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2 Mistrials, 1 Acquittal & A DOJ Listening Problem

By **Bryan Koenig**

Law360 (July 8, 2022, 7:50 PM EDT) -- The defense said the case should have never been brought. The judge told the U.S. Department of Justice's top antitrust official to "reflect" on the evidence after two separate juries deadlocked on price-fixing charges against chicken industry executives.

But federal prosecutors pressed on anyway, having already refused to meet with the defendants. The result Thursday was a clean acquittal in Denver federal court, delivered by the third set of jurors to hear the case in an extraordinary tale of prosecutorial persistence in the face of two hung juries, which attorneys say should have highlighted the limits of the DOJ's evidence.

"The judge tried to point that out," said Waymaker LLP partner Melissa Meister, a former assistant U.S. attorney and trial attorney with the DOJ's civil fraud section. "I just don't think DOJ did a good job of listening regarding the evidentiary problems that were in the case."

Prosecutors will have to start listening, attorneys say, as the DOJ gears up for two more criminal cases in the industry for broiler chickens, meaning birds raised expressly for human consumption, which comprise virtually all chicken eaten in the United States.

And the lessons appear not to be limited to alleged price-fixing in the "protein" space, with Thursday's verdict coming on the heels of stinging back-to-back defeats in the DOJ's first-ever attempts to criminally prosecute alleged agreements to fix employee wages and inhibit recruitment and hiring.

"Combined with the first two mistrials and the recent stumbles in the no-poach cases, the DOJ must realize that public policy statements and blog posts on enforcement priorities are no substitutes for our jury trial system, which requires evidentiary proof as well as soundly constructed case theories," R. Mark McCareins, a Northwestern University professor at the Kellogg School of Management and a former co-head of Winston & Strawn LLP's global competition practice, said.

In the instant case, the DOJ had tried to adapt after the second mistrial in late March, cutting the number of defendants in half from 10 to five in an effort to streamline what would be presented to the jury on allegations the

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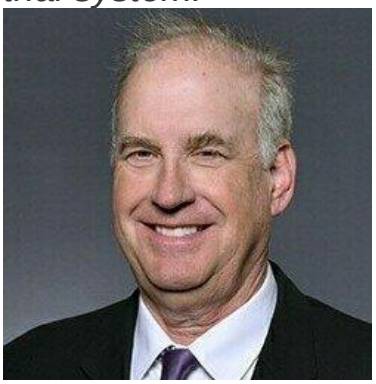

R. MARK MCCAREINS
Northwestern University's Kellogg School of Management

men helped orchestrate a scheme among the nation's largest poultry producers to rig bids for chicken sold to restaurant chains and grocery stores, including most notably Kentucky Fried Chicken.

Streamlining didn't work for the jury, which began deliberations Wednesday. Instead, retired Pilgrim's Pride CEO Bill Lovette, his successor Jayson Penn, sales executive Roger Austin, Claxton Poultry leader Mikell Fries and Claxton sales executive Scott Brady walked away Thursday with clean not-guilty verdicts, after having faced years of scrutiny and the overhanging threat of prison time.

Attorneys say the case suffered in particular from a shortage of cooperating witnesses.

"The division seems to currently be overly confident that circumstantial evidence can win price-fixing cases," Lisa Phelan, a partner at Morrison & Foerster LLP and a former chief of the National Criminal Enforcement Section, said.

According to Phelan, antitrust crimes are different from bribery or fraud cases where juries "can tangibly see money moving between accounts or false statements in documents." Sherman Act prosecutions, for alleged agreements in restraint of trade, instead need to show a "meeting of the minds" between the defendants, she said.

"This type of evidence only comes from direct testimony of insider witnesses, and the long-standing policy at the division was that you needed at least two such witnesses to have a winning case. DOJ relied heavily in these chicken trials on documents and agent testimony, which is just not persuasive to most juries without those multiple insider witnesses," she said.

The DOJ also relied heavily on Robert Bryant, a longtime Pilgrim's Pride employee currently on leave, who received immunity for testifying. The defendants had assailed the testimony from Bryant, who admitted he had lied to the FBI multiple times and didn't name the defendants specifically when describing the agreements he witnessed.

When the DOJ goes to trial in its two remaining chicken price-fixing cases, including one against Claxton Poultry and Koch Foods, it is likely to be heavily reliant on Bryant, who can be pressed on any potential inconsistencies in his testimony in the prior cases.

According to McCareins, the DOJ "failed to evaluate the strength of their allegations, especially when the actual buyers of the allegedly fixed poultry product testified that they controlled the price and had no evidence of a supply-side conspiracy. The DOJ again discounted such real-world testimony and how that buyer testimony would be weighed by the jury."

Meister also noted the DOJ's reliance on attorneys from the division itself without the aid of local assistant U.S. attorneys.

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Morrison Foerster

The local federal attorneys are "another avenue of fresh eyes that DOJ can take advantage of," Meister said. They don't always have deep subject-matter expertise, she noted, "but they do know their courts, and they know their juries."

U.S. District Judge Philip A. Brimmer may have anticipated the jury's acquittal. After the second mistrial

and before the DOJ definitively committed to what attorneys say may have been an unprecedented third go in a criminal antitrust trial, the judge took the extraordinary move of calling DOJ Antitrust Division head Jonathan Kanter to discuss the prosecution in person.

During the mid-April hearing, the judge said there was no due process reason barring the government from trying the case again and said he couldn't force the DOJ to hold itself to its own prosecutorial standards. But he implored Kanter to reflect on their discussion and the importance of the standards to the department and its reputation.

"I know you talked to all sorts of very capable people and you brought in some fresh perspectives, but I would ask that you reflect on that and ask yourself based on our conversation today whether, in fact … a third trial would uphold that standard," the judge said, according to an unofficial transcript of the hearing.

Kanter agreed, but also said he did not want the court to think he had not already thought hard about the issue and insisted the agency has an obligation to protect the American public from antitrust crimes.

"Deciding not to proceed with a meritorious case comes at an expense for our client, the United States of America," Kanter said. "These are hard decisions … I don't want you to be left with the impression that this is being done lightly or reflexively. We are taking this seriously."

After that hearing, the DOJ continued to press ahead, attacking an ultimately rejected dismissal bid by arguing that even "multiple hung juries" don't require the conclusion that the government had insufficient evidence. Instead, the DOJ called the mistrials "irrelevant" to the acquittal bids.

A source familiar with the trials told Law360 that Judge Brimmer likely couldn't have tossed the case even if he wanted to, with such a ruling likely to be overturned on appeal based on the separation of powers between executive branch prosecutors and the judicial branch.

The DOJ said in a statement Thursday that while "disappointed" with the case's ultimate outcome, the department "will continue to vigorously enforce the antitrust laws, especially when it comes to price-fixing schemes that affect core staples," and it "will not be deterred from continuing to vigilantly pursue cases to protect the American people and our markets."

The DOJ declined Friday to respond to follow-up questions, but top officials have repeatedly tried to signal they remain undaunted in the face of setbacks here and in criminal cases on labor issues, all of which predate the Biden administration.

Kanter, for instance, has argued the DOJ's persistence shows it's not afraid of prosecuting corporate executives and that the Antitrust Division has actually won important victories in the labor-side cases, where judges have so far rejected defense arguments that such cases cannot be pursued.

The instant case also highlights another recent DOJ Antitrust Division policy shift: a resistance to so-called pre-indictment meetings with the lawyers of subjects facing potential prosecution, meetings prosecutors refused to take with the chicken executives here.

Richard A. Powers, deputy assistant attorney general for criminal enforcement, defended the shift last year while serving as acting Antitrust Division head before the Senate confirmed Kanter to the post. While the Justice Manual says Antitrust Division targets are "usually afforded an opportunity to meet,"

Powers said in a July 2021 speech that such a policy is "far from absolute."

When targets don't "engage throughout the investigation, or [make] apparent to staff that further engagement will not be productive, then the Division will not continue to spend its valuable time and resources on pointless meetings," Powers said at the time.

Here, the DOJ chose not to hear the executives out and pressed on, animated by the importance of pursuing cases. Attorneys say, however, that the DOJ's job isn't to bring cases — it is to successfully prosecute defendants.

"The DOJ doesn't have unlimited resources. They have to apply the resources where they think they'll be the most successful," said Carl Hittinger, the national team leader of BakerHostetler's antitrust and competition practice. "You have to pick and choose."

Here, the DOJ's choice cost a huge amount of resources that contrast sharply with the more than $100 million brought in from a deal with Pilgrim's Pride itself.

"Corporations settle cases for institutional reasons not necessarily dictated by the merits. The Division's apparently knee-jerk view that convictions of individuals will inexorably follow corporate pleas is unrealistic and empirically unsound," Eric Grannon, a former counsel with the Antitrust Division and now a partner with White & Case LLP, said.

Going forward, attorneys noted the lessons to be learned aren't only for the DOJ itself, but also for corporations and other defendants facing punishing litigation with the department. While "risk aversion is one thing," Grannon said, "capitulation to overreaching prosecution on insufficient evidence" is a different matter.

"If you go to trial, sometimes you can win," said Hittinger.

The case is U.S. v. Penn et al., case number 1:20-cr-00152, in the U.S. District Court for the District of Colorado.

--Additional reporting by Cara Salvatore, Matthew Perlman, Jack Queen and Hailey Konnath. Editing by Philip Shea.
