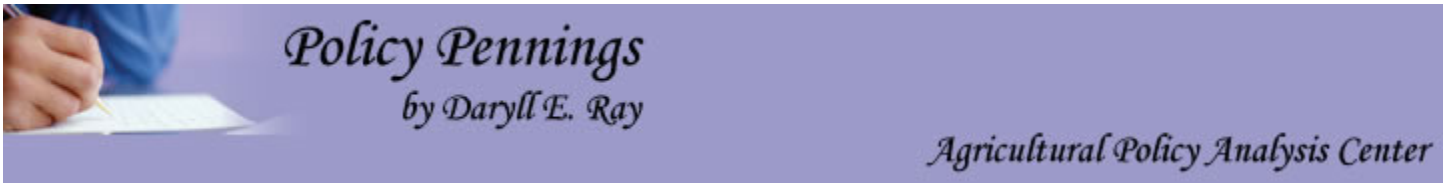
University of Tennessee Economist Cites Taylor Domina Work

Highly regarded and widely read University of Tennessee economist Dr Daryl Ray chose to devote a series of columns to the work of Dr Robert Taylor and David A Domina on problems affecting market concentration in American Agriculture.

This is the second of Dr Ray's columns, reprinted with permission of the author:



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1. USDA claims new GIPSA Section 202 rules clarifies the section's original intent

On June 22, 2010, the United States Department of Agriculture's (USDA) Grain Inspection, Packers, and Stockyards Administration (GIPSA) published a proposed rule, as required by the 2008 Farm Bill, that is designed to provide significant new protections for producers against unfair, fraudulent, or retaliatory practices (http://archive.gipsa.usda.gov/rulemaking/fr10/06-22-10.pdf).

One of the new rules concerns Section 202 of the Packers and Stockyards Act (PSA) that lists seven unlawful acts by the meat packing industry. Each one of those subsections describing a particular unlawful act is separated by a semicolon and the word "or." Grammatically, each of those clauses is an independent clause, which means that each one stands alone.

Subsection (a) makes it unlawful for the industry to "engage in or use any unfair, unjustly discriminatory, or deceptive practice or device." Subsection (b) makes it unlawful for the meat packing industry to "make or give any undue or unreasonable preference or advantage to any particular individual or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage

in any respect." The two subsections describe individual harms while the remaining five deal with actions that restrain competition.

In *Terry v. Tyson Farms, Inc.*, Tyson argued "that because the PSA is essentially an antitrust statute, subsections (a) and (b) require a party to allege an adverse effect on competition in order to sustain a cause of action." The Sixth Circuit Court of Appeals, which heard *Terry v. Tyson Farms, Inc.* noted that seven circuits "have addressed this precise issue" and declined to deviate from the findings of the others.

In terms of grammar, the eight circuits—now including the Sixth—have, in effect, made subsections (a) and (b) dependent clauses that can only be invoked if one of the remaining five independent clauses dealing with harm to competition is also proved.

The USDA has disagreed with the courts' interpretation and consistently held that under sections 202 (a) or (b) of the PSA, an unfair practice can be proven without proof of predatory intent, competitive injury, or likelihood of competitive injury.

Despite USDA's long-held position, the courts failed to defer to USDA's interpretation of the statute because that interpretation was not enshrined in regulation even though the USDA had filed an amicus brief in support of Terry. As a result the USDA asserts that their newly proposed regulations would constitute a material change in circumstances that would warrant judicial reexamination of this issue.

Responding to the release of the proposed rules, AMI (American Meat Institute) Senior Vice President of Regulatory Affairs and General Counsel Mark Dopp accused the USDA of "engaging in a regulatory end-run and attempting to change the law through administrative fiat."

In proposing regulations that would clarify that violations of subsections (a) and (b) of section 202 of the PSA, the USDA provides evidence that the legislative history and purposes of the PSA also support USDA's position. After providing a number of examples, the USDA concludes that the purposes of the PSA are not limited to protecting competition.

In addition to the grammatical perspective and the legislative history and purposes of the PSA, one could look at the issue from an economic point of view. From an economic point of view, it is clear that the court rulings have confined attention to violations of 202(a) and (b) that harm the retail consumer. As the USDA argues, many practices can be unfair and never have anticompetitive implications at the retail level. Examples of such practices include, but are not limited to, not allowing a poultry grower to watch birds being weighed, using inaccurate scales, providing a grower poor quality feed, giving a grower sick birds to raise, failing to provide a grower the growing contract in a timely manner, or retaliating against a grower.

While not ignoring the grammatical, historical and purpose arguments, it could be argued that the courts have ignored half of the anticompetitive equation. And that half is the purchase of product by the packing firm and/or integrator—called by economists a monopsony or oligopsony when one or a very small number of buyers control a market. At the national level and on the buying side, the meat industry is an oligopsony, and at the local level it is usually a monospony.

Poultry integrators usually offer contracts to growers within a limited radius from the plant. And on the occasion that two integrators draw from the same area, they do not poach each others' growers. They don't even compete for the best growers. The poultry integrators are certainly not like the major sports leagues where teams are salivating to grab the others' best players when those players achieve free agency—to wit: LeBron James and the question of whether or not the Cleveland Cavaliers can offer a contract that will keep him in town.

While the integrators do not compete with each other for growers, the growers are in competition with other growers. In the tournament system that is used in the poultry industry, the growers are in competition with each other to be among the top producers. Their level of pay depends upon their tournament placement.

So even if the courts were to continue to ignore grammar, history, and purpose, it could be argued from an economic perspective that giving a particular grower poor feed or sickly birds harms competition at the grower level. The same could be argued for the other practices that were identified as examples by the USDA.

As it stands, the courts have adopted an asymmetric understanding of the nature of competition in the poultry industry to the detriment of the poultry grower. The USDA's rule goes a long way toward restoring the original intent of the statute.

As "Supreme Court Justice Peckham, in one of the first substantive decisions interpreting the Sherman Antitrust Act, said, 'It is not for the real prosperity of any country that such changes should occur which result in transferring an independent businessman…into a mere servant or agent of a corporation…having no voice in shaping the business policy…and bound to obey orders issued by others.'" (Quoted in Domina and Taylor: http://www.competitivemarkets.com/index.php?option=com_content&task=view&id=347&Itemid=50).

The proposed rule was published in the June 22, 2010, Federal Register. GIPSA will consider comments received by August 23, 2010. Comments may be sent via email to comments.gipsa@usda.gov or sent by mail to Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW, Room 1643-S, Washington, D.C. 20250-3604. Copies of the proposed rule and additional information can be found at: http://www.gipsa.usda.gov by clicking on Federal Register.

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column and your total circulation. Also, please send one copy of the first issue with Dr. Ray's column in it to Harwood Schaffer, Agricultural Policy Analysis Center, 309 Morgan Hall, Knoxville, TN 37996-4519.