Developments in Horizontal Consolidation
and Vertical Integration

1. Introduction: Concerns related to horizontal consolidation and vertical integration.

Farmers and ranchers have long advocated the use of antitrust and trade practice policy to curtail the power of firms that purchase agricultural commodities and sell agricultural inputs. Concerns about the market power of firms in the meatpacking and railroad sectors and how this power affected farmers pushed Congress to pass much of the antitrust legislation in the late 19th and early 20th centuries, including the Sherman Act, the Clayton Act, the FTC Act, and the Packers and Stockyards Act.[1] These laws were designed to address problems associated with horizontal consolidation and vertical integration.

Horizontal consolidation describes the number and size of firms in a particular market,[2] for instance the number and size of beef packers that purchase steers and heifers in a particular geographic region. Vertical integration generally describes when one firm has control of more than one part of the supply chain, for instance when a packer also owns or controls its supply of livestock.[3] A variant of vertical integration is vertical coordination where the relationship between the different levels on the supply chain may rely on contracts rather than ownership.[4] In the livestock industry, captive supply livestock would fall under either category because captive supplies are either owned by or contracted to a packer at least seven or fourteen days before slaughter.[5]

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[1] Current Legislation, The Packing Industry and the Packing Act, 22 COLUM. L. REV. 68, 68-69 (1922); *see also* Jon Lauck, *Concentration Concerns in the American Livestock Sector: Another Look at the American Livestock Sector*, National Agriculture Law Center, at 11-12, available at http://www.nationalaglawcenter.org/assets/articles/lauck_livestock.pdf (discussing the historical context in the livestock industry that brought rise to antitrust policy); Michael Stumo and Doug O'Brien, *Antitrust Unfairness versus Equitable Unfairness in Farmer/Meatpacker Relationships*, 8 DRAKE J. OF AGRIC. L. 91, 92-94 (2003).

[2] The United State Department of Justice describes horizontal consolidation with the term "market concentration" and defines it as "a function of the number of firms in a market and their respective market shares." United States Department of Justice Merger Guidelines, § 1.5 (1997), *available at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/.

[3] Steve Martinez, *A Comparison of Vertical Coordination in the United States Poultry, Egg, and Pork Industries*, Current Issues in Economics of Food Markets, at 2 (A publication of the USDA ERS) ("In vertical integration, a single firm controls the administrative operations of two or more successive stages of production.").

[4] Steve Martinez, *Vertical Coordination of Marketing Systems: Lessons from Poultry, Pork, and Egg Industries*, USDA Economic Research Service Agricultural Economic Report No. 807, at 2 (May 2002) ("Vertical Coordination refers to the synchronization of successive stages of production and marketing with respect to quality, quantity, and timing of product flows.").

[5] Definitions of 'captive supply' vary. USDA Grain Inspection Packers and Stockyards Administration states that the term includes "livestock that is procured by a packer through a contract or marketing agreement that has been in place for more than 14 days, or livestock that is committed to a packer more

The top five firms in the steer and heifer slaughter market have 88.7% of the market, with the top four having about 83%.[6] The top five in hogs have 71.6%, and the top five in poultry processing have 60.5%.[7] In terms of vertical integration or coordination, the hog industry has over 75% in captive supplies,[8] while the poultry industry approaches 90%.[9] Although the cattle industry, with about 40% or 50% of fed cattle under captive supply, is not nearly as vertically integrated as the poultry and hog industries, the numbers are climbing.[10] A significant development in this area last year highlights how horizontal consolidation and vertical integration can work together. Smithfield Foods, the largest player in the hog and pork industries that is largely vertically integrated, purchased a number of feedlots and indicated that its interest in gaining a larger presence in the cattle industry.[11]

Even without Smithfield's forecasted entrance as a major player in the industry, most agree that the cattle industry would continue to feel pressure to use more vertical integration, whether

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than 14 days prior to slaughter." USDA GIPSA, *Captive Supply of Cattle and GIPSA's Reporting of Captive Supply*, at 2 (Jan. 11, 2002). Where by implication, some legislation defines captive supplies as cattle owned or controlled by a packer within 7 days of slaughter. S. 27 (108th Cong. 2003).

[6] Rod Smith, *Long Legal Road Ahead to Resolve Pickett-IBP*, FEEDSTUFFS, Feb. 23, 2004.

[7] *Id*.

[8] Steve Martinez and Kelly Zering, *Pork Quality and the Role of Market Organization*, USDA Economic Research Service Agricultural Economic Report No. 835, at 1 (Nov. 2004) (stating that 69% of hog were sold under marketing agreements and 17% were owned by packers; also noting that the percent of hogs contracting sharply increased from 2% in 1980 to 11% in 1993 to 69% in 2004).

[9] James MacDonald, et al., *Contracts, Markets, and Prices: Organizing the Production and Use of Agricultural Commodities*, USDA Economic Research Service Agricultural Economic Report No. 83, at 15 (Nov. 2004) (reporting that 88.1% of poultry production was under either a marketing or production contract, with the vast majority, 81.3%, under production contracts).

[10] The numbers for captive supply cattle are a constant source of debate in the industry. Nevertheless, the Grain Inspection, Packers and Stockyards Program reports that cattle purchased under marketing contracts by the four largest beef packers accounted for 24% of steer and heifer procurement in 1999 and 32% in 2001, and packer ownership rose from 8% to 11% in the same time period, resulting in about 43% of cattle as captive supplies in 2001. USDA Grain Inspection, Packers and Stockyards Program, *FY 2003 Annual Report*, at 40 (Apr. 2004).

[11] In a feature story in its January 1, 2005, edition, Beef Magazine looks at Smithfield Foods' recent acquisition of the ConAgra feedlot system, consisting of three feedlots in Colorado and one in Idaho. Bob Finkelstein, *Smithfield Beefs Up*, BEEF (Jan. 1, 2005). Smithfield is the dominant player in the pork industry, playing the part of both the largest packer and hog owner by far. Smithfield made a play for IBP when Tyson eventually acquired the firm in 2002 and has ever since been trying aggressively to enter the beef industry. *Id.* Some in the industry believe that Smithfield purchased the feedlots in preparation for buying more packing space, specifically the old Swift plants. *Id.* Such a move would have two major impacts: First, it would further increase the market share of the top four beef packers to 88%; second, it would give a significant toe-hold in the cattle industry to the firm most responsible for the vertical integration of the pork industry. Smithfield has stated that it plans to get bigger in the feedlot business. *Id.* At any rate, Smithfield's focus on consistency may indicate that it will only buy cattle raised under certain nutritional, genetic or production protocols, which likely means that the cattle would be procured under some type of contractual arrangement with the packer.

by packer ownership or through captive supplies, because others in the industry continue to search for ways to manage their inventory and provide greater communication between the different sectors so as to achieve the desired meat qualities. A recent USDA Economic Research Service report provides two main theories to explain why markets transition from spot markets to contractual markets.[12] The first theory focuses on the farmers' desire to shift either production or price risk from his operation to the larger processor.[13] The other theory focuses on transaction costs and looks at producers' and processors' desire to lock in either a market or a supply for their product.[14] This latter theory observes that when people are dealing with significant investments to produce or process very specific products, those people will usually need to know that they will be able to utilize those investments. Another branch of the transaction costs theory states that sometimes contracts minimize the costs of searching, measuring, and monitoring the production of specialized products.[15]

Although contracting may result in efficiencies in certain kinds of markets, people become concerned when a market becomes highly concentrated and vertically integrated because it increases the risk of anticompetitive behavior. Some of the concerns related to high levels of consolidation include:

a. Farmers and ranchers experience decreased negotiating strength;[16]
b. Farmers and ranchers lose share of the consumer dollar;[17]
c. Farmers may not have access to market information, and traditional price discovery mechanisms may fail;[18]
d. Contract producers lose independence;[19]

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[12] James MacDonald, et al., *Contracts, Markets, and Prices: Organizing the Production and Use of Agricultural Commodities*, USDA Economic Research Service Agricultural Economic Report No. 83, at 25-30 (Nov. 2004).

[13] *Id.* at 25. As to price risk, marketing agreements often do not manage price risk very well because the price is based on the spot market, which is the same pricing structure relied on by producers not in contracts. Marketing contracts are also usually based on the units actually delivered, so yield risk is also still borne by the seller. Production contracts, however, do help producers manage price risk because the farmer no longer owns the animals; rather he is raising the animals for someone else.

[14] *Id.* at 26-28.

[15] *Id.* at 28-29.

[16] Democratic Staff of the U.S. Senate Agricultural Committee, *Economic Concentration and Structural Change in the Food and Agricultural Sector: Trends, Consequences and Policy Options*, at 8-12 Oct. 29, 2004, available at http://harkin.senate.gov/agriculture/CommStaffConcentrationPaper.pdf; James MacDonald, et al., *Contracts, Markets, and Prices: Organizing the Production and Use of Agricultural Commodities*, USDA Economic Research Service Agricultural Economic Report No. 83, at 50-54 (Nov. 2004).

[17] Democratic Staff of the U.S. Senate Agricultural Committee, *Economic Concentration and Structural Change in the Food and Agricultural Sector: Trends, Consequences and Policy Options*, at 8-12 Oct. 29, 2004, available at http://harkin.senate.gov/agriculture/CommStaffConcentrationPaper.pdf.

[18] *Id.*

[19] James MacDonald, et al., *Contracts, Markets, and Prices: Organizing the Production and Use of Agricultural Commodities*, USDA Economic Research Service Agricultural Economic Report No. 83, at 29

e. Contractor could go out of business.[20]

The recent USDA Economic Research Report provides specific examples of how contracts may be used to exert market power, especially if the contracts are used in a concentrated market.[21] The report cites three ways that contracts could be structured to exert market power: 1) by limiting entry of competing buyers by having the supply tied up, 2) by limiting price competition by utilizing such pricing structures as having the base price based on the top of the market, and 3) by discriminating in price by using exclusive contracts to pay premiums only to certain sellers.[22] The report does note that a number of very specific factors need to be in place before such market power is exercised and, at any rate, more research is needed in this area.[23]

2. Policy responses.

Concerns related to increased consolidation in the meat packing industry are not new. As discussed earlier, these concerns were a major impetus for the passage of the grandfather of antitrust policy, the Sherman Act. This law made it illegal to attempt to monopolize or enter into collusive agreements. The farm lobby was not happy with its enforcement and pushed for a series of other laws that eventually led to the Packers and Stockyards Act of 1921.[24]

There are two different types of laws that address concerns related to the market power imbalance that exists in most agricultural sectors.[25] The first set of laws, generally known as antitrust policy, attempts to affect the structure of the industry either by reducing the size of a firm or by not allowing it to grow larger. For instance, the Sherman Act provides the federal government with the ability to punish firms that attempt to monopolize a particular market.[26] The Clayton Act provides the federal government with the ability to prohibit the merger of large firms if such a merger is likely to injure the competitive environment.[27] Although historically the

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(Nov. 2004) (speculating that because farmers value their autonomy, some contractors may need to compensate them for the loss of control).

[20] *Id.* at 30 ("[O]nce a farmer has contracted to produce a crop or livestock variety specific to the needs of a single buyer, the farmer faces the risk of failure of the buyer/contractor to purchase the product, with the attendant risks to market access and payment.").

[21] *Id.* at 54.

[22] *Id.* at 50-53.

[23] *Id.* at 54 (listing a number of factors that must be present for these market power concerns to arise, including that there must be significant scale economies and competing firms must use similar pricing structures).

[24] *See generally*, Doug O'Brien, *Policy Approaches to Address Problems Associated with Consolidation and Vertical Integration in Agriculture*, 9 DRAKE J. OF AGRIC. L. 33 (2004).

[25] Democratic Staff of the U.S. Senate Committee on Agriculture, *Economic Concentration and Structural Change in the Food and Agricultural Sector: Trends, Consequences, and Policy Options* 15-23, Oct. 29, 2004 available at http://harkin.senate.gov/agriculture/CommStaffConcentrationPaper.pdf.

[26] 15 U.S.C. § 2.

[27] 15 U.S.C. § 18.

Clayton Act has been used to stop concentration in its incipiency, in recent years courts and regulators have seemed more accepting of higher industry concentration levels.[28] Most states also have antitrust laws, although state attorneys general rarely have the resources to enforce the laws, and the state laws tend to use the federal law as precedent.

The second set of laws, sometimes called trade practice policy, addresses the behavior of the firms rather than the structure of the industry.[29] Examples here include the FTC Act's prohibition of unfair and deceptive acts[30] and the Packers and Stockyards Act's somewhat comprehensive regulation of the stockyards and livestock auction markets.[31] A number of state laws also exist that regulate agriculture contracts, such as Minnesota's law that provides farmers the right to recapture their investment before a contractor can terminate a production contract[32] or Iowa's law that prohibits confidentiality clauses in production contracts.[33] This type of state legislation, commonly referred to as the producer protection act,[34] generally affects the contractual relationship between farmers and integrated companies and is the most active area in competition and trade practice legislation at this time.

A related set of laws, known as corporate farming laws, prohibits certain types of firms from owning farmland or engaging in the production of certain agricultural commodities, such as Iowa's law that prohibits most meatpackers from owning livestock.[35] These laws are a combination of antitrust policy and trade practice policy in that they affect the structure of the industry (by restricting who can be involved) and the business activities within the industry (by affecting what can legally be done).[36]

Together, these laws are designed to protect farmers and consumers from the harmful effects of excess consolidation and integration. Such protection is limited, however, by the way the laws have been interpreted over the years. To illustrate this point, this article will first

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[28] WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 6.4 (2004).

[29] *See* Michael C. Stumo and Douglas J. O'Brien, *Antitrust Unfairness v. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. OF AGRIC. L. 91, 99 to 111 (2003) (discussing the Idea of equitable unfairness in a number of trade practice laws, such as the FTC Act and state franchisee laws).

[30] 15 U.S.C. § 45(a).

[31] 7 U.S.C. §§ 201-217a.

[32] Minn. Stat. Ann. § 17.92 (West 2004); *see* Crowell v. Campbell Soup Co., 264 F.3d 756 (8th Cir. 2001) (holding that the termination of a poultry contract invoked the statutory protection of recouping investments in § 17.92).

[33] Iowa Code chapter 202.

[34] *See* Producer Protection Act, Chapter 5 in ASSESSING THE IMPACT OF INTEGRATOR PRACTICES ON CONTRACT POULTRY GROWERS (A publication of Farmers Legal Action Group), available at http://www.flaginc.org/pubs/poultry.htm (providing the text of the model Producer Protection Act).

[35] Iowa Code § 202B.

[36] For a list of state corporate farming laws, see Harrison Pittman, *The Constitutionality of Corporate Farming Laws in the Eighth Circuit*, National Agricultural Law Center Research Article, at note 1 (June 14, 2004), *available at* http://www.nationalaglawcenter.org/assets/articles/pittman_corporatefarming.

discuss how the Department of Justice applies the Sherman and Clayton Acts, the classic antitrust laws that prohibit firms from exerting too much market power, and then looks at two recent federal cases, one dealing with the federal Packers and Stockyards Act and the other dealing with Iowa's law that prohibits meatpackers from owning livestock.

3. Enforcement of the Sherman and Clayton Acts.

In most cases, the Department of Justice will not challenge market behavior unless it "imposes an unreasonable restraint on competition."[37] This approach is known as the "rule of reason" and requires highly complex litigation to prove a violation.[38] As a proxy for a determination of an unreasonable restraint on competition, courts will often focus on the concentration of a particular market because a highly concentrated market provides the right environment for firms to engage in strategic behavior that harms other market participants and lessens competition.[39] In recent decades, antitrust case law has adopted much of the teaching from the "Chicago School of Economics," which prefers efficiency goals to the exclusion of almost all other antitrust policy.[40] This approach to antitrust law tends to ignore activity that might be likely to harm the competitive environment or harm producers but that is difficult to prove is ineffecient. Some in the farm sector are especially concerned that the Chicago School approach might allow certain market behavior that harms farmers because the activity does not harm consumers,[41] such as when a merger of some type of food processor might lower the price of the agricultural commodity but not necessarily raise the price of the consumer product.

In the area of mergers, the Department of Justice (DoJ) does not seriously review a merger unless it significantly increases concentration or results in a concentrated market.[42] To calculate the concentration of a particular industry, DoJ will first define the product market and the geographic market. Once this is done, DoJ applies the Herfindahl-Hirschman Index (HHI), which looks at the number of firms in the market and market share of each of those firms.[43] If the firms tend to have large market shares and the HHI is therefore high, DoJ is more likely to

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[37] State Oil Co. v. Khan, 522 U.S. 3, 10 (1997). In rare cases where a practice is deemed to almost always restrict competition, courts will find a per se violation if the plaintiff proves particular facts, without a developed analysis of the harm caused by the activity. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 50 (5th ed. 2002). For instance, the Supreme Court has held that a group boycott held with the intent of fixing prices justified a per se violation. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990).

[38] ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 61-62 (5th ed. 2002).

[39] *Id.* at 68 (5th ed. 2002).

[40] Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH L. REV. 213, 226 (1986).

[41] *See generally*, Peter Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 WISC. L. REV. 531 (2000) (arguing that antitrust policy should focus on policies that protect independent farmers).

[42] Department of Justice Merger Guidelines, § 1.0 (1997), *available at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/.

[43] Technically, the HHI "is calculated by summing the squares of the individual market shares of all the participants." Department of Justice Merger Guidelines, § 1.5 (1997), *available at* http://www.usdoj/atr/public/guidelines/horiz_book.

review the merger. For example, it has been reported that the market for slaughtering steers and heifers has an HHI well over 1800, which places that industry in DoJ's category of "highly concentrated," while it is likely that the market for pork processors would be "moderately concentrated" because the HHI would fall between 1000 and 1800.

There are two kinds of concentrated industries, those that possess monopoly power and those that possess monopsony power. Monopoly power describes sellers' market power (such as retailers' power as related to consumers), and monopsony power involves buyers' market power (such as a meatpackers' market power relative to cattle feeders).[44] Although DoJ merger guidelines state that exercise of either of these types of power may violate the antitrust laws, many commentators feel that mergers that involve high degrees of monopsony power "tend to get less attention than those involving an increase in selling power,"[45] which especially concerns farmers and ranchers because they are often selling products into relatively concentrated markets.

For a specific example of how DoJ applies the merger guidelines in the agricultural industry, in 1998 Cargill proposed to acquire Continental, thus merging two of the largest grain traders in what was a highly concentrated market.[46] Generally, four firms (two of which were the parties to this merger) controlled between 70 and 100 percent of the export market from any given domestic port. The Department of Justice reviewed the merger and determined that if allowed to proceed as proposed, the merger would substantially lessen competition in a number of markets. To cure this problem, DoJ and Cargill/Continental entered into a consent decree that essentially stated that DoJ would not challenge the merger if Cargill/Continental agreed to sell off over 10 of its grain handling facilities to competitors, thus limiting the amount of market power Cargill/Continental would have in the affected markets. The lion's share of the merger went through untouched.[47]

In another example, in 2003 Smithfield proposed to purchase Farmland Foods' pork processing plants.[48] Although this acquisition provided Smithfield with approximately 30 percent of the nation's hog slaughter capacity, DoJ decided not to challenge the merger, apparently reasoning that the deal would not significantly harm competition because the geographic market of the Farmland plants (the upper Midwest) would still contain five active firms after the acquisition. The lesson to be learned from these mergers is that DoJ is unlikely to challenge a merger unless the agency has clear evidence that the merger will result in a highly concentrated, strictly defined market.

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[44] ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 232 (5th ed. 2002).

[45] *E.g.*, Warren Grimes, *Smithfield Acquisition of Farmland Foods*, American Antitrust Institute News Alert, Aug. 7, 2003, at 1, *available at* http://www.antitrustinstitute.org/recent2/261.pdf.

[46] James MacDonald, *Cargill's Acquisition of Continental Grain: Anatomy of a Merger*, Agricultural Outlook (a publication of USDA Economic Research Service), at 21 (Sep. 1999).

[47] United States v. Cargill Inc., Civ. No. 99-1875 (GK) (D.D.C. 1999) (unreported case); United States v. Cargill Inc., Civ. No. 99-1875 (D.D.C. June 30, 2000) (memorandum opinion affirming the earlier final judgment after consideration of public comments).

[48] Amy Shafer, *Farmers Worry About Smithfield Purchase of Farmland Foods*, CINCINNATI ENQUIRER (July 21, 2003).

While there is no reason to expect antitrust enforcement to change direction in the near future, other federal and state law designed to address the effects of consolidation is currently under consideration in the federal courts and may have an impact on trade practice policy in the future.

4. Packers and Stockyards Act and Captive Supplies.

In *Pickett v. Tyson Fresh Meats, Inc.*,[49] a group of cattle feeders argued that the largest beef processor, Tyson (formerly IBP), violated the Packers and Stockyards Act by manipulating the market for cattle in its use of captive supplies. This case cuts to the core of the captive supply debate as it pits the manipulation concerns against efficiency grounds. The essential argument was that the packer was able to control the supply of cattle to the degree that the packer could affect the price of cattle that it buys from feeders on the open market. The jury instruction required that for the plaintiffs to be successful, the jury had to find the following:

> (1) a nationwide market for fed cattle; (2) that defendant's use of marketing agreements and forward contracts had an anticompetitive effect; (3) that defendant lacked a legitimate business reason or competitive justification for using captive supply; (4) that defendant's use of captive supply caused the cash market price to be lower; (5) that each member of the class suffered impact or injury; and (6) that there were damages sustained from the alleged violations of the Packers and Stockyards Act.[50]

The jury returned a verdict for the producers for over $1.2 billion.

The judge, however, set aside this verdict, reasoning that jury could not have found that there existed no legitimate business justification for utilizing captive supplies. The packer presented a number of business justifications for using captive supplies and the plaintiffs attempted to rebut those claims by arguing that the packer could have reached similar results by using means other than captive supplies. The judge refused to allow the plaintiffs to use this argument during the creation of the jury instructions or on the consideration of the motion for a judgment as a matter of law.[51] The judge also noted that if the packer were not able to use captive supplies, it would be put at a competitive disadvantage with other packing firms that are allowed to use captive supplies.[52] The plaintiffs refuted this notion by arguing that one packer could not be justified in engaging in an illegal act just because other packers are engaged in the same illegal act. The judge dismissed this argument reasoning that there was no evidence before the court that the competitors' use of captive supplies was illegal.[53] The plaintiffs have appealed the case to the Eleventh Circuit.

It is hard to know whether any middle ground exists in this captive supply debate. One possible avenue appeared as a precursor to the *Pickett* litigation when livestock producers in

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[49] 315 F.Supp.2d 1172 (M.D. Ala. 2004).

[50] *Id.* at 1175.

[51] *Id.* at 1176.

[52] *Id.* at 1176-77.

[53] *Id.* at 1177.

the mid-1990's petitioned USDA to adopt a rule under the Packers and Stockyards Act that became known as the WORC rule (named after the rule's main organizational champion, the Western Organization for Resource Councils). This rule allowed for captive supplies, but only if the contract to purchase the livestock included a firm delivery date and a firm price. The idea behind this rule was that these firm contractual terms would minimize the likelihood that packers would be able to manipulate the market with captive supplies. The WORC rule garnered serious discussion in USDA for a number of years, but no action was ever taken. Proponents of this idea have now moved their focus from an administrative solution to a legislative one and are looking to legislation in Congress.[54]

Just as the fate of how the Packers and Stockyards Act will treat captive supplies in the future, the constitutionality of corporate farming laws is now in the hands of a court.

5. Corporate Farming Laws.

In the past three decades a number of upper Midwestern states have passed corporate farming laws in the past three decades with the goal of preserving family farms. Challengers to these laws have appeared in the past few years and argued with some success that the laws discriminate against out-of-state interests and thus violate the dormant Commerce Clause of the United States Constitution.[55] For instance, in *South Dakota Farm Bureau v. Hazeltine*,[56] the United States Court of Appeals for the Eighth Circuit held that a state constitutional amendment that prohibited corporations from acquiring land used for farming and from otherwise engaging in farming in South Dakota violated the dormant Commerce Clause.

When considering dormant commerce clause challenges, the Eighth Circuit uses a two-tier analysis. First, if it finds that the state law either has a discriminatory purpose, is facially discriminatory, or has a discriminatory effect, then the law will be struck down unless the proponents of the law can show under rigorous scrutiny that they have no other way to forward a legitimate purpose.[57] The second tier deals with a situation where the law is not discriminatory and "provides that the law will be struck down only if the burden it imposes on interstate commerce 'is clearly excessive in relation to its putative local benefits.'"[58] The court analyzed the law under the first tier, relying heavily on its finding that the proponents of the amendment had a discriminatory purpose in its passage.[59] Specifically, the court pointed to a pro-con statement that the Secretary of State sent to voters before the referendum that included

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[54] S. 1044 (108th Cong., 2003).

[55] *See generally*, Harrison Pittman, *The Constitutionality of Corporate Farming Laws in the Eighth Circuit*, National Agricultural Law Center Research Article (June 14, 2004), *available at* http://www.nationalaglawcenter.org/assets/articles/pittman_corporatefarming.

[56] 340 F.3d 583 (8th Cir. 2003).

[57] *Id*. at 593 (citing Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994) and C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 392 (1994)).

[58] *Id*. (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

[59] *Id*. at 594.

language under the pro-column that the amendment would send profits out of state and would threaten the independence of the state's family farmers.[60]

In *Smithfield Foods, Inc. v. Miller*,[61] another Eighth Circuit case, Smithfield challenged Iowa's law that generally prohibits processors from owning livestock feeding operations in the state.[62] A processor is defined as anyone who processes or slaughters cattle or hogs if the products from the processing "have a total annual wholesale of value of eighty million dollars or more."[63] A cattle or swine operation means pretty much anywhere that livestock are fed or maintained.[64] Swine processors are also restricted from financing a swine operation.[65] The district court in *Smithfield* agreed with the meatpacker because the court found that the statute had discriminated against out-of-state interests on its face and that it had a discriminatory purpose.[66] The court pointed to a legislator's statements in a newsletter to constituents in which he stated that the bill was needed in response to a recent court decision that allowed an out-of-state packer to finance swine operations.[67] The court also found discriminatory purposes in an advertisement citing language of a gubernatorial commission and other unrelated legislation that generally showed that state lawmakers intended to pursue policy to capture more of the agricultural dollar in the state.[68] The fate of this case is still unclear since an appeal to the Eighth Circuit sent it back to the district court because the state legislature amended the law after the district court's opinion and took away an exemption for cooperatives incorporated in Iowa.

6. Conclusion.

The likely continued increase in agricultural consolidation and vertical integration, as well as a number of important decisions that will soon be handed down, ensure that the areas of antitrust and trade practice regulation will continue to be an important facet of agricultural policy. As it has in the past, the enforcement and interpretation of these laws will continue to play a crucial role in how the different agricultural sectors evolve.

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[60] *Id*. ("without the passage of Amendment E, "[d]esperately needed profits will be skimmed out of local economies and into the pockets of distant corporations." *Id.* Further language from the "pro" statement explains that "Amendment E gives South Dakota the opportunity to decide whether control of our state's agriculture should remain in the hands of family farmers and ranchers or fall into the grasp of a few, large corporations.")

[61] 367 F.3d 1061.

[62] Iowa Code § 202B(1)(a).

[63] Iowa Code § 202B.102(10).

[64] Iowa Code § 202B.102(4) and (13).

[65] *Id*. § 202B.201(1)(b).

[66] 241 F.Supp.2d 978 (S.D. Iowa 2003).

[67] *Id*. at 988.

[68] *Id*. (citing *Iowa 2010 – The New Face of Iowa: Embracing Iowa's Values—Shaping Iowa's Future*, 4 (2000 advertising supplement) and legislative findings to the Iowa Agricultural Industry Finance Act, Iowa § 15E203(1)(1998)).