

## Despite 2 Mistrials, DOJ Won't Say Chicken Case Is Done

By **Matthew Perlman and Bryan Koenig**

*Law360 (March 31, 2022, 7:31 PM EDT)* -- The U.S. Department of Justice is slimming down its allegations that chicken industry executives orchestrated a sprawling scheme to fix prices ahead of an extraordinary third attempt to prosecute a case that has spanned two administrations and tested a trial judge's patience.

The Justice Department moved to drop five of 10 defendants from the case after a second mistrial this week, saying in a filing on Thursday that Assistant Attorney General Jonathan Kanter, head of the DOJ's Antitrust Division, plans to appear for a hearing to discuss another retrial for the remaining defendants, who include two former CEOs of Pilgrim's Pride and the president of Claxton Poultry.

When U.S. District Judge Philip A. Brimmer declared a second mistrial Tuesday in the case he said he planned to order Kanter to appear in his Denver courtroom to look him "in the eyes" and explain why he should give the agency another chance.

"If the government thinks that the 10 defendants and their attorneys and my staff and another group of jurors should spend six weeks retrying this case after the government has failed in two attempts to convict even one defendant, then certainly Mr. Kanter has the time to come to Denver and explain to me why the Department of Justice thinks that that is an appropriate thing to do," Judge Brimmer said, according to a transcript of Tuesday's proceedings.

"The question for Mr. Kanter is why, after the government has tried twice and failed, it believes that a third time admissible evidence will probably be sufficient to obtain and sustain a conviction," the judge said.

A third trial on the claims would appear virtually unprecedented, with former enforcers telling Law360 they know of no other time that the Antitrust Division took the same case back to court after two hung juries.

"I'm not aware of any precedent for a third attempted trial in a criminal antitrust case — ever," said Eric Grannon, a White & Case LLP attorney and former counsel with the DOJ Antitrust Division.

Lisa Phelan, a partner at Morrison & Foerster LLP and a former chief of the Antitrust Division's National Criminal Enforcement Section, told Law360 she never saw a third criminal trial on the same claims in her 30 years at the agency either.

"Part of the reason is the principles of federal prosecution that apply to all federal prosecutors," Phelan said, noting that the rules have been interpreted as requiring prosecutors to have a good-faith belief they have at least a 50% chance of winning if they go to trial.

"The judge seems to be raising the issue, 'How can you say you have such a good-faith belief, if twice you've had jurors unable to convict on this?'" Phelan said.

Judge Brimmer himself seemed skeptical that another trial would comport with DOJ prosecutorial guidelines, even reading from the department's prosecutorial manual when he declared a mistrial at Tuesday's proceedings. Before the judge demanded answers from the DOJ about why a third trial would be worthwhile, he quoted portions of the manual instructing prosecutors to move forward with cases only if they believe they have enough evidence to win a guilty verdict.

The government has conducted a yearslong investigation into the broiler chicken industry over allegations that Pilgrim's Pride, Tyson Foods and other major poultry companies coordinated bids made to restaurant chains and grocery stores from 2012 until at least 2019.

The criminal probe has netted a corporate guilty plea from Pilgrim's Pride with a \$107.9 million criminal fine, while Tyson Foods is cooperating with investigators and applying for leniency. But 14 individuals and two additional companies, Koch Foods and Claxton Poultry, are fighting the allegations in court.

The first case to be tried involved high-ranking executives at several of the companies, including two former Pilgrim's Pride CEOs. Juries were unable to convict even a single individual after two trials before Judge Brimmer, despite the government's having a cooperating witness from Pilgrim's Pride testify in the first trial and witnesses from Pilgrim's Pride and Tyson Foods during the second.

An attorney for one of the executives, Rick Kornfeld of Recht Kornfeld PC, who represents Claxton Poultry president Mikell Fries in the case, told Law360 he's disappointed the DOJ insists on going forward with a third trial "in light of the fact that two separate federal juries utterly rejected the government's case."

"Not a single defendant was convicted," Kornfeld said. "I would hope that the government would rethink its theory and its evidence in light of the fact that they've gone 0-20 in federal court in Denver."

Grannon said that the chances of the DOJ's obtaining a conviction after two mistrials seem slim and that the case is "a cautionary tale for companies that enter corporate plea agreements with large fines on shaky evidence."

He also said the Antitrust Division's amnesty program, which provides protection for parties that come forward with information about anti-competitive conduct, is only supposed to be for "hardcore" cartel activity. But if the agency is unable to obtain a conviction on the allegations, he said, this case may not involve the type of conduct the program was intended to capture.

"Many other amnesty grants went untested by any subsequent trial, just domino-like guilty pleas," Grannon said. "The division's AAG needs to consider rigorously the evidence underlying grants of amnesty, which can trigger years of civil class-action litigation that may be unwarranted, yet result in costly settlements."

Phelan said a major problem with the DOJ's case was that it targeted so many people. While some might

see an advantage to bringing a case that alleges the existence of a wide-ranging, sweeping conspiracy, she said that's not always the best approach.

"Some people are of the thought that more is more, that the sheer volume or number must mean there is something going on here," Phelan said. "But oftentimes in these prosecutions, less is more is actually what you should be thinking because of the complexity."

The executives contended during both trials and in motions for acquittal that the government offered no evidence of an agreement between any of the defendants, saying they were merely sharing information, which is not illegal. The juries in both trials also sent several questions to the court during deliberations, some having to do with statutes of limitations and other time limits, issues that show antitrust cases are not always as straightforward as they seem.

Another factor is that in conspiracy cases, the government has to show there was a "meeting of the minds" among the participants. Phelan said this is hard enough to prove beyond a reasonable doubt when a case involves two or three defendants, let alone 10, plus the co-conspirators who were not indicted.

"It's an almost overwhelming burden for the government and for a jury to sort through that much evidence," she said. "I think now we've seen it is just too overwhelming a burden."

The DOJ has two additional pending cases from the chicken investigation, one against four more individuals and another against Koch Foods and Claxton Poultry, both of which are scheduled for trial later this year. Phelan said prosecutors may now look at the nature and strength of their evidence in the other cases to see if they look more promising.

"Maybe resources would be better devoted there than on this piece that seems to be something that juries just can't come to a conclusion on," she said.

Attorneys for the dismissed executives praised the DOJ's decision to drop them from the case on Thursday. Elizabeth Prewitt, a partner at Latham & Watkins who represents former Tyson Foods executive Tim Mulrenin, said his dismissal after two mistrials in the past five months is a vindication.

"This has been a challenging chapter for our client and his family, and we are pleased that the government has decided to finally abandon their case against him, with prejudice," Prewitt said in a statement Thursday.

Wendy Johnson of RMP LLP and Barry Pollack of Robbins Russell Englert Orseck Untereiner & Sauber LLP, who represent former George's Inc. worker Ric Blake, said the government should never have filed the case.

"Had the government adequately investigated this case before bringing charges, it would have recognized that the case should not have been charged in the first place," the attorneys said. "We are pleased that the government has finally recognized that Ric Blake did nothing wrong."

An attorney for former Tyson worker Gary Brian Roberts, Craig Gillen of Gillen Withers & Lake LLC, said they are pleased with the court's dismissal of the charge against Roberts.

"After two grueling multiweek trials, Mr. Roberts looks forward to putting this nightmare behind him

and getting on with his life," Gillen said.

An attorney for retired Pilgrim's Pride sales executive Jimmie Little, Mark Byrne of Byrne & Nixon LLP, told Law360 on Thursday they are relieved "this nightmare is over for Mr. Little" as well, saying the government finally acknowledged the evidence did not support its theory.

"We hope the government will come to the same conclusion regarding the remaining defendants and abandon this misguided prosecution," Byrne said.

Representatives for the DOJ did not respond to a request for comment Thursday.

The government is represented by Michael Koenig, Heather Call, Carolyn Sweeney and Paul Torzilli of the U.S. Department of Justice's Antitrust Division.

Tim Mulrenin is represented by Elizabeth Prewitt and Caroline A. Rivera of Latham & Watkins LLP, and Marci LaBranche of Stimson Stancil LaBranche Hubbard LLC.

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

Jimmie Little is represented by Mark Byrne and Jennifer L. Derwin of Byrne & Nixon LLP.

Jayson Penn is represented by Chad Williams and Jacqueline Roeder of Davis Graham & Stubbs LLP, and Michael Tubach, Anna Pletcher and Brian Quinn of O'Melveny & Myers LLP.

Gary Brian Roberts is represented by Craig Gillen and Anthony Lake of Gillen Withers & Lake LLC, and Richard Tegmeier of Sherman & Howard LLC.

Scott Brady is represented by Bryan Lavine of Troutman Pepper.

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

William Kantola is represented by James Backstrom and Roxann Henry.

William Lovette is represented by John Fagg Jr., James P. McLoughlin Jr. and Kaitlin M. Price of Moore & Van Allen PLLC.

Rickie Blake is represented by Wendy Johnson of RMP LLP and Barry 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 Cara Salvatore, Dorothy Atkins and Khorri Atkinson. Editing by Peter Rozovsky.