt like they had no choice. (Their) largest customers indicated that 'You need to get involved with the program' if you want to sell them eggs."

JIM KING, partner, Porter Wright Morris & Arthur

Porter Wright partner Jim King



tried very often," says Porter Wright partner and trial team member Jim King. "We had a really good group of people working together on this case with a great breadth of knowledge in the antitrust world."

The verdict is the second jury win for Rose Acre. A jury also found in favor of the company in 2018. King says the plaintiffs in this recent decision were some of the grocery store chains (including Kroger and Giant Eagle) that didn't join the previous class-action case. The case itself has been argued in court off and on since 2008, when the class action lawsuit against 13 egg producers was initially filed.

As part of the initial class action, the group of buyers claimed Rose Acre and others conspired together by creating an animal welfare

program ostensibly to create better living situations for their chickens. But plaintiffs claimed the egg producers actually just wanted to increase prices.

King says buyers had required their producers to sell only eggs produced in compliance with animal welfare standards. After groups like PETA targeted the fast food industry in the 1990s and early 2000s, they turned their attention to supermarket chains. As a result, the larger chains decided to get in front of the issue and designated standards for animal welfare, King says. Producers adhering to the standards could package their products with a certification logo.

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get involved with the program' if you want to sell them eggs."

As the case has continued over the years, most of the other defendants have settled, King says. Jim Wilson, a partner with Vorys Sater Seymour and Pease whose practice focuses on antitrust litigation, says the balance of risk and reward is a main factor in most antitrust cases settling out of court.

"There's a lot of incentive on both sides to settle these kinds of cases, particularly if they get past summary judgment," Wilson says. "Frankly, the class of plaintiffs will often settle for a reasonably small amount, and the defendant doesn't want to risk the potential for huge damages."

The plaintiffs in the egg producers case planned to seek about \$1 billion in damages, which can be tripled in antitrust cases. The 2018 class action case also sought about \$1 billion in damages.

Wilson says there has been an

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JAY LEVINE, partner and trial team member,
Porter Wright Morris & Arthur

JURY WIN

CASE: *In Re: Processed Egg Products Antitrust Litigation*

CASE NUMBER: 2:08-md-02002

COURT: U.S. District Court for the Eastern District of Pennsylvania

PLAINTIFFS: Large grocery chains including Kroger and Giant Eagle

DEFENDANT: Rose Acre Farms

CLAIM: Egg producers conspired to raise prices by enacting common animal welfare standards.

JURY FINDING: Plaintiffs failed to prove conspiracy.

TRIAL TEAM LEADS: Porter Wright attorneys Jim King, Don Barnes and Jay Levine

increase in antitrust litigation in the past 15 years. "That's for a couple of reasons, but especially in price-fixing cases, the Department of Justice has been very aggressive in investigating that kind of conduct," he says. "There have been a lot in the agricultural sector, in eggs, poultry, potatoes, mushrooms, in many cases where defendants thought they were being lawful and want to defend what they did. No one wants to admit they violated the antitrust statutes."

While antitrust statutes and contract disparities might seem overly complicated at times, Porter Wright partner and trial team member Jay Levine says cutting through the jargon to make a clear argument is a favorite aspect of the job.

"As with all complex trials, especially antitrust trials, trying the case was intellectually stimulating," Levine says. "Personally, I enjoy trying to take very complex ideas and facts and summarize them for a lay jury in a way that will resonate with them."

The rulings in both cases involving Rose Acre Farms have been appealed, King says—the initial class action will be argued before the U.S. Court of Appeals for Third Circuit sometime in the spring. An appeal for the most recent ruling will be argued probably around the end of this year or early 2021. King says he would expect a decision before the end of the year on the class action case, and that Porter Wright will continue to represent Rose Acre Farms.

Levine says the outcome could quite possibly have an impact on future antitrust or agricultural cases.

"Most antitrust defendants assume that a jury's natural inclination will be to believe that something happened and therefore shy away from going to trial," Levine says. "This case shows that whether or not that assumption is correct, antitrust defendants can demonstrate that 'nothing happened.' And agricultural producers can take heart that their activities with their cooperatives will not necessarily expose them to antitrust liability.

"So, while every case and every defendant is different, this could help tip the scales when an antitrust defendant is considering between settling and going to trial."

Lin Rice is a freelance writer.