

## Is Big Chicken Cooked? DOJ Intervenes in Price-Fixing Investigation

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By Carl W. Hittinger and Jeanne-Michele Mariani

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In June, the DOJ intervened in a class action antitrust lawsuit, filed in the U.S. District Court for the Northern District of Illinois, asking the court to stay discovery for six months while the Antitrust Division pursued potential criminal charges against key players in the chicken industry. Just recently the district court granted the stay, but reduced the request to three months as opposed to six. The class action as filed alleged that the some of the biggest poultry companies, such as Pilgrim's Pride, Tyson Foods, Sanderson Farms and Perdue Farms, coordinated prices between 2008 and 2016, resulting in a 50% price hike for broiler chicken. The complaint further alleges that they took this action "despite input costs ... falling roughly 20% to 23% over the same time period ... ." According to the allegations, the poultry industry as it currently exists, is highly consolidated, with just two companies, Tyson and Pilgrim's Pride, controlling about 40% of the market, and the top 10 poultry companies controlling nearly 80% of the market. Such market power, it is alleged, gives the Big Chicken industry enough power to manipulate pricing and supply.

The major allegation lodged at the defendants in the current lawsuit revolves around a company called Agri Stats, a subscription service that documents production practices across the chicken industry. According to the complaint, it is alleged that chicken companies used the platform to share detailed marketing and supply information, thereby allowing competitors to potentially discover how many chickens its rivals were hatching and then reduce their own production as a result. The lawsuit specifically alleges that "the principal ... method by which defendants implemented and executed their conspiracy was by coordinating output and limiting production with the intent and expected result of increasing prices of broilers in the United States. In furtherance of their

conspiracy, defendants exchanged detailed, competitively sensitive and closely guarded nonpublic information about prices, capacity, sales volume and demand, including through third party co-conspirator Agri Stats."

Claims of price fixing against chicken producers have persisted for years. Previously, the poultry companies had faced multiple similar lawsuits, as well as an investigation by the U.S. Securities and Exchange Commission, yet nothing was ever found. The DOJ's recent intervention, however, would obviously escalate the situation if criminal charges are filed.

Back in 2015, the DOJ launched a similar investigation into the canned tuna industry, which resulted in six criminal charges. In May 2017, one tuna company pleaded guilty for its role in fixing the prices of shelf-stable tuna fish sold in the United States and agreed to pay a \$25 million fine. In October of that same year, a second tuna company pleaded guilty in the same case and was fined \$100 million. A third canned tuna company was exempted from criminal prosecution because it cooperated with the investigation. The DOJ's success in those cases is obviously a motivating factor for it to examine the next consumer food industry if the facts are there. Like the auto parts cartel hydra, government investigations can expand rapidly and pervasively.

The civil case against Big Chicken was originally filed in 2016, which has some wondering why the DOJ is just now deciding to intervene. Some experts in the regulatory field have posited that it is likely due to the pending depositions of fact witnesses, which would have started soon without the intervention. In the motion to intervene, the DOJ said "the government has a significant interest in ensuring the integrity of the grand jury's investigation and if charges are filed, minimizing the extent to which civil discovery can be used to circumvent criminal discovery." This seems to mean that the government wants to ensure nothing is made public that might hinder their pre-indictment investigation.

All of the defendants have vehemently denied the allegations as baseless and have done so again even after the announcement of the DOJ probe. In such situations, the best defense is often a good offense. As Pilgrim's Pride told CNBC in the wake of the DOJ intervention, "the company welcomes the opportunity to defend itself against these claims through the legal process."

On the heels of the Big Chicken case, there are also allegations of price fixing being raised as to the pork industry, the farm-raised salmon industry and the beef industry—although the federal government has yet to intervene in any of those cases. Moreover, these antitrust concerns are being felt in other countries as well. Just last year, Canada launched an antitrust investigation into the bread industry.

Whether any of these suits have merit remains to be seen, but often the mere suggestion of a federal investigation can cause immediate aftershocks to targeted defendants' businesses. In the wake of the intervention by the DOJ into the Big Chicken lawsuit, Tyson's stock dropped 1.05%, Pilgrim's Pride fell 1.25% and Sanderson Farms dropped 2.22%. Stay tuned.

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