Price Fixing in Agriculture

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For decades after the emergence of price fixing as a *per se* offense under federal antitrust law,¹ the major concern about price fixing in agriculture was the scope of the agricultural immunity² from antitrust challenge in the face of efforts to combine to fix the prices at which agricultural products are marketed.³ In more recent years, however, the focus has shifted to price fixing by increasingly concentrated input suppliers and output processors, handlers and shippers.⁴ The recent high profile case involving price fixing for lysine and citric acid is an example of recent antitrust concerns in this area and involved criminal charges.⁵ A decision handed down on June 18, 2002, by the same court (the Seventh Circuit Court of Appeals) is an example of a recent civil action for price fixing.⁶

The significance of cases that certain practices are illegal *per se* is evidentiary in that it is only necessary to prove that price fixing has occurred. The recent case involving high fructose corn sweeteners (HFCS) provides a useful analysis of what is required to show that price fixing has occurred for purposes of a civil case where the standard is a preponderance of the evidence.⁷

The HFCS case

In the June 18, 2002, decision, *In re High Fructose Corn Syrup Antitrust Litigation*,⁸ the defendants were the principal manufacturers of high fructose corn syrup—Archer-Daniels-Midland (ADM), A.E. Staley, Cargill, American Maize Products and CPC International.⁹ CPC International had settled out of court and was no longer a party to the action.¹⁰ The plaintiffs were a certified class consisting of direct purchasers of the product from the defendants.¹¹

The plaintiffs claimed that the defendants secretly agreed, in 1988, to raise the prices of HFCS with the conspiracy continuing from 1989 until mid-1995 when the Federal Bureau of Investigation raided ADM offices in search of evidence in the lysine/citric acid price fixing case brought by the Department of Justice.¹² The district court concluded that “no reasonable jury could find in [the plaintiff’s] favor on the record presented in this case without resorting to pure speculation or conjecture” and granted summary judgment for the defendants.¹³ The plaintiffs appealed the district court decision on several grounds.

The Court of Appeals pointed out that the statutory language in Section 1 of the Sherman Act¹⁴ is broad enough to encompass a price fixing agreement that did not
involve any actual communication among the parties to the agreement.\textsuperscript{15} As the court noted, “if a firm raises price in the expectation that its competitors will do likewise, and they do, the firm’s behavior can be conceptualized as the offer of a unilateral contract that the offerees accept by raising their prices.”\textsuperscript{16}

The court noted that, in the absence of an admission by the defendants that they agreed to fix prices, evidence must be presented from which the existence of such an agreement can be inferred.\textsuperscript{17} The court explained that the evidence generally takes the form of—(1) a showing that the structure of the market was such as to make price fixing feasible and (2) evidence that the market behaved in a non-competitive manner.\textsuperscript{18} In addressing the defense argument that some of the transactions occurred at a lower price then the level pegged by the alleged price fixing activity, the court echoed Justice Stone’s comments in \textit{United States v. Trenton Potteries Co}.\textsuperscript{19} in stating that—

“The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.”

The court agreed with the plaintiffs that the structure of the market was conducive to price fixing behavior and that, during the period of the alleged conspiracy, the defendants avoided or at least limited price competition.\textsuperscript{20} Moreover, there was testimony involving statements by one of the defendants’ plant managers that, “We have an understanding within the industry not to undercut each other’s prices.”\textsuperscript{21}

The Seventh Circuit Court of Appeals reversed the grant of summary judgment and sent the case back for trial to establish whether there was a price fixing violation.

\textbf{In conclusion}

The June 18 decision breathes new life into price fixing litigation. Proving an explicit agreement to fix prices is difficult; proving that the parties avoided or limited price competition in a setting that is favorable for price fixing is substantially more attainable. This decision could have important implications for cases arising in the future. The prospect of treble damages in a civil case\textsuperscript{22} provides an economic incentive to challenge such practices.

\section*{FOOTNOTES}

\begin{footnotes}
\item 1 \textsuperscript{See, e.g., United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 811 (1940).}
\item 2 \textsuperscript{Clayton Act, \textsection 6, 38 Stat. 730 (1914), 15 U.S.C. \textsection\textsection 12-27, 29 U.S.C. \textsection 52; Capper-Volstead Act, 7 U.S.C. \textsection\textsection 291, 292.}
\item 3 \textsuperscript{Capper-Volstead Act, 7 U.S.C. \textsection\textsection 291, 292. See generally, 14 Harl, \textit{Agricultural Law} \textsection 137.06[6] (2002).}
\item 5 \textsuperscript{See United States v. Andreas, 216 F.3d 645 (7th Cir. 2000).}
\item 6 \textsuperscript{\textit{In re High Fructose Corn Syrup Antitrust Litigation}, No. 01-3565, \_ F.3d \_ (7th Cir. 2002).}
\item 7 \textsuperscript{Id.}
\item 8 \textsuperscript{Id.}
\item 9 \textsuperscript{Id. at 1.}
\item 10 \textsuperscript{Id.}
\item 11 \textsuperscript{Id.}
\item 12 \textsuperscript{Id. at 2.}
\item 13 \textsuperscript{Id.}
\item 14 \textsuperscript{26 Stat. 209 (1890), 15 U.S.C. \textsection\textsection 1-8.}
\item 15 \textsuperscript{N. 6 supra at 2.}
\item 16 \textsuperscript{Id.}
\item 17 \textsuperscript{Id. at 3.}
\item 18 \textsuperscript{Id. at 4.}
\item 19 \textsuperscript{273 U.S. 392 (1927).}
\item 20 \textsuperscript{\textit{In re High Fructose Corn Syrup Antitrust Litigation}, n. 6 supra at 7.}
\item 21 \textsuperscript{Id. at 17.}
\item 22 \textsuperscript{Sherman Act \textsection 7, supra n. 14.}
\end{footnotes}

\section*{CASES, REGULATIONS AND STATUTES}

\textit{by Robert P. Achenbach, Jr.}

\section*{ADVERSE POSSESSION}

\textbf{FENCE.} The disputed land was located between the parties’ lands. An unknown previous owner of one of the properties erected a barbed-wire fence between the properties but 45 to 60 feet on the plaintiff’s side of the actual boundary. The defendants presented no evidence of why the fence was located there. The evidence demonstrated that the several owners of the two properties did not discuss or object to the fence and no one had claimed that the fence was the true boundary. The court noted that the defendants did not provide any evidence that the boundary was in dispute or that the fence was erected to determine the boundary. The evidence showed that the defendants’ predecessors in interest made only sporadic use of the disputed land and only as incidental to the use of the whole property. The court held that the defendants did not acquire title to the disputed land by