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Why DOJ's Chicken Price-Fixing Probe Fizzled Out

By **Matthew Perlman**

Law360 (October 19, 2022, 8:16 PM EDT) -- The U.S. Department of Justice recently dropped the last remaining charges stemming from its investigation into an alleged price-fixing conspiracy among the nation's largest chicken producers, conceding the final round of a disappointing fight for antitrust enforcers.

Enforcers ditched the last of the charges on Sunday, days after a Colorado federal judge excluded much of the government's evidence from a looming Oct. 31 trial for a final pair of former Pilgrim's Pride employees. The move means the DOJ charged a total of 14 people with participating in the scheme without winning a single conviction and secured a guilty plea from only one of the companies it accused of being involved.

It was an inauspicious end to a probe that started with a bang in June 2020 when the DOJ announced the indictment of Jayson Penn, then-president and CEO of Pilgrim's Pride, along with several other high-level industry executives on criminal antitrust charges.

"One needs to be careful not to overstate the significance of any one case or group of cases, but this is a very bad day at the office for the DOJ," said David I. Gelfand, a former deputy assistant attorney general in the DOJ's Antitrust Division who is now senior counsel with Cleary Gottlieb Steen & Hamilton LLP.

Experts said the case called into question the DOJ's prosecution strategy and its leniency program.

The DOJ had alleged that executives from the country's largest suppliers of broiler chicken, the primary chicken sold for human consumption, conspired to rig bids made to restaurant chains and grocery stores between 2012 and 2019.

Tyson Foods applied for leniency and cooperated with the investigation, and enforcers eventually obtained a guilty plea with a $107.9 million criminal fine from Pilgrim's Pride.

But Penn and four other chicken industry executives were acquitted of the charges following two mistrials, and the DOJ ultimately dismissed charges against nine other people who allegedly participated in the scheme, along with charges against Claxton Poultry and Koch Foods.

Lisa Phelan, a partner at Morrison & Foerster LLP and a former chief of the Antitrust Division's National Criminal Enforcement Section, told Law360 that the DOJ may have been hurt by a change in its enforcement strategy.

In the past, the DOJ would try to obtain several guilty pleas from the companies themselves during a price-fixing investigation before charging any executives. This ensures that prosecutors will have multiple witnesses, from different companies, testifying at trial about the existence of a conspiracy.

Here, Phelan said, the agency appeared to be trying to "sort of shock the world" by charging the executives first. But enforcers never got the additional cooperation needed to firmly establish the conspiracy.

"I hope DOJ will rethink this approach that they're taking, that it's somehow impressive to quickly rush out with individual executive charges," Phelan said. "If at the end of the day you can't make the conviction, then it isn't going to help with deterrence. It might actually embolden more defendants to fight these charges."

The case was also somewhat rare in that 14 individuals were indicted in the same alleged conspiracy and none of them "broke ranks" to cut a deal with the government, according to Carsten Reichel, a Norton Rose Fulbright partner who served as a trial attorney in the DOJ's Antitrust Division.

The Justice Department's first case included 10 individual defendants, but prosecutors whittled that down to five after two mistrials. A second case was brought against four more individuals, but the DOJ dropped those charges ahead of trial.

"In multiple defendant cases, there's a lot of incentives for someone to break off and cooperate with the government for some lenient outcome," Reichel said. "But here none of them did, and so it really limited the amount of testimonial evidence the government had for its case."

Others said the case also raises issues about the division's use of its leniency program, which allows the first company to report and cooperate with the agency on an antitrust problem to qualify for immunity from criminal prosecution. Tyson disclosed that it had applied for leniency in the broiler chicken investigation shortly after the DOJ announced its first indictments.

Eric Grannon, a former counsel with the agency's Antitrust Division who is now a partner at White & Case LLP, told Law360 that the investigation is another example of the DOJ failing to obtain convictions after granting amnesty for supposedly "hard-core cartel conduct."

"The DOJ's zeal for convictions is resulting in improvident grants of amnesty," he said. "When amnesty is granted, it should be 110% clear to everyone in the conference room that a criminal violation of the Sherman Act has occurred."

The order excluding evidence issued by Colorado U.S. District Judge Daniel D. Domenico on Friday highlighted what appeared to be the DOJ's heavy reliance on circumstantial evidence to prove the existence of the conspiracy, rather than testimony from witnesses who allegedly participated in it. The order excluded statements made by alleged co-conspirators from the government's case against former Pilgrim's Pride executives Jason McGuire and Timothy Stiller after finding prosecutors had not met their burden to demonstrate a conspiracy existed.

The case would have been the second stemming from the investigation to be tried after the one involving Pilgrim's ex-CEO Penn, but prosecutors dismissed the charges after the judge's order, saying it

effectively excluded the bulk of the government's evidence.

"Both circumstantial and direct evidence in these cases are important," said Reichel of Norton Rose. "Here, they just didn't have much witness testimony and they relied very heavily on the circumstantial evidence, the emails and the texts and the invoices."

Judge Domenico held a so-called James hearing to assess the admissibility of the evidence, since most out-of-court statements would normally be considered hearsay unless an exception applies.The judge found that the DOJ had not established that a conspiracy existed and so cannot rely on testimony and evidence from alleged co-conspirators.

Phelan of Morrison & Foerster said the problem stemmed from enforcers' decision to charge the executives before obtaining more cooperation from the companies. Generally, she said, multiple witnesses from different companies testifying about their participation in a conspiracy will be enough to show the conspiracy existed under the "preponderance" standard applied to the evidence.

While a jury is charged with deciding issues beyond a reasonable doubt, the standard for allowing the evidence was only that it showed a conspiracy was more likely than not.

Judge Domenico's decision was still somewhat surprising since the judge in the first case, Colorado U.S. District Judge Philip A. Brimmer, found the government had shown a conspiracy existed and allowed statements from co-conspirators to be used. But Judge Domenico also had the benefit of the prior trials, all three of them, and found the testimony fell short.

"He didn't give them the benefit of doubt, which DOJ historically has always gotten, because he could see that the actual evidence in those actual prior trials was not sufficient," Phelan said.

Judge Domenico's order said the DOJ's evidence only demonstrated that chicken executives exchanged pricing information and contained only the "faintest whiffs of an agreement to fix prices," contending the evidence relied too heavily on the recollections and interpretations of witnesses to be admissible.

The primary testimony the judge looked at came from Pilgrim's employee Robert Bryant, who took the stand in the other trials and was expected to testify again that Stiller directed him to get pricing information from competitors and that McGuire assured him competitors would raise prices along with Pilgrim's.

But Bryant's statements, the judge said, prove only the sharing of information and "by no means constitute smoking-gun evidence of an agreement in place." He said testimony from an FBI agent likewise supports findings that information was shared, but not that prices were fixed.

Grannon said it is "black-letter law" that information sharing alone is not enough to trigger civil antitrust liability, let alone criminal liability, and said the judge got the ruling right.

"The court's ruling that DOJ failed to make the predicate showing of a conspiracy to admit the purported co-conspirator hearsay evidence was spot on," Grannon said. "Using the hearsay to make the predicate showing would have been bootstrapping."

Phelan noted that if the DOJ continues to bring cases by charging executives first, the agency could run into similar problems down the road.

"They're going to be challenged every time on whether or not they can even meet that first burden of establishing that there was a conspiracy," she said.

The judge's order also said some of the government's key evidence was "misleading," noting an email from Penn that ended with the phrase, "Do not fwd. not exactly a legal conversation," that the judge said referred to products not at issue in the alleged conspiracy. The order also said a handwritten note from Bryant with competitor pricing information actually included past prices, as opposed to forward-looking information.

"Out of context, the handwritten notes may appear conspiratorial and secretive, but the notes reveal nothing about an agreement between competitors to fix prices," the order said.

Cleary's Gelfand said similar issues have come up recently in other government enforcement actions, including the Federal Trade Commission's case challenging Altria Group Inc.'s deal for a minority stake in Juul Labs Inc. and in the DOJ's bid to block Booz Allen Hamilton's planned purchase of EverWatch. Decisions rejecting allegations in both of those cases noted instances where enforcers used selective quotations to support their claims.

"The government needs to be meticulously careful about anything it presents to the court in the way of evidence that it claims establishes something that it's trying to establish," Gelfand said. "They can't play fast and loose with the facts and with evidence. It's a problem for the government when they do that. You're supposed to be wearing the white hat coming into court."

If prosecutors continue to use this practice, he added, courts are not going to allow it.

"I know the government gets excited when they see a provocative quote and they want to use it, but they have to be careful that they present it thoroughly and completely," he said. "When they don't, they lose credibility with the courts."

Despite the hurdles encountered in the chicken case, Reichel said the DOJ likely will not be deterred in its future enforcement efforts. While the investigation originated in the prior administration, Assistant Attorney General Jonathan Kanter, the head of the DOJ's Antitrust Division, pressed ahead with the cases, even appearing in Colorado to explain to Judge Brimmer why the agency was trying the first case for a third time after two mistrials.

Kanter has also stated publicly in a number of contexts that enforcers will not shy away from difficult cases, particularly in response to recent losses in some of the government's first criminal labor-side antitrust cases.

"They're not going to stop bringing cases because of losses in litigation," Reichel said, noting that the division has increased its litigation capacity recently. "I think at least for the duration of this administration, I would expect more of the same."

--Editing by Jill Coffey.
