

Journal of Agricultural & Food Industrial Organization

Volume 2

2004

Article 8

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David A. Domina*

*DominaLaw pc llo, Omaha, Nebraska, USA, DAD@dominalaw.com

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Proving Anti-Competitive Conduct in the U.S. Courtroom: The Plaintiff's Argument in *Pickett v Tyson Fresh Meats, Inc.**

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Abstract

Defining competition in a U.S. Courtroom involves the analytical and intellectual collision of the law's pragmatic aspects with the academic realities of economics. Both disciplines depend heavily upon competition, and employ a rich dosage of competition language. However, "competition" in law and "competition" in economics are dramatically different.

Economists often study market efficiencies. In an academic setting, economics and econometrics evaluate efficiency, and assess its achievement or failure. As a social science, the study of markets by economists often involves the specific assessment of market efficiencies. Here, too, the law's social disciplines differ greatly from those of academic economics. Except for a few aberrant moments of brief duration, the process of making, enforcing, and litigating over legal principles in history's democracies has never involved pursuit of an efficient economy, or even an efficient legal system. To the contrary, the law's goal is to govern behavior to ensure fairness, justice, legal compliance, and not efficiency.

Through analysis of a history-making U.S. cattle market trial, this paper considers legal "proof" and illustrates application of the rules of evidence and courtroom-level definitions of "proof" and "evidence." Routinely, juries are instructed on what constitutes proof, and what does not. In the legal case that provides this paper's illustrative focus, the United States District Court's definition of evidence for the jurors, the court's rulings on evidence issues, and the lawyers' arguments of the evidence to the jury impacted an entire industry. The case provides a useful tool for studying and defining competition in a U.S. courtroom.

KEYWORDS: Pickett, Tyson, IBP, captive supplies, cattle prices

*David A. Domina, DominaLaw pc llo, 2425 South 144th Street, Omaha, Nebraska 68144-3267, ww.dominalaw.com. Mr. Domina was lead counsel for the cattlemen plaintiffs in *Pickett v. Tyson Fresh Meats, Inc.*, United States District Court, Middle District of Alabama, Case No. 96-A-1103-N. The Editor invited Mr. Domina to submit a paper for publication based on a seminar titled "Defining Competition in the U.S. Courtroom" presented at the University of Nebraska-Lincoln on April 23, 2004.

1. Introduction.

Defining competition in a U.S. Courtroom involves an analytical and intellectual collision of law and its pragmatics with economics and its academics. Both disciplines employ a rich dosage of competition language. Economists compete for the attention of policymakers or decision makers, or peers for acceptance, and implementation of theories. Courts rely on the competition of the adversary dispute process as fundamental to dispute resolution, and emergence of the “truth” about disputed facts.

But “competition” in law and “competition” in economics are dramatically different. For an economist, “competition” finds its context, definition, application, and evaluative importance, in defining and understanding the dynamics of a market. The economist assesses the motivations of prospective buyers and sellers to hedge, speculate, offer, accept, and trade.¹ An economist’s study of “competition” is an academic evaluation of all factors that come to bear on an enterprise or sector at a marketplace. Econometrics may be used to measure the magnitude of variability for one or more market dynamics.

Economists often identify with different views, opinions and perceptions. Indeed, “schools” of thought attract economists who are viewed as liberal, conservative, pragmatic, or theoretical as a result.² They present these differences in erudite papers, intellectual arguments and scholarly journals. Their competitive expressions are most often for an audience of peers.

For lawyers and judges, “competition” nearly always means something quite different. America’s judicial system is rooted in “competition;” so is its lawmaking. In a courtroom, the competition between advocates presenting their clients’ opposing causes is stark and contentious.³ In an American courtroom, is there constantly present an opponent who is attempting to tear down and destroy the construct of his or her adversary on a question-by-question and a moment-by-moment basis⁴. A courtroom’s competition is more pure than the competition of athletics because the outcome impacts real lives of real people. The competition of a courtroom is not engaged in for entertainment purposes.⁵

Thoracic surgeons compete against nature to perform operations, but there is no one in the operating room trying to toss a wrench into the patient’s chest

¹ Wilcox, Competition and Monopoly in American Industry, Monograph No. 21 (1940).

² Chicago, Austrian, Marxian, Keynesian, Classical Schools of economic thought are but a few examples.

³ Thorstein Veblen, The Theory of the Leisure Class (NY, Modern Library (1934).

⁴ America is not alone at using adversarial presentation before an impartial judge to resolve disputes of course. But the U.S. commitment to playing out this process before a jury in all" suits at common law, where the value in controversy shall exceed twenty dollars” is unique. U.S.Const. Amend. VII.

⁵ Consider, Wm. Shakespeare, Measure for Measure II, 1 (1604-5).

during the procedure. A trial lawyer's surgical efforts are constantly troubled, and sometimes thwarted, by the wrench-throwing of one or more adversaries.

Law's competition continues to the legislative process. There, many competing perspectives may oppose one another in an effort to find a middle ground, and thwart an extreme position, in legislation.

Perhaps it is unfortunate that the English language offers a single term for "competition," when its applications and significance are so markedly different for the law on one hand, and economics on the other. Though both law and economics are social sciences,⁶ there is too little discourse between the disciplines for either to have an effective understanding of the other's assessment of "competition."⁷

Economists often study market efficiencies. In an academic setting, economics and econometrics evaluate efficiency, and assess its achievement or failure. As a social science, the study of markets by economists often involves the specific assessment of market efficiencies.⁸

Here, too, the law's social disciplines differ greatly from those of academic economics. Except for a few aberrant moments of brief duration, the process of making, enforcing, and litigating over legal principles in history's democracies has never involved pursuit of an efficient economy, or even an *efficient* legal system. To the contrary, the law's goal is to govern behavior to ensure fairness, justice, legal compliance, and not efficiency. Thus [f]ree competition is worth more to society than it costs. Efficiency is often antithetical to fairness or justice.⁹ This observation about America is old: "We succeed in enterprises which we possess, but we excel in those which can also make use of our defects." In the antitrust area, the extremes of efficiency may also be unlawful.¹⁰

This background is important in assessing how competition or lack thereof is proven in a U.S. courtroom in a case involving economics. For this paper's purpose, a specific lawsuit is used, and one side's perspective is considered. The defense's perspective is described, in this paper, strictly as viewed through the plaintiffs' eyes. Judges are trained, and experienced at trying to synthesize two opposing points of view. Lawyers try to understand an opponent's perspective, but do so for the purpose of attacking it and undermining it, not articulating it with objectivity.¹¹ This paper is the work of a lawyer, not a judge.

⁶ Shavo II, *Foundations of Economic Analysis Law* (Harvard Press 2003).

⁷ Roe, *Corporate Law's Limits* (Harvard Press 2002).

⁸ *Vegejohn v. Guntner*, 167 Mass 92, 44 N.E. 1077, 1080 (1896) (O.W. Holmes, J.).

⁹ Alex DeTouqueville, *Democracy in America* (1835).

¹⁰ 15 *USC* §§ 1 & 2.

¹¹ The author confesses partisanship in this paper. His advocacy on behalf of America's cattlemen in the case which is this paper's primary subject, is not set aside in this article's authorship.

It is worthwhile, therefore, to consider a rudimentary definition of “proof” and “evidence.” Routinely, juries are instructed what constitutes proof, and what does not. In the legal case that provides this paper’s illustrative focus, the United States District Court defined evidence for the jurors as follows:

During the trial I have ruled on objections to certain evidence. You must not concern yourselves with the reason for such rulings since they are controlled by rules of law.

You must not speculate or form or act upon any opinion as to how a witness might have testified in answer to questions which I have rejected during the trial, or upon any subject matter to which I have forbidden inquiry.

In coming to any conclusion in this case, you must be governed by the evidence before you and by the evidence alone.

You have no right to indulge in speculation, conjecture or inference not supported by the evidence.

The evidence from which you are to find the facts consists of the following: (1) the testimony of the witnesses; and (2) documents and other things received as exhibits.

The following things are not evidence: (1) statements, comments, questions and arguments by lawyers for the parties; (2) objections to questions; (3) any testimony which I have stricken or which I have told you to disregard; and (4) anything you may have seen or heard about this case outside the courtroom.¹²

The Court also defined direct and circumstantial evidence, and observed that the law makes no distinction between these two kinds of evidence as to character, quality, persuasiveness, or acceptability. The Court’s definitions of direct and circumstantial evidence were as follows:

¹² *Pickett v Tyson Fresh Meats, Inc.*, Civil No. 96-A-1103-N, US Dist Ct MD AL, 2004), Jury Instruction No. 4.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case. You have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms since the law makes no distinction between the weight to be given to direct and circumstantial evidence.¹³

2. The Subject Case.

This article focuses on the summation of evidence and presentation of argument by lawyers for America's cattle feeders in *Pickett v. Tyson Fresh Meats, Inc.*¹⁴ In *Pickett*, the cattlemen contend that America's largest slaughterhouse, Tyson Fresh Meats, Inc., procures fed cattle through forward contracting, off-the-market formula contracting, joint venture ownership, alliance purchasing with post-mortem pricing methods, or other procurement methods that involve no price negotiation or price discovery at the time of sale. They contend these off-the-cash market methods so reduce and diminish cash market activity as to permit the slaughterhouse to downwardly depress (manipulate) the residual cash price, and thereby lower its procurement cost for all of its cattle.¹⁵ The cattlemen contend this conduct violates 7 USC § 192, the competition section of the *Packers and Stockyards Act* of 1921 ("*P&S Act*"). This statute provides as follows:

It shall be unlawful for any packer with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

- (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

¹³ *Pickett v. Tyson Fresh Meats, Inc.*, Civil No. 96-A-1103-N, US Dist Ct MD AL, 2004), Jury Instruction No. 3.

¹⁴ *Pickett* is the first class action ever certified, and the first tried, in the *Packers & Stockyard Act's* 84 year history.

¹⁵ *Id.*, Plaintiff's Third Amended Complaint.

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire,¹⁶

Following sections of this paper summarize the circumstances, and much of the argument, along with some of the actual evidence, presented during trial of the *Pickett* case. *Pickett* is a class action. Six cattlemen from Alabama, Kansas, Montana, South Dakota, and two from Nebraska, sued Tyson Fresh Meats alleging unlawful market manipulation and unfair competition. When closing argument was presented the evidence before the jury was housed in 3-ring notebooks covering approximately ninety (90) linear feet of bookshelf space. This “culled” data came from Tyson records, USDA data, feeder data, publications, subpoenas, and academic sources.

Closing argument in *Pickett* was a daunting task. The case summation was required to synthesize an enormously complex lawsuit. These statistics will offer some sense of the case’s complexity:

- The suit was filed in June 1996, and tried January-February 2004, after nearly eight years of litigation.
- Three appeals to the United States Court of Appeals were docketed *before* trial was reached.
- The Plaintiffs’ lawyers traveled an estimated 500,000-600,000 miles to track down the evidence.
- Approximately, one hundred (100) pretrial depositions, given in locations stretching from Washington State to New York City, from the mountains of Colorado and Montana to

¹⁶ 7 USC § 192, sometimes referred to as § 202 of the *Packers and Stockyards Act*.

Washington D.C., and from the North Dakota-South Dakota border to the Gulf Coast of Alabama, were taken.

- The depositions were an estimated 20,000 pages in length.
- More than one hundred (100) separate motions were filed with the Court, resulting in perhaps as many as sixty (60) hearing events.¹⁷
- Millions of dollars were spent by both sides.¹⁸ and
- Trial, once it commenced, was conducted for five (5) weeks before a twelve (12) person jury.

3. *Pickett Case Background*

Background for the *Pickett* case and for the *P&S Act* of 1921 deserves comment. Both case development history and the historical purpose of an antitrust statute play integral roles in problems a practicing lawyer confronts at deciding how to define competition in court.

For more than a century, American meatpacking as an industry engaged in ritualistic, anti-competitive behavior. Over 80 years ago, a United States Senate report concluded, "[i]t has been demonstrated beyond question that the history of the development of this industry has been the industry of one effort after another to set up monopoly."¹⁹ High levels of economic concentration within the meatpacking sector foster packer collusion, discriminatory pricing, manipulation of livestock, and other anti-competitive prices. Similar problems were cited only recently when the U.S. Senate passed, but the House of Representatives defeated, a complete ban on packer ownership of meat-crop animals.²⁰

¹⁷ Some of the motions were heard simultaneously, so there were fewer than 75 actual in-court appearances.

¹⁸ The lawyers for the cattlemen were not compensated, and will not be unless they eventually win the case.

¹⁹ Federal Livestock Comm'ner Senate Report No. 39, 67th Congress, 1st Sess. (May 9, 1921) at 7.

²⁰ In 2002, when the Senate passed the Packer Ban prominent professors working in areas related to ag markets observed:

The meatpacking industry has consolidated rapidly over the last twenty years. In the 1980s and early 1990s, consolidation was primarily horizontal. In the mid-to-late 1990s, vertical integration has progressed rapidly. Packers engaged in livestock production, entered long-term contracts to secure livestock production, and purchased downstream firms for further processing. Additionally, major meatpacking firms have entered into a web of interlocking firms through joint ventures and alliances. This consolidation has led to serious concerns of an imbalance of power between meatpackers and independent producers.

Similar concerns in the late 1800s and early 1900s, led to the passage of the Sherman and Clayton Antitrust Acts and the 1921 Packers and Stockyards Act (PSA). The Congress finds itself in an analogous position today due to the structure and conduct of the contemporary

The *Pickett* plaintiffs and the author presented trial evidence that economic concentration levels within beef packing reached all-time highs by the mid-1990s. They contend these circumstances fostering packer collusion, discriminatory pricing, and, most importantly, livestock price manipulation through use of captive supply arrangements, also known as "forward contracts." Though these forward contracts were efficient tools for the packers to procure cattle, but the efficiency was believed driven, in large measure, by price depression in the cash market. The Pickett plaintiffs claim the *P&S Act* prohibits this conduct.²¹

The *P&S Act* of 1921 was remedial legislation. Its design and purpose was to protect producers of the nation's meat supply from the disparate financial power of packers. Before the statute was enacted, President Wilson commissioned the newly formed Federal Trade Commission to conduct a large scale study of the packing industry. A year later, the FTC released a massive study, uncovering numerous, large-scale anti-competitive schemes among packers.²² The FTC responded to President Wilson question as follows:

Answering directly your question as to whether or not there exists 'monopolies, controls, trusts, combinations, conspiracies, or restraints of trade out of harmony with the law and the public interests,' we have found conclusive evidence that warrants an unqualified affirmative.²³

The FTC Report caused alarm. Congress held hearings on anti-competitive packer activity.²⁴ One student of the subject concluded his treatise-long review of this history with the words the "impetus for the enactment of the *Packers & Stockyards Act* was provided by an investigation and report of the Federal Trade Commission on conditions in the livestock and meat industries."²⁵

meat industry. Connor, Carstensen, McEowan & Harl, *The Packer Ban on Livestock Feeding and Ownership, Legal & Economic Implications*, <http://www.econ.iastate.edu/outreach/agriculture/reports/PackerOwnership.pdf>.

²¹ This point was briefed extensively and repeatedly. It remains the central appellate issue in the case. *Pickett v Tyson Fresh Meats, Inc.*, #04-12137-D, (11th Cir 2004).

²² FTC Report, Summary and Pt. 1 at 28 (noting the FTC reviewed "detailed evidence, including hundreds of documents taken from the files of the packing companies, about 9000 pages of sworn testimony, and many thousand pages of field reports")

²³ FTC Report, Summary and Pt. 1 at 23.

²⁴ Donald A. Campbell, *The Packers & Stockyards Act Regulatory Program in Agricultural Law* (John H. Davidson Ed.) 186-87 (1981).

²⁵ *Id.*

When the early 20th century's packers could see legislation, and possible long-term litigation with the justice department, they signed a 1920 Consent Decree prohibiting some anti-competitive behavior. But Congress was not satisfied. Pressure continued in the House of Representatives. Congressman J. N. Tincher (R, Kan.) observed that the *Packers & Stockyards Act* "goes farther than we have ever gone in reference to regulating private business, except in the Interstate Commerce Act."²⁶ Advocates of the Act were particularly concerned about the manipulation of livestock prices. They adopted the statute to prevent such manipulation. Sen. George Norris (R, Neb.) asked the prevailing question in legislative hearings prior to adoption of the Act:

[Stockyards] are supposed to be a public marketplace where competition would be unrestrained – yet if that marketplace was owned by the man who was going to be doing the buying, would you not fear that he might interfere with the price that the seller might get?²⁷

Senator Norris responded to his own question by saying, "We endorse as essential the policy of divorcing the packers from control of the stockyards, which should be public market forces, treated as public utilities, and open, under equal and reasonable conditions to all."²⁸

As in 1921, the mid-90's presented cattlemen with a market consisting of so few packers, so large, with so much advance price control, that price manipulation was an overt temptation that no one could deny. The *Pickett* plaintiffs and their lawyers set about to prove that anti-competitive behavior dominated their industry, and that the nation's largest slaughterhouse, Tyson Fresh Meats, Inc., known at the time suit was filed as IBP, inc., was liable for violating the *P&S Act*.

The *P&S Act* is fundamentally different from other antitrust laws.²⁹ Though the *Act* is sometimes is referred to as one of the nation's antitrust laws, its literal language is markedly different from the *Sherman Act*, perhaps its closest cousin in antitrust enforcement. Indeed, the trial judge in *Pickett* chose to use

²⁶ 61 Congress'l Record 1804 (May 26, 1921).

²⁷ Government Control of Meatpacking Industry Hearing before the Subcommittee on Agriculture & Forestry, U.S. Senate, 65 Congress 2d Sess. on Senate Res. 221 In Favor of Government Control In The Operation Of Packing Houses and Packing Plants During The Continuance of The War (9-18-1918) at 73.

²⁸ Meatpacking legislation, hearings before the Committee on Agriculture, House of Representatives, 66 Congress 2d Sess. (March 1, 1920) pt. 5 at 272-73.

²⁹ Christopher Kelly, *An Overview of the Packers & Stockyards Act*, http://www.nationalaglawcenter.org/assets/articles/kelley_packers.pdf.

Sherman principles to interpret the *P&S Act* – framing a fundamental issue that must now be addressed by the appellate judiciary.

From the *Pickett* plaintiffs' perspective, and that of their lawyers, these stark differences exist between the *P&S Act* of 1921 and the *Sherman Act* of 1895:

- The *Sherman Act* includes a "rule of reason" analytical requirement. If a rational basis for the challenged behavior exists, the behavior is deemed lawful under Sherman. The "rule of reason" analysis is specifically negated by the *P&S Act* of 1921, which charges that conduct engaged in "for the purpose or with the effect" of manipulating price, achieving an anti-competitive result, or creating a monopoly is unlawful.
- *Sherman Act* cases often turn on circumstantial evidence, based on market shares, as a way of proving the existence of market power, a prerequisite to establishing market manipulation. The *P&S Act* does not require such evidence, and the *Pickett* case did not involve circumstantial evidence of market power's possession by Tyson. Instead, direct evidence was relied upon and used as proof of abusive market power's presence in the fed cattle trade.
- While Tyson argued otherwise, the law is clear that the P&S Act prohibits practices the *Sherman Act* allows:³⁰

In a *Sherman Act* case, plaintiff must prove (1) specific intent by the defendant to achieve monopoly power by predatory or exclusionary conduct, (2) factual proof of anti-competitive conduct, (3) a dangerous probability the defendant will achieve to succeed a monopoly.

The *P&S Act* requires proof that a packer "(1) engages in or use any unfair, unjustly discriminatory, or deceptive practice or device, (2) sell or otherwise transfer to or for any person, or buyer otherwise receive from or for any person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or

³⁰ *DeJong Packing Co. v. USDA*, 618 F2d 1329, 1335 n7 (9th Cir 1980).

dealing in, any article, or of restraining commerce, or (3) engage in any course of business or do any act for the purpose or with the effect of controlling prices, or of creating a monopoly"³¹

The starkness of differences between the *Sherman Act* and the *P&S Act* has drawn frequent comments from the courts.³² Simply, the "rule of reason" defense so typically used in other antitrust areas appears to be negated by the facial language of the *P&S Act* quoted above. It should be borne in mind that "the *Packers & Stockyards Act* is remedial legislation and should be liberally construed to further its life and fully effectuate its public purpose."³³

The *Act* also "is one of the most comprehensive regulatory measures ever enacted."³⁴

4. Trial By Jury

Pickett was tried to a twelve (12) member jury. Eight (8) of the jurors had college diplomas or degrees, three (3) had military experience, one (1), without a college degree, was a lifelong research librarian, and all were intensively focused and aggressive note takers throughout trial. The presiding judge in *Pickett* permitted the jurors to question each witness, by submitting written questions, when the lawyers were finished interrogating each witness. Several jurors asked written questions. Twice during the trial, questions about econometrics, including questions about regression analyses and their methods, were posed to the expert witnesses. One questioned posed hypothetical use of regression analysis in a particular setting; another asked about a formula variable.

After the case was submitted to it at 12:30 p.m. on February 10, 2004, the jury deliberated until 10:30 a.m. on February 17, 2004, when it returned its verdict. During its deliberations, nearly a dozen jury questions were sent to the judge. These questions were often quite frank and specific. For example, one question focused on a single page within Exhibit 228, a lengthy, complicated data set of Tyson Fresh Meats' records.

³¹ 7 USC § 192.

³² *Swift & Co. v. US*, 393 F2d 247, 253 (7th Cir 1968); *Swift & Co. v. US*, 308 F2d 849, 853 (7th Cir 1962); *Farrow v. USDA*, 760 F2d 211, 215 (8th Cir 1985) (noting that lack of competition with depression in prices was an evil at which the *P&S Act* was directed); *Spencer Livestock Comm'n Co. v. USDA*, 841 F2d 1451, 1455 (9th Cir 1988).

³³ *Bruhns' Freezer Meats of Chicago, Inc. v. USDA*, 438 F2d 1332, 1336 (8th Cir 1971).

³⁴ Christopher R. Kelly, *An Overview of The Packers & Stockyards Act*, 1 The Nat'l Agricultural Law Center (April 2003).

Trial by jury is intended to be conducted as a democratic process in which unanimity is required of the participants. In the United States District Courts of America, only a unanimous civil jury can return a verdict. Less than unanimity results in a mistrial.³⁵ In *Pickett*, jurors were required to decide seven separate verdict issues unanimously. This means that all twelve jurors were required to be unanimous seven times over to decide the case. For the Plaintiffs to win, the vote had to be as follows:

- Cattlemen 84
- Tyson Fresh Meats, Inc. 0

5. Historical Significance of the *Pickett* Effort

Pickett v. Tyson Fresh Meats, Inc. is the first class action certified on behalf of producers against a packer under the P&S Act of 1921. It is also the first case brought by private citizens, tried to a jury, and fought in a battle through the courts lasting nearly eight years to the time of trial, to bring to court a private lawsuit-framed competition issue. The case arrived at the courthouse for trial at a time when consolidation across the U.S. economy had reached staggering levels in banking, retailing, transportation, food processing, newspapers, and in some other fundamental sectors. As the case unfolded, every news service in the country, and many in other nations³⁶ focused a significant interest in the case. The case drew comment from several federal lawmakers.³⁷ It became an issue in connection with a proposed takeover of Farm Credit Services, and has been mentioned, though only slightly, during the 2004 Presidential campaign.³⁸

The *Pickett* case's historical significance stems from at least these factors:

³⁵ *F R Civ P* 48.

³⁶ Editorials on the subject of the case were published by the *New York Times*, the *Wall Street Journal*, scores of newspapers in cattle country, and many industry publications.

³⁷ See, e.g., 3-18-04 Press release of US Congressman Earl Pomeroy, (D ND), citing legislation co-sponsored with Congresswoman Barbara Cubin (R WY). Others speaking for the position of the *Pickett* Plaintiffs were U S Senators Enzi (R WY), Dorgan (D ND), Conrad (D ND), Grassley (R IA), Harkin (D IA), Johnson (D SD), Daschle (D SD), Thomas (R WY), who co sponsored the *Captive Supply Reform Act, S 1044 (2003)*.

³⁸ John Kerry's running mate, John Edwards, co sponsored S 91, the Fair Contracts for Growers Act. Kerry's official website published an anti-concentration position paper. <http://www.johnkerry.com/issues/rural/farmers.html>.

Pres. Bush was not specific on the issue. His administration did not support the packer ban legislation in Congress. <http://www.beefusa.org/BushKerryComparison.htm>

Ralph Nader spoke directly to the issues. <http://www.votenader.com/issues/index.php?cid=45>.

- The passage of nearly 80 years between adoption of the P&S Act in 1921 and trial in *Pickett*.
- The enormous burden of bringing the case – in terms of out-of-pocket expenses and investment of time and energy by the plaintiffs' lawyers.
- The risk to the courageous cattlemen who brought the case while trying to remain in business.
- The reticence of the federal government to take action on its own, and its default of the statute's enforcement to the private sector.
- The common sensical nature of the plaintiffs' claims, coupled with the big money vs. small producer structural framework of the case.

A debate of values exists in America. Some believe that an economy dominated by smaller companies, though less efficient, assures greater and better competition, more opportunity, more invention and entrepreneurship, and a stronger, more stabilized citizenry braced against threats to their freedom.³⁹ Others see America differently.⁴⁰ They perceive it as a country where big companies, operating at a high degree of efficiency, can do the job of running America's economy, and competing with one another. They do not value grass roots' enterprise with the same premium. These factors all came to swords' points when *Pickett v. Tyson* came to trial.

6. Proving Anti-Competitive Conduct In Court - *Pickett v. Tyson Fresh Meats, Inc.*

At the heart of *Pickett v. Tyson* is the cattlemen's contention that the *P&S Act's* competition sections are intended to function as a legal fence marking a sharp line of demarcation between producers, and their rightful territory in the economic system, and packers and their rightful territory on the other side of the legal fence. The cattlemen contend, simply, that cattle producers are responsible to breed, feed, grow and sell cattle. Packers, on the other hand, are to buy, kill, process, and box and sell meat. When packers become involved in cattle ownership, or possession of large cattle inventories, they encroach upon the legal fence designed to separate producers from packers, and violate the law.

³⁹ See, e.g., *Brief of Amici Curiae, Fifty Leading Scholars et al, Pickett v Tyson Fresh Meats, Inc.*, # 04-12137-D (11th Cir 2004).

⁴⁰ See, e.g., *Brief of Banks (Including RaboBank et al.), Pickett v Tyson Fresh Meats, Inc.*, #04-12137-D (11th Cir 2004).

In *Pickett*, a stark physical illustration of this was present in court throughout trial. Behind the Plaintiffs' counsel's table in the courtroom near the jury, a six-foot section of barbless, wired fence was erected on a stand. At the outset of the case, the fence was loose, the wires were floppy, and the structure looked incapable of holding anything in or out. After the Plaintiffs' evidence was finished, the fence was tightened, braced and looked formidable. At the case's outset and intermittently throughout the case, the Plaintiffs sought to remind the jury that the trial's objective was to repair or fix the fence – legal fence – between packer and producer.

This illustration or metaphor for the law as a fence drew a response from Tyson Fresh Meats' lawyer in opening statement, and the response played throughout the trial. When Tyson's counsel responded to the Plaintiffs' opening statement out the outset of the case, the slaughterhouse's lawyer said that an icon or object in the courtroom to represent the case's true essence would, if he had a choice about it, not be a barbed wire fence. The lawyer said barbed wire fences are mean. They separate and divide, and do not represent cooperation.

Tyson's lawyer continued that if he had brought an icon to the courthouse to represent the case's theme, he would have chosen a voting booth, representing choice.⁴¹ This was so, because according to Tyson's lawyer, the lawsuit's essential character was about choice – should cattlemen have the freedom to choose to sell their cattle in forward contracts, through captive supply or alliance arrangements, or should some cattlemen who oppose those methods of selling be permitted to prohibit them through litigation?

The Plaintiffs were mindful of this defense argument throughout the trial. It was inevitable that the metaphorical clash between the law as a fence and the voting booth as a choice would play a significant role in the Tyson case in defining competition.

7. Fencing Off Market Manipulation.

Before trial actually commenced in *Pickett v. Tyson*, the Plaintiffs' evidence was physically moved into the courtroom, and the Plaintiffs' portion of the trial stage was set.⁴²

⁴¹ TR 1/13: 204:2-10.

⁴² Approximately 200 volumes of written exhibits were moved into the courtroom and assembled a crude bookcase 32-feet long, and consisting of three shelves so it would fit immediately below the jury rail. The reader may be interested to know that the bookshelves were cut to length, and drilled for assembly in the courtroom at the author's specific direction and pursuant to his measurements and calculation of the shelving space needed in the courtroom. The U.S. Marshall's Service granted special permission for simple screwdrivers to enter into the courtroom to assemble the bookshelves.

The most interesting part of setting the stage for trial involved moving the illustrative fence, requiring mending and tending, into the courtroom immediately behind the Plaintiffs' counsel table. The fence remained there until after closing argument was given. It became a constant and daily prop to remind the jurors, the Plaintiffs, and the lawyers that the entire objective was to fix the legal fence designed to keep packers on their rightful part of the economic landscape, and the producers on theirs.

The theme "Fencing Off Market Manipulation" helped set the stage for the closing argument. PowerPoint summation and supplementation was used for the closing argument. A total of 34 slides were presented.⁴³

8. The Closing Argument

Perhaps the best way to illustrate how competition was defined at trial in *Pickett v. Tyson* is to simply present the closing argument given in the case.⁴⁴

8.1 Purpose. Closing argument's purpose or objective is much debated by trial lawyers. No unanimity of opinion about how to conduct an effective closing argument has emerged. Styles vary from lawyer to lawyer, case to case, and era to era.

In every case, jurors are instructed by the Court that "what the lawyers say is not evidence." One celebrated lawyer's view on closing argument was expressed as follows and may be helpful to the Journal's reader at understanding the art of summation following years of preparation and weeks of trial:

A successful trial follows a pattern. The opening statement is the prologue, the testimony is the acting out of the contest between right and wrong, and the closing argument is the epilogue. Someone has said that the best jury technique is to tell the jury what you are going to do; then do it; and then tell them that you have done it.

A good closing argument ties up all of the loose ends and imparts a message that gratifies the wish of the audience to carry away a feeling of participation and education. If a trial could be successfully planned and executed in this fashion, it would truly be a work of art and some trials are.

⁴³ Certain of these slides appear along the text of this paper.

⁴⁴ The argument is modified here, significantly, for publication purposes.

To accomplish this, a moral issue must be developed and resolved. The jury must be able to recognize the action as a procedure from cause to effect. The cause is the action of the hero, the Plaintiff or the Defendant. The action is the plot. The action causes a crisis and the resolution of the crisis is the dramatic moment which clasps the passions of the jury

Every great speech ever given has been an appeal from the law of man to the Higher Law. The question is one of liberty or bondage, life or death, and the self-consciousness of the speaker is swallowed up in the purpose.⁴⁵

Most successful trial lawyers believe the law has its only real life and breath in a courtroom. There, what is legislated must be applied. Success in its application, or failures at attempts to apply it, proves how weak or strong the law will be. Trial lawyers who are truly good at their art seldom involve themselves extensively in lobbying efforts, and have little faith in legislation. America's quintessential trial lawyer, Clarence Darrow, said:

I soon discovered that no independent man who fights for what he thinks is right can succeed in legislation. He can kill bad bills by a vigorous fight and publicity, but he can get nothing passed. Among the bills that I always tried to kill⁴⁶, and with good success, were laws increasing penalties and creating new crimes.⁴⁷

8.2 The Scene At Closing Argument. *Pickett v. Tyson* was tried in Montgomery, Alabama. The large, majestic courtroom with its extra large bench is designed to accommodate three-judge panels of the Eleventh Circuit Court of Appeals, which occasionally hear arguments in Montgomery.⁴⁸

The courtroom's configuration throughout the trial was essentially as follows:

- To the left of the judge and along the left side of the courtroom ahead of the bar, a jury box with sixteen seats to accommodate twelve jurors and four alternate jurors was

⁴⁵ Stein, *Closing Argument* § 201 (Callahan 1996)

⁴⁶ Darrow served a short term in the Illinois legislature.

⁴⁷ Clarence Irving Stone, *Clarence Darrow For the Defense*, 159 (Doubleday 1941).

⁴⁸ The Eleventh Circuit's "home" is at Atlanta. Like all of the circuit courts, panels occasionally hear cases elsewhere.

equipped with multiple television screens for easy exhibit viewing and electronic evidence presentation.

- The witness stand, to the judge's immediate left was equipped with a screen for the witness to see. The microphone placement encouraged any witness to face the jury.
- Immediately in front of the Bench, and below it, the "well" of the courtroom was equipped with the electronic data to accommodate the court reporter, the courtroom bailiff, and an assistant bailiff when necessary. Lawyers requiring exhibits to be marked did so at the well. Witnesses entering the courtroom approached the Bench, stood before the well of the courtroom, and were administered the oath by the courtroom bailiff.
- Approximately thirty (30) feet from the bench, and between the tables for the respective parties, was a sophisticated podium, equipped with technology to permit documents to be viewed, videotapes to be played, compact discs to be used, and equipped with a sound system for the lawyer. This podium was designed to remain relatively constantly in a single location with little movement to and fro. The podium's purpose was to allow the lawyer conducting a witness examination, or addressing the Court during an argument, to place documents on the podium, and have access to all electronic equipment needed to control exhibits. But the podium was not configured for use during closing argument.
- Nearest to the jury, to the left of the podium from the judge's perspective (and to the right to one entering the courtroom from the rear), a relatively small table (perhaps sixty-six (66) inches long and forty (40) inches wide) would barely accommodate three seated persons. I chose this position from which to conduct trial for the Plaintiffs in *Pickett*.
- To the judge's right of the podium (the left to one entering the courtroom from the rear) a long L-shaped table – large enough to accommodate perhaps fifteen (15) persons – was available. Tyson's lawyers (often 9-12 at a time) used this table.

8.3 The Day Before Closing Argument. The closing argument was scheduled for Tuesday, February 10, 2004. On February 9, a lengthy jury instructions conference was conducted. At the conference, the lawyers saw the judge's proposed final jury instructions for the first time. After thousands of pages of briefs, arguing hundreds of legal points in the case, it was up to the judge, now, to summarize the principles of law applicable to the case for the jury's use.⁴⁹

The instructions were shocking to the Plaintiffs'. It was clear from the instructions that the trial judge had decided to apply *Sherman Act* antitrust principles to the *P&S Act*. He would tell the jury that the Plaintiffs could not prevail in the case unless they proved that Tyson had:

- Unfairly manipulated the cash market through use of captive supplies.
- Done so with no legitimate business purpose or competitive reason.
- If Tyson proved any legitimate business purpose or competitive reason existed, Tyson was to win, even if the jury believed that the reason was not sufficient to justify captive supplies usage. In other words, the jury was to conclude for Tyson if it found that some legitimate reason – even an inadequate one in its view – existed.
- Tyson's market manipulation without a legitimate business purpose had purposefully or effectively lowered the cash price, harmed a national market and caused damages to all members of Plaintiffs' class of cash fed animal sellers to Tyson.
- If the jury found all of these matters, it would also determine the amount of damages caused to the national market for fed cattle, but not necessarily to the class alone, during the class.⁵⁰

The jury instructions imposed a dramatically higher burden of persuasion and proof on the Plaintiffs than Plaintiffs' counsel believed was appropriate under the *P&S Act* alone. Plaintiffs had argued repeatedly that the *P&S Act* is a trade

⁴⁹ The judge's jury instructions may be seen at www.endcaptive.com, an official court website. The instructions were 27 pages long.

⁵⁰ The "class period" at issue in the case commenced February 1, 1994 and extended to October 31, 2002. The commencement date was determined by the date when Plaintiffs filed suit and was governed by an applicable statute of limitations. The conclusion date was chosen by the Court and imposed judicially to limit proof and allow efficient administration of the lawsuit.

protection statute designed to protect producers from packers, and to prevent packer abuse of market power.⁵¹

The court's instructions made it clear that the judge believed that Plaintiffs had to prove Tyson held, and abused, its market power. The instructions indicated judicial acceptance of Tyson's argument that a firm with 30-40% market share presumptively lacks market power. Plaintiffs had argued against this repeatedly, and until the final instructions were distributed by the Court the day before closing argument, it seemed as though the Court had been persuaded that market share, expressed on a percentage basis, need not be proven.⁵²

Of course, Plaintiffs' trial team was keenly aware that the *Pickett* case represented the first significant private litigation effort to enforce the *P&S Act*. It [was] "of great importance that the standards established in this case reflect the policies that Congress intended to address with the . . . *P&S Act*."⁵³

Plaintiffs' counsel left the jury instructions conference on the evening of February 9 disappointed with the Court's decisions, and acutely aware that the jury instructions would make success with the jury extremely difficult. Three years of planning for trial and preparation of closing argument, had to be redone overnight. The context in which evidence was to be placed, and the backdrop against which it was to be measured by legal principles established in the jury instructions had to be rethought. The burden of the court's decision was great.

On the morning of February 10, 2004, nearly a hundred cattlemen journeyed to Montgomery to hear the closing arguments.

The cattlemen looked eager, aware that the case's importance in their lives could hardly be expressed, and fearful of losing. Most of them in attendance genuinely believed winning would mean another generation could follow them in the cattle business, and losing would mean cattle production would follow the path of poultry and pork. They knew only protection of a vibrant cash cattle market could provide opportunities for new cattlemen to enter, small cattlemen to compete, and large cattlemen to face the reality that their efficiencies or inefficiencies would be measured at the marketplace instead of being accommodated by deals with packers.

⁵¹ 7 USC § 192 (a-d). The law does not impose a requirement of market share or any minimum threshold or indirect proof of market power before condemning its abuse and permitting damages.

⁵² Courts have long held that proof of market power through indirect evidence such as market share, as contrasted with direct market-participant proof of abusive conduct, is proper. Direct evidence is always more desirable than circumstantial evidence. See, e.g., *Todd v. Exxon Corp.*, 275 F3d 191 (2nd Cir 2001); *United States v. Microsoft Corp.*, 253 F3d 34 (DC Cir 2001) (where evidence indicates that a firm has in fact profitably [raised prices substantially above the competitive level] the existence of monopoly power is clear.)

⁵³ Brief of Amici by 3 professors, submitted in *Pickett v. Tyson*, 96-A-1103-N (March 31, 2004).

8.4 The Summation. The courtroom hushed when the bailiff entered and intoned “All rise.” The Judge entered, was seated, and the lawyers, parties and audience followed. The court asked, “Is there any reason why we shouldn’t bring in the jury?” Both sides answered, “No. The Plaintiffs and the Defense are ready, Your Honor.” The jury entered, and the courtroom stood and again was seated. Preliminary instructions were given, and the jury was told that the statements of lawyers in closing arguments are not evidence, but the court expected that the closing argument would prove very helpful to the jury and its work. Jurors were permitted to continue note taking, which had commenced with opening statements, throughout the closing argument process. The court’s specific comments in this regard were as follows:

Let me say something to you now. This has been a long case, and there’s been a lot of testimony that’s been received. It’s important for you to keep in mind that the case is to be decided on the evidence that you heard and as you recall it from your notes and from your memories of the testimony. What the lawyers say to you now in their closing arguments is not evidence. And if they tell you that certain – that the evidence is this or the evidence is that – that just represents their representation. That is not the evidence. You are to decide this case on the basis of the evidence that you heard and recall in this case. And if that disagrees with what the lawyers tell you, then you rely on what your notes and what your recollection, your collective recollection of the evidence is.

Since it’s been a long case, and there’s been a lot of evidence, I do invite your close attention to what counsel may have to say in closing argument. While it’s not evidence, I do believe that it will aid and assist you in evaluating this evidence, determining what the facts are, applying the law as I give it to you, and reaching a verdict which speaks the truth of the evidence in this case.

So with those, opening remarks, Mr. Domina⁵⁴

⁵⁴ TR 2/10: 3182-83.

8.5 Summation Begins. The time had come, now, for me to summarize competition, unfair competition, the cattle market, and the Plaintiffs' view of market manipulation by America's largest slaughterhouse, before a jury. It was time to pull together the exhaustive effort made to prove anti-competitive conduct in a United States courtroom.⁵⁵ Doing so requires context. Here, the jury would be asked whether the Plaintiffs have proven that the cattle market was national. I chose to approach this topic first by talking about the breadth and importance of the case:

This is America's cattlemen's case. When we finished our evidence, our very last witness . . . from the South Dakota-North Dakota border, came here to deliver one really simple, specific message. He described those two states, and made them sound like they are – mostly pasture, and said in response to the last question that he was asked during our case, "We live on cattle." In huge stretches of this country, cattle and existence – economic existence, social continuity – are absolutely perfectly intertwined. One cannot be without the other. . . because in large stretches of this country, there is no other use for the land and no other economic activity.

This is an important case. Without a market, the cattle business can't exist. Our claim is that the Defendant has routinely, regularly taken down the market. In exactly the same way that a national tragedy takes down the stock market, we contend that the defense's presence or absence, entry and exit from the market, takes down the cattle market. When that market is taken down to a lower level, there's still trading that occurs, just as happens with the stock market after a calamity when it drops and shares trade, but at a lower level. That drop is the difference that we're concerned about here.⁵⁶

With the comments made to open, I hoped to make it clear to the jury that the context of the *Pickett* case – a context testified to by many witnesses – was a

⁵⁵ The Plaintiffs' Complaint, defining its position in the case, contained specific allegations about unfair competition and market manipulation. The Complaint alleged that Tyson had used captive supplies, cattle controlled under contracts, to downwardly depress the entire cash market for fed cattle and achieve its cattle procurement objective at an artificially reduced cost level.

⁵⁶ *Id.* at 3184-85.

fundamental part of the real proof of the case. A national market, a national impact from hostility to free and fair cattle trading and pricing, all set the stage for the jury's decision that the market had been manipulated and the manipulation had been nationwide. I called on history, and known elements of national heritage, to make the point:

. . . This is an enormously significant lawsuit. It's not just another case tried in just another courtroom. This case does involve our heritage, and I think our security and our future, certainly the future course of our heritage.

Cattle and the cattle business and production agriculture have been our backbone. Our economy has changed, but our dream has not been repealed as people, the dream to get an education, own a home, and have a business, or the opportunity to have a business, and independent, family-owned business. That's the way the cattle business has essentially been. That business led us across the continent, conquered the West, populated many of our states in the West and in the South; and that business is still fundamental to building a particular kind of person we need in our society. You saw some of those people as we presented our evidence. So, we are talking about our heritage.

We are talking about a security issue, about food being heavily concentrated or not so heavily concentrated so one company can or can't be sold and change the entire course of how we live. We are talking about whether, in the future, that kind of a look [gesturing to the cattlemen assembled for the closing arguments – families] that kind of look that represents the people involved in this case, the families who are trying to survive will continue, or whether the future of America looks more like that [pointing at Tyson's table, where only lawyers, and not even a corporate executive, were present.]. It's a significant case.⁵⁷

⁵⁷ *Id.* at 3185-86.

Unless the jury understood its decision would affect persons far beyond Montgomery, and Alabama, and the South, and even the Midwest, I feared jurors could not grasp the implications of hostility practiced against the market and price manipulation. Without being able to see the market as a whole, from the perspective of the nation as a whole, there was too much risk the jury would simply focus on individual transactions, isolated impacts, and, therefore, an insufficiently broad view of anticompetitive behavior by a national firm. Having set this stage, it was time to define the legal issue. I continued:

Our contention is that the *Packers and Stockyards Act of 1921* has been broken. That statute, which is summarized in the Court's Instruction No. 12, is paraphrased here. First of all, the instruction doesn't say this, but the evidence discloses that the purpose of the *Packers and Stockyards Act* is to protect producers from packers. That's what we are here for. We are asking you to help us rebuild the fence that keeps the packer over there, and lets the producer be over here.⁵⁸

The statute prevents – it prohibits unfair, unjust practices or courses of business that manipulate price. Our contention that is that the prohibition against manipulating price is a prohibition against manipulating inventory when the manipulation of inventory leads to the manipulation of price. If you are in a market as a dominant player and you run your inventories up so you can drop your price down, and the only reason, the only legitimate reason, to run your inventory up is to drop your price down, you have engaged in manipulation of price through manipulation of inventory. We contend Tyson, IBP, violates this statute by doing exactly that.⁵⁹

The Court's jury instructions communicated to the jury the essential language of the *P&S Act's* anti-competition section, 7 USC § 192. But the Court decided before trial it was not appropriate to attempt to summarize the statute's legislative history or articulate its "purposes." Generally, the courts virtually

⁵⁸ Plaintiffs claimed and offered evidence throughout the trial that the statute's purpose was to keep the producer in the business of breeding, calving, growing, feeding and selling animals. The packer was to be kept in the business in buying fed animals, killing, slaughtering and processing them, and selling what their carcasses yielded.

⁵⁹ *Id.* at 3186-87.

never tell a jury what a statute's purpose is. Instead, courts tell juries what a statute's requirements are, and allow the jury to judge how those requirements apply to particular facts presented in the course of a trial's evidence. Each member of Congress may have a different reason for casting a vote in favor of a statute, so statutory "purpose" is not commonly submitted for jury consideration.⁶⁰

During trial, two letters written by one of the six cattlemen serving as class representatives were received as evidence.⁶¹ I noted for the jury that one of these exhibits clearly portrayed the history and historical aspects of the *P&S Act*, and imparted market conditions at the time of its passage. The jury was shown this graphic⁶²:

History Calls

- Ex 1527 & A Witness for Plaintiffs:

“...Upton Sinclair’s book... “The Jungle” talks about a devastating “Beef Trust”, a packer monopoly....[T]oday, you have a front row seat in viewing a more ... powerful **packer monopoly, one headed by IBP, who, today, by itself, controls nearly as much of the market as the big five packers did in 1921....** [t]he country depends on you to be more than a spectator.”

Use of this slide drew an objection from Tyson’s lawyer. He observed that there was no strict “monopoly” issue in the case, and the Court agreed, noting that the jury would be so instructed, but permitted me to continue. I said, “. . . the instructions don’t refer to monopoly, but the exhibit does.” I read the last line

⁶⁰ Compare, *Corporation of Presiding Bishop v Amos*, 483 US 327 (1987).

⁶¹ Exhibits 1526 & 1527.

⁶² Plaintiff’s closing argument Powerpoint slide 7.

again, “The country depends on you to be more than a spectator. . . What we know from this piece of history is that in 1921, five companies had as much impact and control over our [cattle] industry as one [as now].”⁶³

The jury was then referred to exhibits showing that the Tyson family owns substantially all of Tyson Fresh Meats, and summarizing its revenues, including the contribution of beef to its revenues.⁶⁴

I asked the jury to recall testimony by the highest ranking Tyson official to appear at trial.⁶⁵ I reminded the jury there was no evidence from any source, whatsoever, to suggest Tyson had ever used economics, econometrics or even simple, general business analysis in an effort to determine whether its use of captive supplies was justified, or “legitimate” in cost terms, or for other business reasons. I reminded the jury that the President of Tyson was unable to identify by name the Vice President or Treasurer of Tyson Fresh Meats, Inc., although he knew more than 70% of the company’s revenues were contributed by the fresh meats’ portion of the business, where the beef and swine slaughter occurs

The jury surely also recalled that the President of Tyson had been compelled to acknowledge a contract with a major captive seller in the Pacific Northwest used the six Midwest states for its pricing, tending, therefore, to prove with Tyson’s own documents that the price for fed cattle was national, and Northwest cattle were priced off Midwest cattle.⁶⁶

It was clear Tyson senior management was insensitive to its operations, but was certainly using national pricing.

Tyson’s president conceded at least thirty percent (30%) of Tyson’s cattle over the eight and one half (8 ½) year class period from February 1, 1994 through October 31, 2002 had been procured through use of captive supplies.⁶⁷ He acknowledged that each ten percentage points represented about a million cattle a year.⁶⁸ Moreover, he acknowledged that members of the company’s Board of Directors never received information about cattle procurement policies, methods, procedures, captive supplies or increases in their usage.⁶⁹

The testimony also proved Tyson studiously avoided tracking transactions or studying cattle procurement methods.⁷⁰ He acknowledged no awareness of one

⁶³ TR 2/10: 3188-9. For simplicity and presentation here, at times items appearing as quotations from the transcript are slightly changed to accommodate presentation in printed format.

⁶⁴ Trial exhibits 70, 74 & 78. TR 2/10: 3189.

⁶⁵ Tyson called eleven witnesses. After eight years of planning, its case took only 3 1/2 days to present, and followed a month of evidence by the Plaintiffs.

⁶⁶ *Id.* at 2902-4 & trial exhibit 677.

⁶⁷ *Id.* at 2915-6.

⁶⁸ *Id.* at 2917.

⁶⁹ *Id.* at 2918-2920.

⁷⁰ TR 2/5: 2927-30.

of Tyson's largest captive supplier.⁷¹ Tyson's senior officer acknowledged another major captive seller to Tyson contained carcass specifications very favorable to the captive seller as compared with cash sellers. Tyson's president acknowledged that these favorable specifications could result in a better price for the captive seller,⁷² and conceded important points about the absence of any viable justification for using captive supplies

Tyson's testimony revealed that by the end of the class period in late-2002, Tyson's annual slaughter was 200,000 per week. Tyson's own evidence established that 100,000 head of its slaughter was purchased in the cash market, leaving the remainder to be procured through captive supplies.⁷³ It was also revealed in the testimony that the company turns its inventory approximately two hundred ten (210) times per year.⁷⁴

All this evidence was presented in the context of proof that Tyson's business was national, its cattle procurement through captive supplies were national, and its captive supply usage had not reduced its buyer force, though it had changed the buyer force's work.

I knew that the jury's verdict form would be as follows, and wanted the form to be completed in our favor. The verdict form was displayed to the jury during closing argument. When it was finally returned, it looked like this:

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

HENRY LEE PICKETT, et al.,)	
)	
Plaintiffs,)	Civil No. 96-A-1103-N
)	
v.)	
)	
TYSON FRESH MEATS, INC.,)	VERDICT FORM
)	
Defendant.)	
)	

FILED

FEB 17 2004 *DWJ*

CLERK
U. S. DISTRICT COURT
MIDDLE DIST. OF ALA.

Do you find, by a preponderance of the evidence:

1. That there is a nationwide market for fed cattle?

Yes No

⁷¹ *Id.* at 2930-31.
⁷² TR 2/5: 2932-38 & trial exhibit 285.
⁷³ TR 2/5: 2948-50.
⁷⁴ *Id.*

2. That the defendant's use of captive supply had an anticompetitive effect on the cash market for fed cattle?

Yes No

3. That the defendant lacked a legitimate business reason or competitive justification for using captive supply?

Yes No

4. That the defendant's use of captive supply ~~proximately~~ caused the cash market price to be lower than it otherwise would have been?

Yes No

5. That the defendant's use of captive supply injured each and every member of the plaintiffs' class?

Yes No

If you have answered "yes" to each of the foregoing questions, then you should proceed to questions number 6 and 7. If you have answered "no" to any one or more of the foregoing questions, you may consider your deliberations completed and your foreperson should sign and date this verdict form.

6. What amount, if any, do you find that defendant's use of captive supply damaged the cash market price of fed cattle sold to IBP during the period from February 1, 1994, through October 31, 2002?

\$ 1,281,690.00 10/31/02

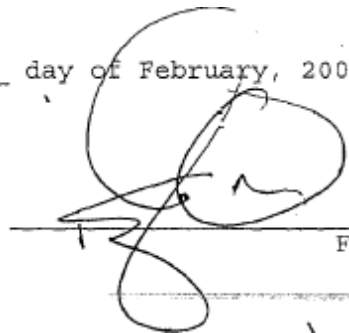
7. Did the defendant's use of captive supply depress the cash market price for fed cattle purchased by IBP by an equal percentage for each year of the class period?

Yes No

If your answer is yes, by what percent?

%

DATED this 17 day of February, 2004.



FOREPERSON

8.6 Producer Evidence Summarized. Time was spent during closing argument reminding the jury of the substantial evidence heard from producer witnesses who testified with forceful clarity about the adverse impact of captive supplies on them and their business. The jury had heard large producers testify that IBP withdrew from the market, the market fell, and cattle traded at a lower level after it did so.⁷⁵ It had also heard gripping testimony from producers about boycotts against them when they had dared to speak out about the dangers of captive supply.⁷⁶

Over and over, witnesses had carefully defined the cash market and contrasted it with captive supplies:

- Q. What is the cash market for fed cattle, as you understand it?
- A. The cash market is a market in which a producer and owner of livestock would negotiate with a buyer, a meatpacker, and deliver those animals within seven days of the time that a price was determined.
- Q. And what are captive supplies of fed cattle, as you understand it?
- A. The captive supplies are essentially all of those animals outside of the cash market which the meatpacker has the ability to draw from without negotiating price.⁷⁷

The jury was reminded, too, that Tyson's manipulative course of business had no legitimate justification or reason. This was summarized with two visual slides during closing argument:⁷⁸

⁷⁵ *Trial Ex 229*; R23-354:3-365:6; R24-478:13-483:8).

⁷⁶ TR 1/26: 1519-1555.

⁷⁷ TR 1/26: 1354.

⁷⁸ Plaintiffs' closing argument Powerpoint slides 11 & 12.

Tyson's Manipulative Course of Business



Without *Legitimate* Reason Tyson

- 1 Manipulates "Inventory" of Cattle
- 2 Is In & Out Of Cattle Market on Whim
- 3 Controls Cattle for Months; not 7 Days
- 4 Uses A 'Deals' Based Course of Business

Tyson's Unfair, Manipulative Course of Business



Without *Legitimate* Reason Tyson

- 5 Alters Deals with Unwritten Changes
- 6 Boycotts Those Who Speak Up
- 7 Drives Others Out
 - Packers -- Producers
- 8 Offers 'Bribes' Not To Report Price

On the final point above, the claim Tyson "offers 'bribes' not to report price," the jury had heard, repeatedly, that Tyson buyers had offered select sellers a favorable price for their cattle on the condition they would not disclose the price.⁷⁹

The impact of Tyson's conduct had been vividly presented in the evidence. A Colorado cattleman, who had served on the United States Department of Agriculture's Small Farms Commission, and authored a portion of its report⁸⁰ made a brief but important appearance on the witness stand during

⁷⁹ E.g., TR 1/30: 2160-1.

⁸⁰ TR 1/28: 1905-1906.

trial. She testified about the adverse impact and consequences of non-competitive cattle sales upon the cash market.⁸¹ This cattleman told the jury the cattle market is a foundation market in the United States, meaning that cattle consumed grains, and impact ag-markets in a broad way.⁸² The cattleman confirmed viability of the fed cattle market would have an eventual impact on approximately 1.2 million cattlemen in the United States.⁸³

Perhaps the most forceful evidence for the cattlemen to emerge during the *defense evidence* came during the course of the Defendant's chief cattle buyer's appearance on the witness stand. First, he admitted as IBP's fed cattle inventory increased, its offering price for cattle to be procured decreased. He testified as follows:

- Q. So, one of the – one of the considerations [in setting price] is your inventory, isn't it?
- A. Yes, sir.
- Q. And as your inventory of cattle goes up, the price you offer goes down.
- A. That can happen. . .
- Q. If you're long on cattle, you don't need to buy as many, so you offer less money, don't you?
- A. That's correct.⁸⁴

The Defendant's cattle buyer was also confronted with documents prepared in his handwriting to summarize the company's number of cattle purchased, projected slaughter, and projected need. One such document follows:

⁸¹ TR 1/28: 1900-39.

⁸² *Id.* at 1907-9.

⁸³ *Id.* at 1917.

⁸⁴ TR 2/5: 3012.

Ex 224, p 1

	3/27/99	4/3/99	4/10/99	4/17/99	4/24/99	5/1/99	5/8/99	5/15/99	5/22/99	5/29/99
Jack	12.6	8.2	6.7	12.1	6.5	10.1	12.3	11.1	8.6	5.9
Brian	16.1	14.2	10.5	13.9	13.8	10.4	16.3	11.6	8.5	6.8
Todd	12.6	6.4	4.4	18.2	6.2	8.9	13.3	13.5	8.7	11.1
Dale	9.6	9.3	8.3	12.4	6.2	6.3	7.4	5.7	7.1	4.1
David	15.7	11.6	13.4	13.3	4.2	10.2	9.6	7.1	5.9	5.2
David	7.9	5.2	11.0	14.6	12.2	12.8	15.3	10.4	10.9	6.5
Mike	8.0	4.6	4.9	4.5	7.1	6.9	7.2	4.1	2.5	2.2
TOTAL CARRY-OVER	82.5	140.2	59.6	81.2	61.4	68.5	71.9	68.3	50.0	41.8
INVENTORY	48.3	44.9	48.4	56.0	44.8	50.5	47.6	50.1	44.7	45.6
TOTAL	130.8	185.1	108.0	137.2	106.2	119.0	119.5	118.4	94.7	87.4
LAST WEEKS TOTAL	124.5	150.3	104.9	128.0	137.2	124.2	119.0	112.5	113.7	98.7
DIFFERENCE	-6.7	-25.9	+3.1	+9.2	-23.0	+12.8	0.5	+5.9	-19.0	-11.3
% DIFFERENCE	-5.1%	-14.2%	+2.9%	+6.7%	-16.7%	+10.7%	0.4%	+5.0%	-16.9%	-12.8%
PROJECTED KILL	27.7	33.0	27.5	29.7	30.0	27.7	22.8	33.2	32.6	27.8
% of PROJECTED KILL ROUGH	174%	135%	178%	129%	143%	122%	145%	151%	143%	144%

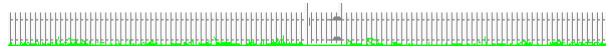
The point was made with the jury that the percentages of projected kill bought did not cover the entire situation, because the chart did not depict the number of captive supply cattle expected at the plant this week, next week, or the following week, and therefore did not disclose how far into the future on the company's plants, for example, could slaughter at capacity without buying any cattle at all by drawing on its 192% (week of 5/1/99) inventory of cattle for projected slaughter, while also procuring a large number of its cattle slaughter through captive supplies.⁸⁵ Other exhibits were recalled for the jury.

⁸⁵ I have estimated, without a calculation to support it, that a 192% projected overrun on cattle for "next week" might, when combined with 60% captive supplies, permit a slaughterhouse run for at least three weeks and perhaps a month while buying no, or substantially no, cash cattle.



Documentary Proof

Ex 285: CattleCo
Ex 632: Cactus
Ex 672: Beef NW
Ex 676: AgriBeef
Ex 677: Simplot*
Ex 680: National Farms
Ex 683: BMG



The jury was also reminded the scalehouse manual⁸⁶ illustrated a series of different ways to cut and issue checks, depending on the procurement method for select cattle. The different prices yielded by different procurement methods were not dependent upon the kind, gender, grade or yield of a carcass, but simply on the procurement method instead.

8.7 The Expert Witnesses. A section of the closing argument devoted itself to analysis of expert testimony. Each side called two economists as witnesses. Of course, this complex case required considerable focus on economics and econometrics. One economist, testifying for the Plaintiffs, had analyzed more than a million bits of IBP data.⁸⁷ He synthesized this material, and boiled it down to a presentable chart summarizing the adverse impact on the cash price for fed cattle from captive supplies, determined on a weekly basis.⁸⁸ This chart illustrated that, by using a consistently revealed coefficient, it had been econometrically established that captive supplies could be seen to adversely affect, and downwardly depress, the cash price for fed cattle on a consistent basis. The economist calculated a coefficient of \$.0000562 cwt per 1,000 captively supplied cattle.⁸⁹ This coefficient, tested with econometrically sound methods involving granger causality and other causation tests, and more than 200 regression analyses, permitted him to opine, with reasonable, professional

⁸⁶ Trial exhibit 418.

⁸⁷ TR 1/27: 1615:23-1616:6.

⁸⁸ Trial exhibit 1219.

⁸⁹ *Id.*

certainty, about the damages.⁹⁰ His opinions involved hundreds of hours of work and analysis of thousands and thousands of pages of documents. The jury had learned he was the only economist in America who had ever seen the data used to present his testimony at trial. Even the defense economists did not see it.

The defense expert witnesses' work contrasted sharply with the plaintiff's economists. One of the defense expert witnesses conceded that he knows nothing about cattle, but essentially said this isn't important.⁹¹ He took issue with the plaintiff's conclusions about causation, though he conceded a proven correlation between elevated levels of cattle supplies and diminished cash prices for fed cattle. He did not compete with Tyson data, but acknowledged that a colleague and a graduate student did some work on limited data for him.

The other expert witness looked only at whether a quality difference existed between cattle purchased, in general, in the cash market, and select cattle purchased under certain chosen IBP alliance programs involving animals qualified for the certified Angus beef program.⁹²

In the end, in terms of data, the jury was reminded:

Tyson's chief cattle buyer had admitted a statutory violation by saying that he, alone as a single person, sets the price to be offered by Tyson for fed cattle, and that as inventories held by the company go up, the cash price offered goes down. The jury was reminded, too, that [Tyson's chief cattle buyer] admitted the company could buy all of the cattle it needs in the cash market as sufficient cattle are available there.⁹³

8.8 The Repeal of Market Fundamentals. The closing argument's quest to prove anticompetitive behavior, including market manipulation, moved, then, to the fundamentals of the cattle market. On several occasions during the trial, and particularly during the testimony of defense witnesses, an effort had been made to establish the market fundamentals for selling cattle, and how captive supplies either work with, or contrast against, those fundamentals. The jury was reminded of this exchange, and others like it:

⁹⁰ The plaintiffs' economists' methods were peer reviewed by four other agricultural economists. They were from Montana State University, Purdue University, University of Illinois and Oregon State University.

⁹¹ TR 2/3: 2595:16-19.

⁹² Deposition, 9/12/00: 53:7-54:1.

⁹³ R39-3011:10-11; R39-3012:14-21; R39-3016:22-3017:11.

- Q. Now, I understand you to say this morning, I think, that there was a fundamental difference, [witness], between the cash market and the noncash or formula market. And you said that the difference was – correct me, please, if I’m wrong – that in the cash market, there is a negotiated price known at the time the animals are surrendered or delivered to the packer, correct?
- A. That’s right.
- Q. In the formula arrangement, there is no known price when the animals are delivered to the packer.
- A. That’s right.
- Q. There is a term, is there not, that’s used fairly in the cattle business and about the cattle marked called market fundamentals?
- A. Yes.
- Q. And one of the market fundamental would be to be aware of the general level of the market or the price. True?
- A. Yes.
- Q. And another fundamental of the market would be to understand the method of procedure of price discovery. True?
- A. Yes.
- Q. Price discovery meaning the strike price at which an agreement to sell cattle is reached, correct?
- A. Uh-huh.
- Q. And would you agree that another fundamental would be to have some general understanding, at least, of the level of need or the slaughter capacity of the packers?
- A. That’s correct.
- Q. And it would be a fundamental of the market, would it not, to understand, [witness], that the packers generally operate with the goal of keeping their plants at maximum utilization?
- A. I would say that is a fundamental, not only in the packing business, but in the feeding business, the ranching business, in almost every business.
- Q. All right. And thank you. I was going to break it down into that, and you anticipated me. So,

obviously, on your side, another fundamental is to achieve economics of scale by keeping your yards fully utilized.

A. Right.

Q. And another fundamental of the market is, is it not, as one understands the process of price discovery, to understand the procedure whereby bidding and asking occurs? How that happens would be a market fundamental, wouldn't it?

A. Well, most people are interested in that.

Q. Would you agree that's a market fundamental?

A. I think it's a – one way to determine valuation for livestock, sure.

Q. Let me perhaps clarify just a bit, because my question may need to be clarified. One would need to understand, for example, whether the bid-and-ask process is to occur, in the easiest illustration, in an auction where a sale is cried by an auctioneer. That would be one way. And if you were going to sell your cattle that way, you'd need to understand that basic fundamental of how the bid-and-ask process works there, correct?

A. If I were sitting in a sale barn, I'd need to understand how it worked.

Q. And if one were selling cattle at the feedyard when packer representatives come by, then one needs to understand the fundamental of that bid-and-ask dynamic, true?

A. Yes.

Q. And, of course, another fundamental is to understand the period of time following an agreement for sale during which the cattle are to be delivered, true?

A. As to the functional delivery of the livestock?

Q. Yes. Are they to be delivered the day after the agreement or within seven days of the agreement. That would be a fundamental matter to know, wouldn't it?

A. Sure.

Q. Because, for example, in an operation like yours, where you're seeking maximum utilization, if you

extend the number of days out from seven to eight or seven to ten, those extra one or three days can significantly impact utilization of your yards, can't they?

A. It could.

Q. Now, with the process, [witness], of selling cattle on formula, it's true to say that at the time of the delivery, there is no price, correct?

A. That's right. Cattle have to be slaughtered and the carcass has to be evaluated.

Q. There is a process for discovering the amount of the check that you're paid, but it occurs unilaterally with information coming back from the packer to you when you receive the check.

A. Yes.

Q. And you have described for us, carefully, an arrangement with Tyson or IBP whereby you have a target with flexibility of two thousand five hundred (2,500) animals a week, that you started out with at least, to deliver to that company.

A. Yes.

Q. And so there is at least some range within which there is dependability of both animal departure, for planning purposes for you, and slaughter arrival, for planning purposes for the packer.

A. Yes.

Q. One of the advantages of that arrangement for you is that you can, if you think the circumstances are appropriate for you, actually put a few more cattle to the packer. True?

A. Flexibility. Yes.

Q. Or you could hold a few cattle back from the packer.

A. Yes.

Q. And the packer, as I understand it, can choose the day of the week during which the cattle are to be called for slaughter.

A. For the specific week, yes.

Q. So in the process of selling cattle under a formula arrangement, several of those market fundamentals either are very significantly changed or they do not

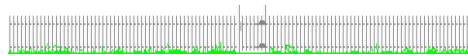
exist at all, correct, [witness]? For example, there is no understanding of the bid-and-ask process, because there isn't any, is there?

A. No.⁹⁴

This testimony was summarized for the jury as follows:⁹⁵

Legitimate Market Fundamentals

- Price
- Price Discovery
- Exposure to Bid & Ask Process
- Understanding Bid & Ask Process
- Constant Demand for Cattle
- No Packer Inventories; 7 Days Rule

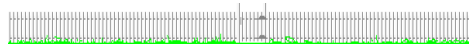


⁹⁴ TR 2/3: 2469:3-25 – 2473:1-10.

⁹⁵ *Pickett* closing argument slides 24 & 25.

Manipulated Market: No Legitimate Fundamentals

- No Price
- No Price Discovery
- No Bid & Ask
- No Bid & Ask Understanding
- No Constant Demand; No 7 Days
 - Packer uses 'flex' inventories



8.9 Tyson's Case. An advocate has a right, and a responsibility, to assess, evaluate and comment on the opposing side's case, too. I did so by noting that Tyson's case was inconsistent. It claimed:

We didn't do it.
And
We did it for "good business reasons."

This led me to muse before the jury that:

Now, Tyson's got some defense theories. Its' first defense theory is we didn't do it. And its second defense theory is, we did it, but for good reasons. I didn't commit the murder; but if I did, I have the insanity defense.⁹⁶

Tyson's best case⁹⁷ had been offered up through eleven captive supply witnesses, and the case was, as I put it:

⁹⁶ TR 2/10: 3209.

⁹⁷ I argued to the jury that Tyson spent eight years to put on its best case, and the jury should bear in mind that its best case did not amount to much in my view.

Filled with holes, that case. It claims there are thousands of formula sellers. We saw no contracts from them . . .

This defendant did not bring to court one single, solitary satisfied cash seller of fed cattle as a witness. It brought some blended formula and cash sellers, three of them – two of them really – who sell some cash cattle. . . If they are not manipulating the market and they buy from a third to 40% of the cattle in the country from thousands of people and they had eight years to look – not one witness who is a cash seller who says we're wrong, the market works. Not one study of a benefit they claim about efficiencies through their plants or in their procurement. No econometric analysis of their data by their own experts. No conclusions like [those produced by the plaintiff's economist].

And they say that they've got to compete. But they didn't offer you one single – even oral, verbal – data point about their competitors. They say, well, our competitors use captive supplies. If their defense is that somehow or another of their competitors do it, number one, doing what is unlawful does not justify lawlessness. My competitor doing something that's wrong; therefore I am permitted to do it. Number two, if the competitors do use captive supplies, why don't they tell us how much?⁹⁸

I summarized that Tyson had no business justification or competition justification, or other legitimate justification for its use of captive supplies. I noted Tyson produced no evidence that captive supply usage affected Tyson's costs of:

- procurement
- processing
- transporting
- selling

and I observed that profit alone is not a justification for antitrust activity. Neither is meeting unlawful competition.

⁹⁸ *Id.* at 3209-10.

8.10 Concluding the Argument. I concluded by reminding the jury of the fence in the courtroom. I recall that when trial started, the structure was a ratty looking fence. I argued fixed it during trial, and asked the jury's help to do the same by enforcing the *P&S Act* as a fence between packers and producers. The defense lawyer had taken issue with our fence analogy in the opening statements. Five weeks later, now in the closing, it was time to respond in defense of our metaphor.

I argued:

You know, that brings me to mending fence. We had that ratty fence here throughout the trial, and now it's pretty much fixed. The last fixing is up to you. But I want to talk about mending fences in terms of choices, because another defense theme is that these captive sellers ought to be free to choose how to sell their cattle and that we ought not deny them that freedom of choice. Well, ladies and gentlemen, this fence, the law, the Packers and Stockyards Act, needed to be – needs to be fixed, because the purpose of the law, is to keep us free.

The defense lawyer said a fence wasn't a very good illustration or example for this case, but a voting booth might be. This law we're trying to enforce became the law because of a voting booth, because people across this country sent others to the Congress of the United States, and it voted and passed the law. Voting gave us this law. Prairie states, most states, have fence laws. They came about because of voting. People have voted to have fence laws because fences assure freedom. Laws assure freedom. Boundaries are necessary so that you can be free on your side and I can be free on my side.

Here that means that fairness trumps a company's claims of efficiency – unproven claims, just assertions. It means that good fences make good neighbors. We'd like to get along with the packer and not be overrun by it. In many, many places in this country the way you decide how to keep a boundary fence is to walk up to it with your neighbor on the other side, reach across it, and shake hands. Then it's your responsibility to maintain the half of that boundary fence that's on your right, and your neighbor has to

maintain the half of that boundary fence that's on his right. By working cooperatively to keep that fence built, each of you your half, you each get along just great. That's the law of the range. My bulls don't get over to breed somebody else's heifers and vice versa. My problems don't become my neighbor's problems. I'm free to be on my side by honoring the fence and obeying the law. And if I don't do that, I overrun my neighbor.

The voting booth produced the fence. The fence assures freedom. These people want to be free on their side with a fair market, a constant and steady flow of cattle, and not a manipulated inventory that makes price irregular and drops that market down so trading is at a lower level. That's all they want.

This company Tyson right now needs to respond in damages by paying back what they've taken. That's the only part of this case we can present to you. Anything else about what else is to occur is up to the Court after your work is done. Your finding that the law has been violated will be an historic finding. It will change the way cattle are traded and allow independent people to continue to be in the cattle business. It will keep North Dakota, North Dakota and lots of other states other states.

The amount, in many ways, is less important than the finding, much less important than the finding, so we can have the market back. But your verdict form asks you to determine an amount. In this case, you've heard one amount from one of the Plaintiffs' experts and an attack on that amount by two witnesses saying he just didn't get it right; no alternative.⁹⁹

I reviewed briefly the jury verdict form, and then concluded my argument by making an observation that I felt I owed the six courageous class members who had been willing to stand up against the packers and make it possible for us to present this remarkable attempt to prove market manipulation and anticompetitive conduct by a meat processor. While my description of all of this

⁹⁹ TR 2/10: 3212:19-25 – 3214:1-24.

to the jury was a little shorter than in other presentations I've made, the longer version is appropriate here.

Since 1921, fifteen (15) presidential administrations have come and gone. None have enforced the competition sections of the P&S Act in a meaningful way.

But since 1921, there has been a second way to enforce the *P&S Act*. Any producer of meats is entitled to do so. All it takes is the courage to stand up and fight.

Since 1921, six producers displayed the courage to stand up and be counted. I asked the jury if it could imagine my pride at being the lawyer for these people.

The end of the closing argument inevitably conjured up some emotions for me. I was concluding, and submitting to the twelve jurors before whom I stood the remarkable responsibility for deciding whether a statute of fundamental importance to an entire industry had been violated, and would be enforced. My voice choked some when I gestured to the Plaintiffs sitting in the courtroom. I closed with these words:

Ladies and gentlemen, I have been enormously, enormously privileged to represent people like them [pointing to the cattlemen]. I 'm finished now. It's up to you. Thank you.

9. Current Case Status

The jury's verdict favored the cattlemen on all meaningful points. Court rules permit a judge to review and set aside a verdict if he believes there is *no* evidence to support it. The judge cannot set aside the verdict simply because he disagrees with the jury's decision about the evidence.

On April 23, 2004, the judge, issued a fourteen (14)-page opinion holding that the jury's verdict would be set aside and judgment would be entered for Tyson. The judge's reasons for his decision were that the plaintiff's proof did not furnish the Court with enough evidence to be able to determine to which members of the class funds should be distributed. The Court did not take issue with the fact a violation of the *P&S Act* had been proven, injury to the cattle market had been established, and Tyson's conduct had manipulated the market.

The Court also found that captive supplies give Tyson a reliable and steady stream of cattle into its plant. And the judge found, applying Eleventh Circuit Court of Appeals precedent that he deemed controlling that this benefit of captive supplies is sufficient to justify their use even if the same benefit can be achieved in the cash market.

At the time of this publication, *Pickett v. Tyson Fresh Meats, Inc.* is docketed with the United States Court of Appeals for the Eleventh Circuit for review. Oral argument will occur January 12, 2005. The appellate case number is 0412137-D. As of the date of this submission, all appellate briefs have been submitted.

An appellate court decision is expected in mid-2005.