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Verdict Form Scrambled Egg Price Suit Trial, 3rd Circ. Told

By Jeannie O'Sullivan

Law360 (January 26, 2021, 5:27 PM EST) -- Grocery retailers asked the Third Circuit on Tuesday to undo an antitrust trial win for an egg producer and trade groups accused of conspiring to drive up prices, arguing that wording on the jury verdict form suggested the grocers had to meet a higher burden of proof than necessary.

During an oral argument, attorney Paul Slater of Sperling & Slater PC said a Pennsylvania federal court erroneously required the jury to find that Kroger Co., Safeway Inc., Walgreen Co., Winn-Dixie Stores Inc. and others had to prove that Rose Acre Farms Inc., United Egg Producers Inc. and United States Egg Marketers Inc. carried out every one of three alleged supply reduction schemes to be held liable at all.

"We asserted there was one conspiracy comprised of all three components and — and — that any one of those three components could be a stand-alone, unlawful agreement," Slater told the court.

The grocers objected to the use of the conjunction "and" in the verdict form at issue, which asked the jury to answer "yes" or "no" to whether or not there was a conspiracy to reduce egg supply through plans for (1) an early molt and slaughter system (2) minimum floor space rules, and (3) exporting eggs. The jury answered "no."

The court had rejected the grocers' proposed verdict form draft, which said: "Do you find that there was an agreement or conspiracy that included competing egg producers that was for the purpose and had the effect of reducing the supply or raising the price of eggs?"

The defendants countered that the grocers were making an eleventh-hour attempt to reduce their burden of proof.

"Over and over again the plaintiffs reiterated that it was a single conspiracy that contains all three," Rose Acre attorney Jay Levine of Porter Wright Morris & Arthur LLP told the court.

In their complaint, the grocers detailed an overarching conspiracy in which the defendants entered into agreements to restrain trade through programs that were pretext to reduce supply and drive up prices. The tactics included the early molting and slaughter of hens, extra cage space for egg-laying hens and exporting eggs to foreign markets, according to court records.

The United Egg Producers have stated that the conduct had given the industry a \$1 billion revenue boost, according to the grocers.

The grocers claimed they have repeatedly presented their theory of an overarching conspiracy in which they only had to prove the defendants participated in "one or more" of the supply reduction tactics. The grocers said in their appeal that they provided their proposed jury verdict form to the court in September 2019, but the court didn't issue its own draft until that December, on the eve of closing arguments.

The trade groups **argued** in a brief in August that the jury was properly instructed and that the grocers were trying to "create an appeal issue that simply does not exist."

Circuit Judges Kent A. Jordan and Paul Matey and U.S. District Judge Marilyn Jean Horan of the Western District of Pennsylvania, sitting by designation, sat on the panel for the Third Circuit.

The grocers are represented by William Blechman, Richard Alan Arnold, Douglas Patton and Michael Ponzoli of Kenny Nachwalter PA, Moira Cain-Mannix and Brian Hill of Marcus & Shapira LLP, David Germaine and Paul E. Slater of Sperling & Slater PC and Patrick Ahern of Ahern & Associates PC.

Rose Acre is represented by James King, Donald Barnes and Jay Levine of Porter Wright Morris & Arthur LLP and Leah Mintz and Robert Palumbos of Duane Morris LLP.

United Egg Producers and United States Egg Marketers are represented by Jan Levine, Whitney Redding and Robin Sumner of Troutman Pepper.

The cases are In re: Processed Egg Products Antitrust Litigation, case numbers 20-1127 and 20-1045, in the U.S. Court of Appeals for the Third Circuit.

---Additional reporting by Brian Koenig. Editing by Jill Coffey.

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