

ANTITRUST TRADE AND PRACTICE

Expert Analysis

Chicken Executives Acquitted in Third Trial. What Next for the DOJ?

On July 7, 2022, a federal jury in Denver acquitted five executives who faced criminal charges for conspiring to fix prices in the chicken industry. The not-guilty verdict, which acquitted current and former executives of top chicken producers Pilgrim's Pride and Claxton Poultry Farms, provides a sense of finality after the DOJ's two earlier prosecutions ended in mistrials. But the acquittal leads to an interesting crossroads for the Biden Administration, which has been clear on its strong antitrust enforcement agenda, and now may have to adjust enforcement strategy following the loss.

The acquittal comes nearly 18 months after Pilgrim's Pride pled guilty in February 2021 to conspiring to fix broiler chicken



By
**Karen
Hoffman Lent**



And
**Kenneth
Schwartz**

prices and agreed to pay \$107.9 million in criminal fines. Tyson Food agreed to cooperate with the DOJ as part of its application for leniency under the DOJ's Corporate Leniency Program to avoid criminal charges.

The case against the individual executives is the first criminal trial arising out of the DOJ's increased scrutiny of the \$95 billion chicken industry and is part of a long-running investigation into alleged chicken price-fixing. The DOJ first revealed its price-fixing probe in June 2019 when it filed a motion to intervene and stay discovery in a private suit in Illinois federal district court. In 2020, the DOJ indicted executives from major chicken producers for allegedly

conspiring to fix prices and rig bids for broiler chicken products in the United States in violation of §1 of the Sherman Act. According to the indictment, the executives communicated with each other by text message and email to coordinate prices and bids to restaurants and other buyers—an orchestrated effort that allegedly spanned several years from 2012 and until at least 2019.

In December 2021, U.S. District Judge Philip A. Brimmer declared a mistrial when a jury was unable to reach a verdict after seven weeks of trial and four days of deliberations. Following a second mistrial in March 2022, Judge Brimmer expressed doubt over the DOJ's approach. In April, Judge Brimmer called Assistant Attorney General Jonathan Kanter to Denver to discuss in person the wisdom of continuing to prosecute. He questioned Kanter about whether the decision to pursue a third trial comports with the DOJ's internal

KAREN HOFFMAN LENT and KENNETH SCHWARTZ are partners at Skadden, Arps, Slate, Meagher & Flom. Law clerk HANNAH M. GUTENPLAN assisted in the preparation of this article.

standards about bringing cases. Judge Brimmer focused in particular on whether the admissible evidence will “probably” be sufficient to obtain a conviction, with an emphasis on “probably” (Status Conference Tr. 7:3-21 (April 14, 2022)), pressing Kanter about whether the pursuit of a third trial might be putting “hope over experience.” *Id.* at 13:16-18. Judge Brimmer urged the agency to “reflect” on whether a third trial would “uphold” DOJ standards about prosecuting antitrust cases. *Id.* at 25:14-17.

Kanter assured the court that the DOJ believed that it would “more than probably” obtain a conviction in a third trial. *Id.* at 8:21-22. Kanter explained that the DOJ would adjust course by cutting half of the defendants from the case to streamline the evidence that would go before the jury. According to Kanter, trying five individuals from two different companies, rather than ten defendants from five companies, would simplify the “nature and volume of evidence.” *Id.* at 10:20-22. Kanter also staffed the trial team for the third effort with additional attorneys who would bring “fresh perspectives” to the case. *Id.* at 11:10-17.

None of Kanter’s efforts prevailed, however, and the five defendants were acquitted. Despite the effort to streamline

the evidence, core evidentiary deficiencies remained in the prosecution’s case. Insider witnesses’ accounts of alleged unlawful agreements are particularly effective to prove Sherman Act §1 price-fixing cases because they can provide first-hand testimony of agreements that may not have left a paper-trail. Here, however, the government’s witnesses proved unpersuasive to the jury. At the third trial, the government relied mainly on the trial testimony of one insider witness,

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Robert Bryant, a Pilgrim’s Pride employee, who by all accounts gave a lackluster performance on the stand. On cross-examination, Bryant admitted that he had lied multiple times to the FBI, which certainly may have damaged his credibility with the jury. Bryan Koenig, “2 Mistrials, 1 Acquittal & A DOJ Listening Problem,” *Law360* (July 8, 2022).

The DOJ’s repeated trials against the chicken executives underscore the Biden Administration’s clear commitment to rigorous

antitrust enforcement, particularly in the agricultural space. This focus is evidenced by President Biden’s July 2021 Executive Order, in which he announced that enforcement should focus on agricultural markets, among others. Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021). That Executive Order contains a special focus on family farmers and decries the consolidation of producers. At the April hearing, after the second mistrial of the case, Mr. Kanter reminded Judge Brimmer that antitrust violations in agriculture, meat packing, and meat processing are “a kitchen table issue” and that the Department seriously considers its obligation to “protect[] the public from antitrust crimes.” Status Conference Tr. 25:23-26:11 (April 14, 2022).

Nevertheless, this loss after two mistrials exposes weaknesses in the DOJ’s litigation strategy. Looking to the future of criminal antitrust enforcement in the poultry industry, the DOJ’s failure to prove a conspiracy beyond a reasonable doubt—even after three tries—may signal a chill in criminal enforcement actions of this size and nature. The DOJ’s loss in this case could have ripple effects and consequences for enforcement in general. For instance, the cost of

expanding antitrust enforcement through the courts places a strain on limited agency resources, and losses at trial may make key witnesses less willing to testify in exchange for leniency. If executives do not see trial as a viable threat, they may decline to cooperate in exchange for plea deals. And going forward, indicted defendants may be more willing to try their luck at trial against the government. As Michael Tubach, a partner at O'Melveny & Myers and lawyer for Pilgrim's Pride CEO Jayson Penn, explained, in future trials against the DOJ, "[a]ll other things being equal, this makes me more willing to roll the dice." Dan Papsun, "DOJ Tactics Come Under Scrutiny After Chicken Price-Fixing Loss," *Bloomberg Law* (July 13, 2022).

Publicly, however, the DOJ does not doubt its strategy and vows to continue strong enforcement. "Although we are disappointed in the verdict, we will continue to vigorously enforce the antitrust laws, especially when it comes to price-fixing schemes that affect core staples," the DOJ said in a statement. "We will not be deterred from continuing to vigilantly pursue cases to protect the American people and our markets. Cara Salvatore, "5 Chicken Execs Acquitted in Denver Antitrust Trial," *Law360* (July 9, 2022).) The department has two more criminal price-fixing cases in

the broiler-chicken industry pending in Colorado district court.

Crucially, the Denver acquittals do not mean that poultry and other agricultural producers can count on escaping all accountability for antitrust violations. The DOJ is continuing to follow the Biden Administration's enforcement priorities by cracking down on labor violations in the agriculture industry. In addition to Pilgrim Pride's guilty plea, the DOJ recently filed a civil antitrust complaint and con-

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sent decree against poultry processors in federal district court in Maryland. On Monday, July 25th, the DOJ accused Cargill, Sander-son Farms and Wayne Farms of conspiring to fix wages by sharing information through a data consultant. If the district court approves the consent decree, the defendants would pay \$84.8 million in restitution to affected processing plant workers.

Private plaintiffs have also found success in pursuing price-fixing

claims against broiler chicken producers. In December 2021, a federal judge in Illinois approved a \$181 million class action settlement against Pilgrim's Pride, Tyson, and other major poultry producers. Mike Leonard, "Tyson, Pilgrim's, Others Get Nod for \$181 Million Antitrust Deal," *Bloomberg Law* (Dec. 21, 2021). The beef and pork industries have also received increased scrutiny from the government and private plaintiffs alike. Major beef and pork producers are defending a number of civil cases for price-fixing. Because price-fixing enforcement is not limited to criminal cases—and because enforcement efforts can reach other parts of the meat-producing industry—the DOJ may still push forward with its enforcement agenda despite this most recent setback in court.

It is clear that the recent jury verdict is a difficult loss for the DOJ and the Biden Administration's broader antitrust enforcement ambitions. But the agency, in its public statements, remains steadfast in its aggressive antitrust enforcement messaging. For the time being, at least, it seems that the DOJ intends to continue to pursue its strategy to aggressively enforce antitrust violations.