

1st Execs Set To Face Trial In Broiler Chicken Price-Fix Probe

By **Matthew Perlman**

Law360 (October 21, 2021, 6:36 PM EDT) -- The government is set to put 10 people on trial Monday in Colorado federal court over their alleged role in a sprawling scheme among some of the nation's largest poultry producers to fix the price of chicken sold in restaurants, grocery stores and elsewhere. The case marks one in a series targeting the broiler chicken industry, stemming from an ongoing criminal antitrust investigation.

The U.S. Department of Justice's ongoing investigation into the industry that produces chickens sold for human consumption has so far netted the indictments of 14 individuals and two companies, Koch Foods and Claxton Poultry Farms.

Pilgrim's Pride pled guilty to charges stemming from the probe in February, receiving a \$107.9 million criminal fine, while Tyson Foods has revealed it is cooperating with investigators and applying for leniency.

The investigation is at least the DOJ's second in recent years targeting a conspiracy among companies to fix the prices of staple food items, following a probe of the canned tuna industry that resulted in a 40-month prison sentence for Bumble Bee's former CEO and more than \$100 million in fines for the companies involved.

Lisa Phelan, a partner at Morrison & Foerster LLP and former chief of the DOJ Antitrust Division's National Criminal Enforcement Section, told Law360 that antitrust cases often involve esoteric products or issues that can be hard for a jury to connect with. But, with products like chicken and tuna, she said, the government may have an advantage.

"It's a very relatable product that jurors are going to care about," Phelan said. "They may have just gone to the store and been frustrated at the price of their last chicken dinner. Things like that matter in these kinds of jury trials because at the end of the day, it's sort of a human drama and you need a set of 12 people to think this is important."

On the other hand, she said, there are both advantages and disadvantages to trying 10 people at once. The government will be able to introduce a lot of information to try and prove the existence of a conspiracy but also risks overwhelming the jury.

"The downside is that it complicates the trial dramatically," she said. "As with many things in life, keeping it simple is often the better strategy."

The Cases So Far

The DOJ revealed its broiler chicken investigation in June 2019 when it asked the court overseeing private litigation accusing the producers of violating the Sherman Antitrust Act for permission to intervene and seek a partial discovery stay.

The agency announced its first indictments a year later, charging four individuals, including Jayson Penn, who was the sitting president and CEO of Pilgrim's Pride at the time, and Mikell Fries, the president of Claxton Poultry, with conspiring to fix prices and rig bids.

A Denver grand jury charged six additional individuals in a superseding indictment in October 2020, including former executives and employees from Koch Foods, Tyson and Pilgrim's Pride, among other chicken producers.

A grand jury then indicted Claxton Poultry Farms on price-fixing charges in May and a superseding indictment in July charged both Claxton and Koch Foods. A separate indictment in July also charged four more former Pilgrim's Pride workers with price-fixing violations.

According to the indictments, the scheme ran from 2012 until at least early 2019, with the executives and employees at the companies involved allegedly communicating with each other via phone, email and text messages to closely coordinate bids made to restaurants, grocery stores and buying cooperatives.

The trial set to kick off on Monday is for the 10 individuals named in the superseding indictment from October 2020, all of whom are charged with criminal antitrust violations and have pled not guilty. Though the indictment also charged Jimmie Lee Little, a former sales director for Pilgrim's Pride, with making false statements and obstruction of justice for allegedly lying to investigators, the DOJ is now seeking to bring the false statements claim separately and has dropped it from the current case.

The trial proceedings will not be accessible remotely, according to the court, with jury selection starting Monday and 32 trial days spread through the end of December.

Trials for the cases against Claxton and Koch Foods and for the additional former Pilgrim's Pride workers are slated for 2022, according to court records.

The Lead Up

U.S. District Judge Philip A. Brimmer rejected a flurry of dismissal bids from the executives and employees this month, finding that the allegations were "sufficiently specific" to move ahead. The order also rejected contentions that the charges are unconstitutional and that the government waited too long to file the case.

In a ruling days later, Judge Brimmer rejected a bid from the executives to exclude from the record certain pretrial statements made by an FBI agent amid claims that prosecutors improperly withheld their witness's full grand jury testimony. The executives had accused the DOJ of withholding "critical information" they said could have shown the government had doubts about the veracity of testimony obtained from a Tyson manager during the investigation.

The effort came through what is known as a James hearing, where the court assesses the admissibility of co-conspirator statements ahead of trial. Such proceedings appear to be uncommon in antitrust cases; Phelan said she did not encounter one during her 25 years at the DOJ.

The government in its pretrial brief said it plans to introduce emails between the suppliers and phone call logs, as well as documents that purport to show the employees exchanging pricing information and agreeing to fix bids. It also plans to call witnesses who will help show certain statements were made as part of the conspiracy

Phelan said it will be important for the DOJ to have witnesses from the industry that help explain that the evidence shows there was an agreement, rather than just an exchange of information, which is not necessarily an antitrust violation.

"Jurors want to hear from a person whose credibility they can evaluate on the witness stand, who directly knows that there was an agreement," she said. "If DOJ is lacking that, then they're going to have a bigger challenge."

What's Ahead

According to a joint trial brief, the executives intend to argue that the DOJ's case is premised entirely on circumstantial evidence and infers an agreement to fix prices based on the exchange of competitor pricing information. But the key issue in a Sherman Act case, the brief said, is whether an agreement actually occurred.

The brief also said the government has "cobbled together an alleged conspiracy consisting of fourteen episodes, which include a muddle of different sporadic communications over many years involving different people, different products, different customers, and different price outcomes."

"The inferences required to find an overarching conspiracy from this disparate and circumstantial evidence are too attenuated to sustain a conviction," the brief said.

The defendants also each filed their own briefs that show they will contest their individual involvement in any alleged scheme at trial, targeting the evidence specific to them and the "inferences" they said the jury will be asked to make.

Phelan said this is why trying the executives together creates a trade-off for the government. The jury may have trouble parsing which bits of evidence pertain to which defendants, even though the court will likely give instructions along those lines.

"The advantage that the government might see is that everybody gets tarred with the same brush," Phelan said. "Even if they're instructed it's very difficult not to have it in your brain."

But, she said, the combined trial also means the jury will be asked to look at what could be an overwhelming amount of evidence and will likely hear from multiple attorneys representing the various executives making different arguments.

"Hearing many, many arguments against the government's case, especially when the government has the burden of 'beyond a reasonable doubt,'" could be a real challenge, Phelan said. "If even one of those lawyers can raise even one doubt, it could bring the whole thing down."

The government is represented by Michael T. Koenig, Heather D. Call, Carolyn M. Sweeney and Paul J. Torzilli of the U.S. Department of Justice's Antitrust Division.

Timothy R. Mulrenin is represented by Elizabeth Prewitt of Latham & Watkins LLP and Marci G. LaBranche of Stimson Stancil LaBranche Hubbard LLC.

Gary Brian Roberts is represented by Craig A. Gillen of Gillen Withers & Lake LLC.

Scott James Brady is represented by Bryan B. Lavine of Troutman Pepper.

Roger Born Austin is represented by Michael S. Feldberg of Reichman Jorgensen Lehman & Feldberg LLP.

Mikell Reeve Fries is represented by Richard K. Kornfeld of Recht Kornfeld PC.

William Vincent Kantola is represented by James A. Backstrom.

Jimmie Lee Little is represented by Mark A. Byrne of Byrne & Nixon LLP.

Jayson Jeffrey Penn is represented by Chad David Williams and Jacqueline Ventre Roeder of Davis Graham & Stubbs LLP and Michael F. Tubach, Anna T. Pletcher and Brian P. Quinn of O'Melveny & Myers LLP.

William Wade Lovette is represented by John A. Fagg Jr. of Moore & Van Allen PLLC.

Rickie Patterson Blake is represented by Wendy W. Johnson of RMP LLP and Barry J. Pollack of Robbins Russell Englert Orseck Untereiner & Sauber LLP.

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 Dorothy Atkins, Al Barbarino, Hailey Konnath, Bryan Koenig, Christopher Cole and Khorri Atkinson. Editing by Michael Watanabe.