MORE THAN A MIRROR: THE PACKERS AND STOCKYARDS ACT, ANTITRUST LAWS, AND THE INJURY TO COMPETITION REQUIREMENT*

*Christopher M. Bass***

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** Christopher M. Bass received his Juris Doctor, *magna cum laude* from the University of Mississippi School of Law. He was former staff editor of the Mississippi Law Journal. He received his BBA, *summa cum laude*, from Mississippi State University. He is licensed to practice law in the State of Mississippi and the State of Texas. He currently practices law in Dallas, Texas at Locke Lord Bissell & Liddell, LLP, where he works in the areas of litigation and antitrust law.

I. INTRODUCTION

In the United States, the meat and livestock industries are becoming more and more integrated.[1] This integration has lead to consolidation within the industry and a decreasing number of producers.[2] [3] With this, comes an increased fear that farmers and growers may be subject to unfair or unreasonable practices from major producers.[4]

The fear of producer power is not a new one in the livestock industry. As early as 1917, President Woodrow Wilson authorized the Federal Trade Commission ("FTC") to investigate the livestock industry and report any findings of violations of antitrust laws.[5] The FTC published a massive study which concluded: "[a]nswering directly [the President's] question as to whether or not

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1. *See generally* Jon Lauck, *Concentration Concerns in the American Livestock Sector: Another Look at the Packers and Stockyards Act*, NAT'L. AGRIC. LAW CTR. 3-8 (2004), *available at* http://www.nationalaglawcenter.org/assets/articles/lauck_livestock.pdf (describing the changes in the livestock industry, including mergers and acquisitions, which prompted concerns over competition); STEVE W. MARTINEZ, U.S. DEP'T OF AGRIC., AGRIC. ECON. REPORT NO. 777, VERTICAL COORDINATION IN THE PORK AND BROILER INDUSTRIES: IMPLICATIONS FOR PORK AND CHICKEN PRODUCTS 1-12 (1999), *available at* http://www.ers.usda.gov/publications/aer777/aer777.pdf (describing the current changes in the vertical coordination of the pork industry with past changes in the broiler industry); Clement Ward, *Beef, Pork, and Poultry Industry Coordination*, OKLA. COOP. EXTENSION SERV., AGEC-552 1, *available at* http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-2001/AGEC-552web.pdf.

2. For ease of use, this article will refer to the companies, or packers, who purchase animals or services related to animals and/or sell final meat products as "producers" or "integrators." Individuals who provide livestock to these companies or who provide the service of raising livestock on behalf of the company will be referred to as "farmers" or "growers."

3. *See* Lauck, *supra* note 1; Martinez, *supra* note 1, at 4-11; Ward, *supra* note 1. *See, e.g*, Press Release, Pilgrim's Pride Corp., Pilgrim's Pride Completes Acquisition of Gold Kist (Jan. 9, 2007), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=68228&p=irol-newsArticle&ID= 948851&highlight=.

4. An example of the dangers associated with concentration in the meatpacking industry can be found in *Swift & Company v. United States*. In *Swift*, the small number of lamb producers in an area was able to collude and agree not to bid against one another, thereby lowering the prices to farmers. 393 F.2d 247, 251, 254 (7th Cir. 1968). *See* Dave Mann, *Getting Plucked: Texas Chicken Farmers Become Modern-Day Sharecroppers*, TEX. OBSERVER, Mar. 18, 2005.

5. G. O. Virtue, *The Meat-Packing Investigation*, 34 Q. J. ECON. 626, 626 (1920).

there exist 'monopolies, controls, trusts, combinations, conspiracies, or restraints of trade out of harmony with the law and the public interest,' we have found conclusive evidence that warrants an unqualified affirmative."[6] The study noted that a farmer "is at the mercy of [five major beef producers] because they control both the market and the marketing facilities."[7]

In response, Congress passed the Packers and Stockyards Act ("PSA") of 1921.[8] "The primary purpose of the [PSA] was 'to assure fair competition and fair trade practices in livestock marketing . . . .'"[9] One year later, the Supreme Court ruled that the PSA was constitutional, holding that:

> The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation.[10]

Recent cases prove that similar risks still exist for the American farmer and highlight the importance of the PSA in modern agriculture.[11] For instance, in 2004 Tyson was found liable for using contracted supplies of cattle to manipulate the cash market, thereby depressing the price of livestock, and the plaintiffs were awarded $1.28 billion in damages.[12] At the conclusion of the case, a member of the jury was quoted as saying that its decision was based upon the "spirit of the law – the Packers and Stockyards Act."[13]

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6. U.S. TRADE COMM'N, REPORT ON THE MEATPACKING INDUSTRY, SUMMARY & PART I 23 (1919).

7. *Id.* at 24.

8. Packers & Stockyards Act of 1921, 7 U.S.C. §§ 181-229b (2006).

9. Spencer Livestock Comm'n Co. v. Dep't of Agric., 841 F.2d 1451, 1455 (9th Cir. 1988) (quoting H.R. REP. NO. 85-1048 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 5212, 5213).

10. Stafford v. Wallace, 258 U.S. 495, 516 (1922).

11. An example of the dangers associated with concentration in the meatpacking industry can be found in *Swift & Co*., 393 F.2d at 251-54. *See* Elizabeth Becker, *Jury Awards Ranchers $1.28 Billion From Tyson*, N.Y. TIMES, Feb. 18, 2004, at C1 (stating that Tyson Fresh Meats was found to have used illegal cattle contracts to hold down prices paid to ranchers).

12. Pickett v. Tyson Fresh Meats, Inc., 315 F. Supp. 2d 1172 (M.D. Ala. 2004), *aff'd* 420 F.3d 1272 (11th Cir. 2005); Becker, *supra* note 11.

13. Scott Kilman, *Tyson Loses Cattle-Price Lawsuit*, WALL ST. J., Feb. 18, 2004, at A2.

Since the PSA's inception, courts have debated the extent to which Sections 202(a) and (b) go beyond the protections offered by antitrust laws.[14] This article addresses why the author believes the PSA extends protections beyond those provided in the Sherman Act, and why the PSA should not require a plaintiff to prove that the actions complained of had a negative effect on competition.[15]

II. SOME COURTS HAVE INCORRECTLY RULED THAT THE PSA REQUIRES A SHOWING OF INJURY TO COMPETITION

In *Armour & Co. v. United States*, the Seventh Circuit considered the scope of Sections 202(a) and (b) and found that the PSA is "aimed at halting 'a general course of action for the purpose of destroying competition.'"[16] The court went on to require a rule of reason analysis, saying there must be "some examination of the . . . likely effects of [a seller's] acts or practices under scrutiny, even though these tests under Sections 202(a) and (b) [are] less stringent than under some of the anti-trust laws."[17]

Some recent opinions have held that a successful claimant alleging violations of Sections 202(a) or (b) of the PSA must prove that the alleged wrong-

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14. *Compare* London v. Fieldale Farms Corp., 410 F.3d 1295, 1304-05 (11th Cir. 2005) (stating that PSA's antitrust history suggests that only those unfair, discriminatory, or deceptive practices adversely affecting competition are prohibited by PSA) *with* Schumacher v. Tyson Fresh Meats, Inc., 434 F. Supp. 2d 748 (D.S.D. 2006) (stating that "[s]ection 202 of the PSA is broader than its antecedent antitrust legislation and in some cases proscribes practices which the antitrust acts would permit"). *See generally* 7 U.S.C. § 192 (2006). The PSA is now codified at 7 U.S.C. §§ 181-229. To avoid confusion, this paper will refer to 7 U.S.C. § 192 as PSA § 202, or simply Section 202.

15. It is clear that a plaintiff suing for damages in certain antitrust cases has the burden of showing an "actual adverse effect on competition as a whole in the relevant market." Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993). A negative effect on competition has been central to a court's analysis of some antitrust cases since the Supreme Court stated that the "criterion to be used in judging the validity of a restraint on trade is its impact on competition." Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 104 (1984). This requirement is sometimes referred to the "injury to competition requirement." *See, e.g.*, Stephen D. Houck, *Injury to Competition/Consumers in High Tech Cases*, 75 ST. JOHN'S L. REV. 593 (2001) (examining whether competitive injury must be proven to establish a Sherman Act violation and how to prove such requisite injury).

16. Armour & Co. v. United States, 402 F.2d 712, 720 (7th Cir. 1968) (quoting H.R. REP. NO. 66-1297, at 11 (1921)).

17. *Id*. at 717.

doing adversely affects competition, or is likely to adversely affect competition.[18] The Eleventh Circuit's *London* case has become the leading case for this proposition.[19] *London* ruled that the PSA only makes unlawful those unfair or deceptive acts which adversely affect competition.[20] The Eastern District of Oklahoma recently adopted a similar rule in 2005.[21]

III. WHY THE PSA EXTENDS PROTECTIONS BEYOND THOSE IN THE SHERMAN ACT

The PSA does not share the requirements of the Sherman Act.[22] Of particular importance, the PSA does not require that the plaintiff plead or prove an injury to competition.[23]

A. *The Plain Language of § 202(a)-(b) Does not Require a Plaintiff to Plead or Prove an Effect on Competition*

Courts begin "any exercise of statutory construction with the text of the provision in question."[24] Courts "may not look beyond the text of the statute

18. *London*, 410 F.3d at 1304. *See* Adkins v. Cagle Foods JV, L.L.C., 411 F.3d 1320, 1321 (11th Cir. 2005); *Pickett*, 420 F.3d at 1279; Jarrett v. Tyson Foods, Inc., Order at 20, No. 3:01-cv-463-J-21HTS (M.D. Fla. Nov. 7, 2002) (holding that "to prove a violation of Section 192(a) and (b), a plaintiff must establish not only that the complained of conduct violates the language of the statute . . . but also that the conduct is likely to adversely affect competition").

19. *See London*, 410 F.3d at 1302-05.

20. *Id.* at 1303. The reasoning behind the *London* opinion is discussed *infra*.

21. *See* Been v. O.K. Indus., Inc., No. 02-285-WH (E.D. Okla. Jan. 28, 2005) (discussing the growers' Section 202(a) claims because they failed to raise a genuine issue of material fact that the integrator's alleged "unfair" conduct "injures[,] or is likely to injure competition." *Id.* at 3 (citing Farrow v. Dep't of Agric., 760 F.2d 211, 214 (8th Cir. 1985). *Been* is currently on appeal to the Tenth Circuit Court of Appeals, 05-7079, as of the date of submission of this article no opinion had been released in the case.

22. *See, e.g. Schumacher*, 434 F. Supp. 2d at 751-54; Wheeler v. Pilgrim's Pride Corp., No. 5:02-CV-136-DF, slip op. at 10 (E.D. Tex. Mar. 30, 2007). *Schumacher* is currently on appeal to the Eighth Circuit Court of Appeals, No. 07-1590. As of the date of submission of this article, no opinion had been released in the case. *Wheeler* is currently pending in the Eastern District of Texas. Prior to the submission of this article, the District Court certified this precise issue for interlocutory appeal to the Fifth Circuit Court of Appeals, docket number 07-40651. As of the date of submission of this article no final judgment had been entered.

23. *Schumacher*, 434 F. Supp. 2d at 754; *Wheeler*, No. 5:02-CV-136-DF, slip op. at 10.

except in those rare instances where using the plain meaning of the text creates an 'absurd result.'"[25]

The plain text of Sections 202(a)-(b) do not require an adverse impact on competition.[26] Sections 202(c)-(e) expressly require an adverse effect on competition.[27] "However, the language in section 202(a) of the Act does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language."[28] The prohibitions listed in subsections (a) and (b) are stated as absolute bans, unlike

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24. Peter v. GC Servs. L.P., 310 F.3d 344, 351 (5th Cir. 2002) (citations omitted).

25. *Id.*

26. Section 202 provides "[i]t shall be unlawful for any packer . . . to:
    (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
    (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or
    (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or
    (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, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or
    (g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section. 7 U.S.C. § 192 (2006).

27. 7 U.S.C. § 192(c)-(e).

28. Wilson & Co. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961).

the prohibitions listed in subdivisions (c) through (e), which bar certain conduct only if it adversely affects competition.[29]

Plainly, Congress knew how to draft parts of the statute to require a competitive injury (as well as how not to) as in subdivisions (a) and (b). Contrary to some arguments, the statute simply does not prohibit only those "unfair," "unjustly discriminatory," or "deceptive" practices or devices (under subdivision (a)), or only those "unreasonable preferences" or unreasonably prejudicial acts (under subdivision (b)) that cause competitive injury. Since the meaning of the PSA is clear on its face, there is no need to consult the legislative history of the PSA.[30]

The interpretation that an injury to competition is required also renders much of the language actually used in Section 202 superfluous.[31] Subdivisions (c) through (e) expressly require an adverse effect on competition. If, however, subdivisions (a) and (b) also require an effect on competition as PPC claims, then the express language used in subdivisions (c) through (e) is superfluous. Courts should reject an interpretation that renders parts of the statute meaningless. As the Supreme Court has stated time and again, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[32]

This canon is most clearly violated when one considers subdivision (e), which prohibits persons from engaging "in any course of business" that has as its purpose or effect "of manipulating or controlling prices, or of creating a monopoly . . . or of restraining commerce."[33] If subdivisions (a) and (b) also require the prohibited conduct to affect competition, then the explicit requirement in subdivision (e) adds nothing and is entirely superfluous.

In recent cases, courts have rejected the argument that an adverse effect on competition is required to prove a claim under Section 202(a)-(b). In *Schumacher v. Tyson Fresh Meats, Inc*., the court held, "Section 202 of the PSA, 7 U.S.C. § 192(a), does not prohibit only those unfair and deceptive practices

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29. *See* 7 U.S.C. § 192.

31. *See* Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 167 (2004) ("Given the clear meaning of the text, there is no need to . . . consult the purpose of CERCLA at all. . . . '[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'" (quoting Oncale v. Sundowner Offshores Serv., Inc., 523 U.S. 75, 79 (1998)); Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 220 (2002) ("[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration.").

31. *Cooper Indus.,* 543 U.S. at 166.

32. Conn. Nat'l. Bank v. Germain, 503 U.S. 249, 253-54 (1992).

33. 7 U.S.C. § 192(e).

which adversely affect competition."[34] The court reasoned that the plain language of § 202(a) "'does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation.'"[35] The court also reviewed the PSA's legislative history and concluded it "clearly [did] not require that a § 192(a) claimant show that the alleged unfair practice adversely affected competition."[36]

Likewise, in *Kinkaid v. John Morrell & Co*., the court rejected the argument that, to be viable, a claim under § 202(a) must show an injury to competition.[37] The court reasoned that "[a]lthough the 'chief evil' [at which the PSA was aimed] may have been 'the monopoly of the packers,' the structure of the statute suggests that 'unfair' or 'deceptive' practices are prohibited separately and apart from anticompetitive or 'monopolistic' practices, where these classes of conduct are prohibited in separate subsections."[38] The court acknowledged the contrary authorities cited by the packers, but concluded "only a strained reading of the statute could require that practices that are 'unfair' or 'deceptive' within the meaning of § 192(a) must *also* be 'monopolistic' or 'anticompetitive' to be prohibited."[39]

In the most recent PSA case, *Wheeler v. Pilgrim's Pride Corp.*, the court ruled that the language of the PSA is clear on its face.[40] The court noted that the absence of qualifying language related to commerce or competition speaks for itself, holding that "[a]n interpretation requiring an adverse effect on competition would render Congress's decision to proscribe acts against particular individuals misplaced."[41]

These cases follow earlier opinions which also held that no competitive injury need be shown to make out a claim under §§ 202(a)-(b) of the PSA.[42]

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34. *Schumacher,* 434 F. Supp. 2d at 754.

35. *Id.* at *752* (citations omitted).

36. *Id.* at *754*.

37. Kinkaid v. John Morrell & Co., 321 F. Supp. 2d 1090, 1103 (N.D. Iowa 2004).

38. *Id.* at 1102-03.

39. *Id.* at 1103 (emphasis in original). Although the *Kincaid* court granted the defendant's motion to dismiss the PSA claims on grounds other than the question of whether the defendant's conduct affected competition, the court also noted various ways in which the plaintiffs could assert a viable PSA claim, none of which would require an adverse effect on competition. *Id.* at 1108 n.5.

40. *See Wheeler*, No. 5:02-cv-136-DF, slip op. at 10.

41. *Id.* at 9.

42. *See Wilson*, 286 F.2d at 895 (stating that language of PSA does not require proof of competitive injury). *See also Swift & Co.*, 393 F.2d at 253 (stating that "[s]ection 202(a) of the Act does not require the Government to prove injury to competi-

A narrow interpretation – limiting the scope of this remedial act exclusively to competitive injury – finds no support from the Supreme Court or the law of several circuits. Indeed, it has been held that the PSA, as remedial legislation, should be construed liberally to effectuate its purposes.[43]

Even if a court were to consider legislative history, which is not necessary or proper because sections 202(a) and (b) are unambiguous, as shown below, the PSA was intended to go beyond then existing antitrust statutes to prohibit a broader range of unfair trade practices.

B. *The PSA Was not Enacted Solely to Protect Competition; It Also Was Enacted to Protect the Producers and Consumers From the ''Unfair'' and ''Deceptive'' Practices*

It has been noted that, since the Sherman Antitrust Act, the Clayton Act, the Interstate Commerce Act, and the Federal Trade Commission Act "were not adequate to deal with the problems of the livestock and meat industries, Congress enacted the Packers and Stockyards Act in 1921."[44] "The legislative history of the Act shows that it was intended to be broader in scope and to go further in the prohibition of undesirable trade practices than the foregoing statutes."[45] In first interpreting the PSA, the Supreme Court recognized that the Congressional intention was to go beyond the existing antitrust laws with additional "remedial legislation" to address the specific and persistent problems facing the meat packing industry.[46] Later, another court noted that the PSA was designed to be "broader

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tion"); Gerace v. Utica Veal Co., 580 F. Supp. 1465, 1469-70 (N.D.N.Y. 1984) (rejecting arguments that claims under § 202(a) required a showing of restraint of trade or hindrance of competition); In re Western Cattle Co., 47 Agric. Dec. 992, 1051-52 (1988) (rejecting arguments that would treat the PSA as "nothing more than a mirror of the antitrust laws," and upholding a violation of the PSA "where the evidence establishes a deceptive practice, whether or not it harmed consumers or competitors"); In re Corn State Meat Co., 45 Agric. Dec. 995, 1025 (1986) (stating that "[m]any types of practices have been held to be 'unfair' under the Packers and Stockyards Act without any proof of predatory intent or likelihood of injury").

43. Travelers Indem. Co. v. Manley Cattle Co., 553 F.2d 943, 945 (5th Cir. 1977). *See* Randi I. Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers*, 25 U. MEM. L. REV. 1207, 1217-18 (1995).

44. Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, *in* AGRICULTURAL LAW 186 (John H. Davidson ed., 1981).

45. *Id.*

46. *Stafford*, 258 U.S. at 520-21.

and more far-reaching than the Sherman Act."[47] It is true that the primary purpose of the PSA was to assure fair competition, or to halt courses of action that serve the purpose of destroying competition;[48] however, this is not the PSA's *only* purpose. Another was ridding the industry of deceptive trade practices.[49] In the same paragraph quoted in footnote forty-eight *supra*, the Supreme Court went on to explain:

> Another evil, which [Congress] sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers, on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce.[50]

As the Supreme Court recognized long ago, "[t]he primary purpose of the PSA was thus two-fold – 'to assure fair competition *and* fair trade practices in livestock marketing and in the meatpacking industry.'"[51] House Report 85-1048 further explained that the PSA's objective is "to safeguard farmers and ranchers against receiving less than the true market value of their livestock and to protect consumers against unfair business practices in the marketing of meats, poultry, etc."[52] It is within this context that the PSA should be analyzed.

Numerous courts recognize that, in addition to assuring fair competition, the PSA was also aimed at preventing unfair and deceptive acts regardless of

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47. *Swift & Co.*, 393 F.2d at 253.

48. *See Stafford*, 258 U.S. at 514-15 (explaining that the "chief evil" at which the PSA was aimed was "the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer").

49. *Wheeler*, No. 5:02-cv-136-DF, slip op. at 9.

50. *Stafford*, 258 U.S. at 515.

51. *Schumacher*, 434 F. Supp. 2d at 751 (quoting H. REP. NO. 85-1048 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213) (emphasis in original).

52. *Id.*; *see Spencer Livestock Comm'n Co.,* 841 F.2d at 1454 ("The statute does not define what is meant by the terms unfair and deceptive; it has been held that 'their meaning must be determined by the facts of each case within the purposes' of the Act." (quoting Capitol Packing Co. v. United States, 350 F.2d 67, 76 (10th Cir. 1965))). As discussed *supra*, one purpose of the PSA was preventing unfair and deceptive practices regardless of whether those practices had an adverse affect on competition.

their effect on competition.[53] Thus, the PSA "was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics."[54]

An interpretation requiring proof of injury to competition also ignores the context and historical setting in which the PSA was enacted. A statute, however, "must take meaning from its historical setting."[55] Courts that have examined the PSA uniformly concluded that it grants broader authority to regulate than previous legislation.[56] In *Wilson & Co.*, the Seventh Circuit noted that Representative (and later Speaker) Rayburn "emphasized that although Congress gave the Federal Trade Commission wide powers to prohibit unfair methods of competition, such authority is not as wide-ranging as that given to the Secretary

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53. *See e.g.*, *Wheeler*., No. 5:02-cv-136-DF, slip op. at 9; Rice v. Wilcox, 630 F.2d 586, 590 (8th Cir. 1980) (noting one of the purposes of the PSA is to protect producers and free them from the fear that the channel through which their products pass, "through discrimination, exploitation, overreaching, manipulation, or other unfair practices," might deprive them a fair return for their product); Van Wyk v. Bergland, 570 F.2d 701, 704 (8th Cir. 1978) ("One purpose of the [PSA] 'is to assure fair trade practices in the livestock marketing . . . industry in order to safeguard farmers and ranchers against receiving less than the true market value of their livestock.'" (quoting Bruhn's Freezer Meats v. U.S. Dep't of Agric., 438 F.2d 1332, 1337 (8th Cir. 1971))); Solomon Valley Feedlot, Inc. v. Butz, 557 F.2d 717, 718 (10th Cir. 1977) (stating that one purpose of the Act is to protect farmers and consumers); *Swift & Co.*, 393 F.2d at 253 (noting the purpose of the PSA is to prevent economic harm to producers and consumers); Kinkaid v. John Morrell & Co., 321 F. Supp. 2d 1090, 1103 (N.D. Iowa 2004) ("Although the 'chief evil' may have been 'the monopoly of the packers,' the structure of the statute suggests that 'unfair' or 'deceptive' practices are prohibited separately and apart from anticompetitive or 'monopolistic' practices, where these classes of conduct are prohibited in separate subsections."); Pa. Agric. Coop. Mktg. Ass'n v. Ezra Martin Co., 495 F. Supp. 565, 569-70 (M.D. Pa. 1980) (noting that one purpose of the PSA is to give all possible protection to producers).

54. *Spencer Livestock Comm'n Co.*, 841 F.2d at 1455 (rejecting the argument that the PSA requires proof of an anti-competitive effect, which the court found was based "on an incomplete understanding of the objectives of the Act").

55. United States v. Henning, 344 U.S. 66, 72 (1952).

56. *See e.g.*, *Swift & Co.*, 393 F.2d at 253 ("[T]he statutory prohibitions of Section 202 of the Packers and Stockyards Act are broader and more far-reaching that the Sherman Act or even Section 5 of the Federal Trade Commission Act."); Swift & Co. v. United States, 308 F.2d 849, 853 (7th Cir. 1962) (explaining that the legislative history shows Congress understood Section 202 of the PSA to be broader in scope than antecedent legislation, such as the Sherman Antitrust Act, Section 2 of the Clayton Act, Section 5 of the Federal Trade Commission Act, and Section 3 of the Interstate Commerce Act).

of Agriculture under the language in section 202(a) and (b) of the Packers and Stockyards Act."[57]

It is notable that the "Department [of Agriculture] has consistently taken the position that in order to prove that any practice is 'unfair' under §§ 202(a) (7 U.S.C. § 192(a)) or 312(a) (7 U.S.C. § 213(a)) of the Act, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury."[58] Courts generally give considerable weight to an executive agency's construction of a statute it was entrusted to administer.[59] Although not controlling, the USDA's consistent interpretation supports the contention that an adverse impact on competition is not an element of a claim under sections 202(a) and (b) of the PSA.

C. *Interpretation of Similar Language in the FTC Act Supports This Interpretation of Sections 202(a) and (b) of the PSA*

One should also look to the similarly worded Federal Trade Commission Act ("FTC Act") in construing sections 202(a) and (b) of the PSA. Using language similar to sections 202(a) and (b) of the PSA, Section 45(a)(1) of the FTC Act provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[60] Construing this language, the U.S. Supreme Court held that the FTC may "proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws," and may "proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition."[61] This flexible approach is preferred because "[t]he point where a method of competition becomes 'unfair' within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question."[62]

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57. *Wilson & Co.*, 286 F.2d at 895 (citing 61 CONG. REC. 1806 (1921)).

58. *In re Corn State Meat Co.*, 45 Agric. Dec. at 1023.

59. See United States v. Mead Corp., 533 U.S. 218, 227-28 (2001); Bowman v. U.S. Dep't of Agric., 363 F.2d 81, 84 (5th Cir. 1966).

60. 15 U.S.C. § 45(a)(1) (2006). *See Armour & Co.*, 402 F.2d at 722 ("Section 202(a) should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the Federal Trade Commission (15 U.S.C. § 45) and also to reach any of the special mischiefs and injuries inherent in livestock and poultry traffic.").

61. FTC v. Sperry & Hutchinson Serv. Co., 405 U.S. 233, 239 (1972).

62. FTC v. Motion Picture Adver. Co., 344 U.S. 392, 396 (1953).

Thus, in construing substantially similar language in the FTC Act, the U.S. Supreme Court squarely rejected the argument that the FTC cannot find a practice unfair unless there is proof of an anti-competitive effect. Courts agree that the PSA grants broader authority to regulate than previously enacted statutes, including the FTC Act. If the same language under the FTC Act does not require an adverse impact on competition, then it cannot be so construed under the PSA.

D. The Eleventh Circuit's Opinions in London *and* Pickett *Are not Supported by Law*

The argument requiring plaintiff to prove an injury to competition is shown best in two recent Eleventh Circuit cases: *Pickett v. Tyson Fresh Meats, Inc*.[63] and *London v. Fieldale Farms Corp*.[64] The Eleventh Circuit's view on this issue is incorrect.

In *London*, the court ignored the "cardinal canon" of statutory construction – construing the unambiguous words of the statute – and instead relied on what it considered to be the "primary purpose of the PSA" and "the PSA's antitrust ancestry."[65] As explained *supra*, where, as here, "the words of a statute are unambiguous . . ., 'judicial inquiry is complete.'"[66] The court in *London* erred in failing to abide by the plain language of the statute, which requires no adverse impact on competition. Moreover, the court's analysis of the purposes of the statute was narrow and misleading.[67] Contrary to the broad construction that courts should give this remedial statute, the court ignored concepts of equitable unfairness reflected in Sections 202(a) and (b) as well as the PSA's legislative history, and narrowly limited its application to antitrust concerns relating to effects on competition.[68]

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63. *Pickett*, 420 F.3d 1272.

64. *London*, 410 F.3d at 1302-05.

65. *Id*. at 1302-03.

66. *Conn. Nat'l Bank,* 503 U.S. at 254 (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)).

67. *See London*, 410 F.3d at 1302 (citing selected portions of H.R. REP. No. 85-1048 and Stafford, while ignoring other parts of that report and case that state that another purpose of the PSA was to protect producers from deceptive and unfair business practices).

68. *See id*.; s*ee also* Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 Drake J. Agric. L. 91, 112 (2003) (noting that "[m]uch of the discussion of unfairness in the livestock industry in the context of the P&S Act has confused antitrust fairness with equitable fairness. Yet they are far different in purpose and in analysis.").

Both *Schumacher* and *Wheeler* reviewed and rejected the Eleventh Circuit's analysis of the PSA in *London*.[69] The *Schumacher* court held "the PSA and its legislative history clearly do not require that a § 192(a) claimant show that the alleged unfair practice adversely affected competition."[70] It noted the *London* court's selective citation of *Stafford* and concluded that the court "cites incorrectly to cases from other circuits for the claimed proposition that any PSA claim requires a showing that the challenged practice adversely affects competition."[71] *Wheeler* found *London* equally unpersuasive.[72]

Similarly, *Armour & Co. v. United States* suffers from the same flawed analysis as London, in that it failed to construe the plain language of the statute and instead attempted to determine the purpose of the PSA viewed through an antitrust lens.[73] *Armour* provides no meaningful explanation of why an injury to competition is required under Sections 202(a)-(b) when the text of those sections (unlike Sections 202(c)-(e)) impose no such requirement.

Finally, none of the subsequent cases relying on *London* or *Armour* offer any additional reasoning other than a blanket statement and citation.[74]

IV. CONCLUSION

In today's agricultural climate of a few large producers controlling a plethora of small farmers, Sections 202(a)-(b) of the Packers and Stockyards Act are just as important as ever. It is difficult to understand how courts can add addi-

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69. *See Schumacher*, 434 F. Supp. 2d at 754; *Wheeler*, No. 5:02-CV-136-DF, slip op. at 9.

70. *Schumacher*, 434 F. Supp. 2d at 754.

71. *Id.* at 752. On April 12, 2006, a unanimous jury in Schumacher found that three of the four defendants violated the PSA and awarded $9.25 million in damages to the class members. Combined Brief of Appellants at 3, Schumacher v. Tyson Fresh Meats, Inc., No. 07-1586, 07-1588, 07-1590 (8th Cir. July, 2006).

72. *See Wheeler*, No. 5:02-CV-136-DF, slip op. at 9.

73. *See generally Armour & Co.*, 402 F.2d at 722 (mischaracterizing the PSA as merely another antitrust law).

74. *See Pickett*, 420 F.3d at 1279-80 (merely following *London)*; Mims v. Cagle Foods JV, LLC, 148 F.App'x 762, 766-69 (11th Cir. 2005) (merely restating the conclusion it had reached in *London* two weeks earlier); Wheeler, No. 5:02-CV-136-DF, slip op. at 9; Been v. O.K. Indus. Inc., 02-285 at *3 (stating that the "weight of authority" requires an "unfair" practice under the PSA to be one which injures competition before citing to *Farrow* and *London*).

tional requirements to the PSA given the Supreme Court's clear direction in *Stafford*. This is especially true when one takes into consideration the remedial nature of the Act as well as the wording of the Act itself. Perhaps this issue will remain unresolved until the Supreme Court squarely addresses it.

While the injury to competition requirement clearly has a place in American antitrust law, the American farmer has enough hurdles when it comes to protecting himself from the unfair practices of major corporations. The PSA was passed after the Sherman and Clayton Acts and was therefore meant to be something more than just a mirror of antitrust law.