Meat Institute

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FACT SHEET: Packers and Stockyards Act "Harm to Competition" Legal Analysis

Congress enacted Section 202(a) and (b) of the Packers and Stockyards Act (PSA) to prevent anticompetitive behavior in the meat packing industry. This purpose is reflected in the text of the PSA, which refers to "unfair," "unjustly discriminatory," and "deceptive" practices and "undue" and "unreasonable" preferences. 7 U.S.C. § 192(a) and (b). When the PSA was enacted, those terms had a settled antitrust meaning of activities that injure or are likely to injure competition. The PSA's legislative history confirms that Congress intended to prohibit only those acts that harmed, or were likely to harm, competition. Allowing a plaintiff to make out a claim under Sections 202(a) or (b) without proving harm to competition would thwart Congress's purposes.

Producers who raise cattle, hogs, and chickens sometimes sue packers, claiming violations of the Act. In those cases, the plaintiffs often have argued that proof of competitive harm is not required under the plain text of the PSA. There is a long, but consistently resolved, line of court cases regarding whether a plaintiff must show competitive harm or the likelihood of competitive harm to establish a violation of Sections 202(a) or (b), and in many of them USDA was a participant. Every federal court of appeals that has considered the issue has concluded that a plaintiff must prove actual or likely harm to competition to establish a violation of Section 202(a) or (b) of the Act. *See, e.g.*, *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 272 (6th Cir. 2010); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 355 (5th Cir. 2009) (*en banc*). Producer and packer organizations, such as the Meat Institute have participated as *amicus curiae* to assist courts in understanding why proof of competitive harm should be required.[1]

USDA has weighed in on this issue, but its position has not been consistent. In agency proceedings, USDA has taken contradictory positions on whether actual or likely harm to competition is required to violate the PSA. Compare *Corn State Meat Co.*, 45 Agric. Dec. 995, 1013 (U.S.D.A. 1986) (competitive harm is required), with *In re Ozark County Cattle Co.*, 49 Agric. Dec. 336, 365 (U.S.D.A. 1990) (competitive harm is not required); *In re ITT Cont'l Baking Co.*, 44 Agric. Dec. 748, 781 (U.S.D.A. 1985) (same). In 1997, in a response to a petition for rulemaking, USDA claimed that proof of actual or likely harm to competition *is* required, relying on the Seventh Circuit's decision in *Armour & Co. v. United States*, 402 F.2d 712 (1968), a seminal decision on this issue (which has since been relied upon by seven other courts of appeals).[2]

But more recently USDA changed course and argued to several appellate courts that proof of competitive harm *is not* required to violate the PSA.[3] Four circuits have declined to defer to the USDA's litigating position. *Terry*, 604 F.3d at 278; *Wheeler*, 591 F.3d at 362; *Been*, 495 F.3d at 1227; *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1304 (11th Cir. 2005). Two of those circuits stated they

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[1] *See, e.g.*, *En Banc* Br. for *Amici Curiae* American Meat Institute *et al*. in Support of Appellant, *Wheeler*, 591 F.3d 355 (No. 07-40651).

[2] *See Review of Western Organization of Resource Councils (WORC) Petition for Rulemaking, Grain Inspection and Packers and Stockyards Administration, Packers and Stockyards Programs* 15-16 (Aug. 29, 1997) https://www.gipsa.usda.gov/psp/publication/worc_petition/worchmpg.pdf.

[3] *See, e.g.*, Br. of the U.S. as *Amicus Curiae* in Support of Plaintiff-Appellant, *Terry*, 2008 WL 5665508 (No. 08-5577); Br. of U.S. as *Amicus Curiae* in Support of Plaintiffs-Appellees, *Wheeler*, 2007 WL 7215909 (No. 07-40651).

would not give deference to an agency rule that eliminated the element of harm to competition because Congress's contrary intent is so clear, and one court specifically rejected the agency's assertion it has "consistently interpreted" the PSA to not require proof of harm to competition. *Wheeler*, 591 F.3d at 362; *London*, 410 F.3d at 1304; see *London*, 410 F.3d at 1303 n.7.

After decades of litigation, the federal courts of appeals have reached a consensus view. All eight appellate courts that have considered the issue (the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits) have held that proof of actual or likely harm to competition must be shown for there to be a violation of Sections 202(a) or (b) of the Act. *See Terry*, 604 F.3d at 277; *Wheeler*, 591 F.3d at 358; *Been*, 495 F.3d at 1230; *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005); *London*, 410 F.3d at 1303; *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 164 F.3d 625 (4th Cir. 1998) (table), 1998 WL 709324, at *4-5; *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. United States Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *De Jong Packing Co. v. United States Dep't of Agric.*, 618 F.2d 1329, 1336-37 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980); *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976); *see also Armour & Co.*, 402 F.2d at 720-22. Those courts generally rely on the Act's text, which uses terms of art that had settled antitrust meanings at the time of enactment, and Congress's purpose, which was to protect competition in the packing industry.