

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

<b>HENRY LEE PICKETT,</b>	)	<b>On Appeal from the United</b>
<b>et al.,</b>	)	<b>States District Court for</b>
	)	<b>the Middle District of</b>
<b>Plaintiffs-Appellants,</b>	)	<b>Alabama, Northern Division</b>
	)	
<b>vs.</b>	)	<b>C.A. No. 96-A-1103-N</b>
	)	
<b>TYSON FRESH MEATS, INC.,</b>	)	<b>The Honorable Lyle E. Strom</b>
	)	<b>Judge Presiding</b>
<b>Defendant-Appellee.</b>	)	

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**Brief of *Amici Curiae* Fifty Leading Scholars, Farmers, Ranchers, Farm and  
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Support of Plaintiffs-Appellants Supporting Reversal**

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**CERTIFICATE OF INTERESTED PERSONS  
AND CORPORATE DISCLOSURE STATEMENT**

Set forth below is a complete list of the persons and associations of persons, firms, partnerships, or corporations that have or may have an interest in the outcome of this case, which were not included in the Brief of Plaintiffs-Appellants, including any publicly held company that owns 10% or more of the party's stock, to the best of my knowledge.



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## STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 29(g), Counsel for *Amici Curiae* respectfully request permission to participate in oral argument. This appeal involves important issues regarding the Packers and Stockyards Act of 1921 (“PSA”), an Act that affects hundreds of thousands of livestock producers throughout the Country. This appeal raises legal issues that have never been addressed in this Circuit. The appeal comes from a decision of a district court to nullify a verdict after a four-week trial and another week of jury deliberations. Participation in oral argument by counsel for *Amici Curiae* will assist this Court in understanding the factual background, taken from voluminous record, which clearly demonstrates the district court’s error.

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## INTEREST OF *AMICI CURIAE*

This is the first significant private litigation enforcing the provisions of the Packers and Stockyards Act<sup>1</sup> (PSA) to reach an appellate court. Consequently, it is of great importance that the standards established in this case reflect the policies that the Congress sought to implement when it adopted the PSA. The central goals of the PSA were to create and protect a fair, open, efficient and transparent market for livestock.<sup>2</sup> In reviewing the trial court's decision in this case, this Court will play a vital role in determining whether those goals will in fact be served. For this reason, *Amici* offer these views in the belief that they can assist the Court in its evaluation of the trial court's decision to overturn the jury's verdict in this case.

This brief is submitted by Professors Roger McEowen, Neil E. Harl and Peter C. Carstensen on behalf of themselves and the organizations listed on the inside cover of the brief.

The *amici* professors are scholars whose work includes studies of legal and economic issues affecting agricultural product markets. Professor Carstensen is the Young-Bascom Professor of Law at the University of Wisconsin Law School and a specialist in competition law and policy. A significant part of his scholarship has

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<sup>1</sup> 7 U.S.C. §§ 181-231.

<sup>2</sup> H.R. Rep. No. 85-1048 at 2 (1957).

focused on competition policy issues involving agricultural product markets.<sup>3</sup> Professor McEowen is an associate professor of agricultural economics and extension specialist in agricultural law at Kansas State University and a former Visiting Professor of Law at the University of Arkansas School of Law. He is the lead author, along with Professor Harl, of a leading case book on agricultural law.<sup>4</sup> Professor Harl is the Charles F. Curtiss Distinguished Professor in Agriculture and Emeritus Professor of Economics at Iowa State University. Among his publications is the 15-volume treatise on Agricultural Law published by Matthew-Bender. The *amici* organizations are farm, ranch, consumer, religious, and environmental groups concerned about competitive markets and fair prices. A more complete statement of the interest of *amici* is contained in the Motion for Leave to File *Amici* Brief, filed herewith.

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<sup>3</sup> Peter C. Carstensen, *The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis*, 15 Rev. Law & Econ. 1 (1992) (providing a legal-economic-historical analysis of the grain trade and the role of the Chicago Board of Trade's restraints on price setting by traders); *How to Assess the Impact of Antitrust on the American Economy: Examining History or Theorizing?*, 74 Iowa L. Rev. 1175, 1198-1210 (1989) (analyzing the evolution of the meatpacking industry and the role of antitrust and regulation in that industry) (hereinafter *Impact*); *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 Wis. L. Rev. 531.

<sup>4</sup> Roger A. McEowen & Neil E. Harl, *Principles of Agricultural Law* (Rev. Ed. 2004).

## SUMMARY OF THE ARGUMENT

### I. The Trial Court Ignored Evidence.

The trial court's opinion ignored the detailed economic analyses presented in the case. As illustrated at trial, whenever there is great disparity in the size and other relevant characteristics between buyers and sellers, the dominant parties have both the incentive and the capacity to engage in manipulative market practices to the detriment of their small and dispersed trading partners. In the absence of market-facilitating law and its effective enforcement, the risk of manipulative conduct by such firms is inevitable.

The opinion below accepts the jury's verdict that the defendant's practices in fact manipulated market prices resulting in economic harm to all sellers of fed cattle in the cash market. Such conduct violates the strict prohibitions in the PSA against price manipulation. The PSA provides that, "It shall be unlawful to . . . (e) Engage in any course of business or . . . any act for the purpose or with the effect of manipulating or controlling prices . . . ." <sup>5</sup> Although the Secretary of Agriculture could create safe harbors for any trading practices essential to modern buying methods that have manipulative effects,<sup>6</sup> the defendant has never sought such a right. However, in the absence of a regulatory safe harbor, a cautious court might

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<sup>5</sup> 7 U.S.C. § 192.

imply a necessity defense for specific practices, otherwise unlawful, that the meatpacker demonstrates are essential and for which no reasonable alternative method exists. A meatpacker asserting such an affirmative defense should bear the burden of proving its necessity.

In the present case, the defendant presented its evidence of business justification and the jury rejected it. Nevertheless, the trial judge, without record citation or detailed economic analysis, assumed some justification for captive supply existed and that it was irrelevant to the analysis whether the defendant had alternative ways to accomplish its primary goal(s) without engaging in price manipulation.

## **II. The “Meeting Competition” Defense is Inapplicable in a PSA Case.**

The trial court also opined that the defendant’s price manipulation was justified as “meeting competition.” This is inconsistent with the language and policy of the PSA, ignores the ways that the defendant should have responded to unlawful conduct by its competitors, and is economically indefensible inasmuch as the defendant is the largest buyer of cattle in the United States, and has the ability to obtain all the cattle it requires through non-manipulative means.

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<sup>6</sup> 7 U.S.C. § 228(a).

The trial court's refusal to consider that harm was avoidable is a fundamental legal-economic error. Similarly, the court's use of a "meeting competition" defense fails to follow the standards of the Robinson Patman Act<sup>7</sup> and lacks any defensible economic basis in the logic of the market for fed cattle.<sup>8</sup>

## FACTS

There are certain important facts in this case about which there is no dispute. First, the trial court opinion accepts the conclusion that the defendant engaged in market price manipulation that harmed the plaintiff. Second, there is no support in the record for the claim that the use of captive supply had any positive effect on the efficiency of defendant's meat processing business. Third, the quality characteristics of the cattle purchased as part of the captive supply program were inferior on average to the quality of the cattle purchased in the cash market.<sup>9</sup> Thus, the defendant's price manipulation resulted in lower prices for cash market cattle,

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<sup>7</sup> 15 U.S.C. §§ 13–3b, 21a.

<sup>8</sup> Because our focus is on the proper interpretation of the PSA, this brief only addresses the question of the substantive standards for determining a violation of that act. We note that the plaintiffs sought both injunctive and damage remedies. Moreover, because the PSA, unlike antitrust law, does not impose any fee shifting when a plaintiff prevails in an injunctive action, we suggest that if the jury's verdict on the merits is upheld, the case should be remanded for further examination of the damage issues. Only with a damage recovery can plaintiffs in this or any other private PSA case expect to be able to compensate their lawyers.

<sup>9</sup> See Trial testimony of Dr. C. Robert Taylor, R12-1818:4-13.

denying the sellers the benefit of the higher quality that they had produced and demonstrating that captive supply was not necessary to achieve specific desired quality characteristics. Fourth, evidence at trial revealed that the volume of captive supply taken by the defendant varied greatly from week to week depending on the preferences of the suppliers,<sup>10</sup> thus demonstrating such supplies did not, as the trial court opined, provide a “reliable and consistent supply of fed cattle . . .”.

## **ARGUMENT**

### **I. The Legal-Economic Analysis of Disproportionate Power in a Market.**

This case involves a persistent economic problem for feedlot operators and ranchers—the problem of buyer power. There are many feedlot operators and ranchers in this country, but relatively few buyers for their products.

In markets with a limited number of buyers and many sellers (or the reverse), there is a great potential for strategic conduct to manipulate prices. The key economic characteristics are that 1) the dominant players have sufficient volume or market share to make it worthwhile to manipulate prices, and 2) the market context involves unequal access to information about demand or other economically important knowledge. In such circumstances, major market participants have an

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<sup>10</sup> Trial Exhibit 1210.

incentive to “game” the market. This is true in energy markets and securities markets, as well as agricultural product markets.

Specific manipulations are highly contingent on the market context. In the case of the fed cattle market, the basic manipulation involves the defendant (as buyer) using various means (here, captive supplies) to reduce the public cash market price for fed cattle below that which would have prevailed if the market had operated in a fair, open and transparent manner. Once the cash market price is reduced, the defendant then purchases substantial supplies of fed cattle at the depressed price.

Markets fail when participants have the incentive and capacity to manipulate prices or discriminate among their trading partners in ways that serve their immediate interest but undermine the integrity of the market. If uncontrolled, the economic and social costs of such conduct are substantial. The individual gains come at the expense of the general interest in efficient and workable markets. Judge Richard Posner’s explanation for the prohibition on unlawful monopoly applies equally well to prohibitions on price manipulation: Wealth-seeking enterprises will engage in a wasteful expenditure of society’s resources in seeking such profits.<sup>11</sup> The economy gains nothing from such efforts, and the redirection

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<sup>11</sup> See Richard Posner, *The Social Costs of Monopoly and Regulation*, 83 J. Pol. Econ. 807 (1975).

of resources both distorts the economy and undermines its efficiency relative to a competitive norm.

Public policy in market oriented economies requires regulation to facilitate the market process in such contexts. Unlike utility regulation, market facilitating regulation does not replace the market, but instead limits the ability of powerful market participants to misuse their power to the market's detriment. The fundamental goals of market facilitation are the achievement of transparent, fair, and efficient transactional terms. The Commodities Exchange Act<sup>12</sup> and the securities acts<sup>13</sup> illustrate this policy. The PSA is also an example of the public policy of protecting the disadvantaged class where there is disproportionate power and informational inequity in the market. The goal of such laws is to make markets work better, in fairer, more open ways.

When market-facilitating systems are well worked out, there are often safe-harbors for conduct that the regulatory process has determined is essential to market efficiency even though such conduct would otherwise be labeled manipulative or discriminatory. For example, sellers of a new issue of securities are authorized to stabilize (*i.e.*, manipulate) the market price immediately

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<sup>12</sup> 7 U.S.C. §§ 1-27f.

<sup>13</sup> Securities Act of 1933, 15 U.S.C. §§ 77a-77bbb; Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78mm.

following the public offering, but only under stringent rules including full disclosure of the conduct.<sup>14</sup> Thus, in a market-facilitating regime such as the PSA, absent regulations defining safe harbors, courts should be cognizant that a firm might be able to prove that its conduct, even if on its face unlawful manipulation, was the unavoidable incident of essential market activity.

## **II. The Standards for Proof of Violating the PSA by Price Manipulation.**

The plain language of the PSA<sup>15</sup> establishes a statutory framework that condemns any price-manipulative use of “buyer power” by meatpackers. *Moreover, as to this element of the PSA there is no defense.*<sup>16</sup> Indeed, Congress was reluctant to create any defenses for conduct that involved price manipulation that violated that statute.<sup>17</sup> However, Congressional goals are probably better served if any conduct that violates the statutory command creates a strong presumption of illegality subject to a limited affirmative defense of business

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<sup>14</sup> Section 9 of the Securities Exchange Act, codified at 15 U.S.C. § 78(i), generally forbids manipulation of the prices of securities, but authorizes the SEC to permit certain price stabilization activities. *See* 17 C.F.R. § 242.104 (referred to as Reg. M, Rule 104).

<sup>15</sup> 7 U.S.C. §§ 192(d), (e).

<sup>16</sup> Other violations of the PSA based on “unfair” or “unduly discriminatory” conduct invite balancing. The prohibition on price manipulation is, in contrast, absolute.

<sup>17</sup> *See, e.g., Stafford v. Wallace*, 258 U.S. 495, 514-515, 42 S. Ct. 397, 401 (1922) (“the chief evil feared is . . . unduly and arbitrarily . . . lower prices to the shipper

necessity. Even so, neither the trial court opinion nor the underlying record supports the application of such a defense in this case.

#### **A. Brief History of Events Leading up to Passage of the PSA in 1921.**

Since the late 1800s, anticompetitive conduct characterized the U.S. meatpacking industry.<sup>18</sup> In 1888, the Senate authorized an investigation into the buying practices of the major meatpackers<sup>19</sup> which found that the major packers were engaging in unfair, discriminatory and anticompetitive practices including price fixing, agreements not to compete, and refusals to sell.<sup>20</sup> The Sherman Act (1890), however, did not end the anticompetitive practices of the meatpacking industry, and the industry was the target of numerous lawsuits. For example, in 1902, the packers were found to have engaged in numerous illegal buying practices.<sup>21</sup> An injunction, however, failed to correct the situation and, in 1917, President Wilson directed the Federal Trade Commission to investigate the meat packing industry.<sup>22</sup> In 1919, the FTC report found that the major meatpackers were

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[*i.e.*, feeder]. . .”).

<sup>18</sup> See Carstensen, *Impact, supra* n.3 at 1198-1202 and sources cited therein.

<sup>19</sup> See 61 Cong. Rec. 2614 (1921) for a discussion of the purpose of the investigation.

<sup>20</sup> See *Stafford*, 258 U.S. at 499, 42 S. Ct. at 399-400.

<sup>21</sup> See, e.g., *United States v. Swift & Co.*, 122 F. 529 (7th Cir. 1903), *aff'd*, *Swift & Co. v. United States*, 196 U.S. 375, 25 S. Ct. 276 (1905).

<sup>22</sup> See *Stafford*, 258 U.S. at 500.

engaged in widespread anticompetitive practices.<sup>23</sup> In particular, the FTC found that livestock producers were at the mercy of the five major meatpackers that controlled the livestock markets. As a result of the FTC's study, the Department of Justice initiated another antitrust lawsuit against the major meatpackers. The packers entered into a far-reaching consent decree in 1920,<sup>24</sup> but actively resisted enforcement of the decree and it came into full force in 1932.<sup>25</sup>

The consent decree, however, did not resolve the concerns about the meatpackers' conduct. Congress held hearings on industry practices, and considered legislation to correct the problems.<sup>26</sup> Congress' primary concern was that existing antitrust laws were inadequate to deal with the manipulation of livestock prices by the major packers.<sup>27</sup> Consequently, Congress passed and

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<sup>23</sup> See generally, Neil E. Harl, *Agricultural Law*, Vol. 10, § 71.02 (2004), for further discussion of the 1919 FTC report.

<sup>24</sup> *United States v. Swift & Co.*, Equity No. 37623 (Sup. Ct. of D.C. 1920). See *Meat Packer Legislation: Hearing Before the House Comm. on Agriculture*, 66th Cong. 720 (1920).

<sup>25</sup> *United States v. Swift & Co.*, 286 U.S. 106, 52 S. Ct. 460 (1932).

<sup>26</sup> In these hearings, specific note was made of the lack of bargaining power of farmers, the major packers' market power and the tendency of the meatpacking industry to engage in anticompetitive behavior. See, e.g., statement of Congressman Gilbert Haugen (R-IA), then chair of the House Agriculture Committee at 61 Cong. Rec. 1799-1800 (1921); statement of Congressman J.N. Tincher (R-KS), *id.* at 1804.

<sup>27</sup> In one Senate hearing, Senator Norris (R-NE) noted that stockyards were to be a public marketplace. See *Government Control of Meatpacking Industry, Hearing*

President Harding signed into law the Packers and Stockyards Act of 1921.<sup>28</sup> Its drafters described the resulting PSA, as “the most far-reaching measure and extended[ed] further than any previous law into the regulation of private business with few exceptions,”<sup>29</sup> and the powers given to the Secretary of Agriculture were more “wide-ranging” than the powers granted to the FTC.<sup>30</sup> The PSA was intended to give the Secretary “complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith.”<sup>31</sup>

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*on S.R. 221 in Favor of Government Control in the Operation of Packing Plants During the Continuance of the War: Hearing Before the Senate Subcomm. on Agriculture and Forestry, 65th Cong. 73 (1918).* Also the FTC report noted the ease with which the major packers could manipulate price and that any legislation must ensure that livestock sellers faced a fair market characterized by open bidding and full and transparent information. *See* FTC Report, Summary and Part 1, at 78. Specifically, the FTC found that the major packers controlled the livestock markets and so could engage in buying tactics that would not be available in a truly competitive market. *See id.* at 71 and 81.

<sup>28</sup> 7 U.S.C. §§ 181-231.

<sup>29</sup> 61 Cong. Rec. 1872 (1921).

<sup>30</sup> The provisions of the PSA are broader and more far-reaching than the Sherman Act, go further than the prohibition of the Clayton Act, and although the Federal Trade Commission Act (enacted in 1914) gave the commission wide power to prohibit unfair methods of competition, such authority is not as wide-ranging as that given to the Secretary of Agriculture under the PSA. *See* 61 Cong. Rec. 1805, 1806, 1887-1888 (1921); *Swift & Co. v. United States*, 393 F.2d 247 (7th Cir. 1968); *Swift & Co. v. United States*, 308 F.2d 849 (7th Cir. 1962); *Wilson & Co. v. Benson*, 286 F.2d 891 (7th Cir. 1961); *United States v. Donohue Bros.*, 59 F.2d 1019 (8th Cir. 1932).

<sup>31</sup> 61 Cong. Rec. 1799, 1801, 4783, 8310 (1921); H.R. Rep. No. 67-77, at 2 (1921).

## **B. PSA Enforcement in the Changing Livestock Market.**

At the time of the PSA's adoption the greatest concern was the manipulative and discriminatory conduct in the stockyards where livestock were sold. The Secretary employed the rule-making power to require disclosure of rates and charges as well as regulating other aspects of trading to develop greater sophistication on the part of those using these services.<sup>32</sup> By facilitating price competition, efficiency and new entry on the buying side, this regulatory process kept the commission rates at very competitive levels.<sup>33</sup>

In the 1950s, improved highways and refrigerated trucks resulted in new entry with an emphasis on direct purchase of livestock at the farm gate. The old stockyards declined and eventually vanished. For a period of time in the late 1950s and the 1960s, competition amongst cattle buyers was strong in the industry. But this new marketing context also posed challenges to ensure fair and open competition. Unfortunately, as industry buying practices changed, the Secretaries of Agriculture failed to create regulations to govern the new methods of buying cattle.

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<sup>32</sup> See Carstensen, *Impact*, *supra* n.3, at 1199 (citing Simon Whitney, *Antitrust Policies* 38-39 (1958)).

<sup>33</sup> See *id.* at 40 (from 1921 to 1953, per head charges in Chicago increased by only \$0.15 while the price of cattle themselves tripled).

The industry experienced re-concentration starting in the 1970s. As concentration returned, the historic incentives to engage in manipulative buying practices returned without regulations to facilitate fair, efficient and open transactions. Consequently, in 1976, Congress added a private cause of action to enforce the PSA's prohibitions.<sup>34</sup>

Among the manipulative buying practices that emerged was the use of captive supply. Forward contracting is not inherently manipulative. There are many possible forms that such contracting can take. However, the methods selected by the defendant and the other large firms were (and still are) particularly adapted to undercutting the public market price for cattle. In particular, the defendant's practice of tying a contract's base price to an in-plant average price or to an announced cash market price magnifies the defendant's incentive and power to manipulate the market well beyond that based solely on size or market share. Thus, as illustrated by the evidence presented at trial, the effect of the specific methods of forward contracting was to drive down the cash market price not just for quality cattle, but for all cattle sold on the cash market. Such price manipulation violates the PSA.

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<sup>34</sup> 7 U.S.C. § 209(a). The present case is the first major one to apply the PSA in the context of private litigation.

### **C. The PSA is a Distinct Body of Law Regulating the Livestock Industry.**

The PSA is remedial in nature<sup>35</sup> and should be construed liberally to effectuate its public purpose - to protect livestock producers against receiving less than the true market value for their livestock, and to protect consumers from the unfair marketing of meats.<sup>36</sup> The courts have pointed out that one of the evils that the PSA banned was the elimination of competition in the cash market, with the attendant possible depression of producers' prices.<sup>37</sup> The cases also teach that intent of the parties does not determine the outcome. Instead, the focus is on the outcome of the packer's actions.<sup>38</sup> "[A] practice which is likely to reduce . . . prices paid to farmers for cattle can be found an unfair practice under the Act . . . . [T]his is so even in the absence of evidence that the participants made their agreement

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<sup>35</sup> *Stafford*, 258 U.S. at 187, 42 S. Ct. at 403-04; *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 93 S. Ct. 1455, 1458 (1973) (“[T]he breadth of the . . . authority to . . . sanction strongly implies a congressional purpose to . . . impose [liability]. . . to deter repeated violations of the Act, whether intentional or negligent.”).

<sup>36</sup> *See, e.g., Bruhn's Freezer Meats of Chicago, Inc. v. United States Department of Agriculture*, 438 F.2d 1332, 1336 (8th Cir. 1971).

<sup>37</sup> *Swift & Co. v. United States*, 393 F.2d at 254 (citing *Meat Packer Legislation Hearings Before the House Committee on Agriculture*, 66th Cong., 22, 229, 250, 303, 1047, 2284 (1920)); *see also, Swift & Co. v. United States*, 308 F.2d at 851-53 (eliminating competition in the cash market is itself a violation regardless of intent).

<sup>38</sup> *Swift & Co. v. United States*, 308 F.2d at 853; *National Beef Co. v. Secretary of Agriculture*, 605 F.2d 1167, 1168 (10th Cir. 1979).

for the purpose of reducing prices to farmers . . . .”<sup>39</sup> Hence, the PSA is violated even if the business practice at issue was not intended to harm sellers and might have some legitimate business function.

The PSA regulates the meatpacking industry in a distinct manner. “The main Congressional motivation was . . . the felt need for specialized regulation of the many-tiered industry, with its unique problems arising from marketing and distributing livestock . . . including all the complications arising from packer ownership of stockyards.”<sup>40</sup> Like the Federal Trade Commission Act, the PSA is directed toward market activity that injures the competitive environment.<sup>41</sup>

The PSA’s prohibitions include bans on “any unfair, unjustly discriminatory or deceptive practice or device”<sup>42</sup> and on “any undue or unreasonable preference or advantage.”<sup>43</sup> There are also prohibitions that replicate antitrust rules; for example, the ban on sales where the “purpose or effect” is to apportion supply “if such apportionment has the tendency or effect of restraining competition or creating a

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<sup>39</sup> *Farrow v. United States Department of Agriculture*, 760 F.2d 211, 214 (8th Cir. 1985).

<sup>40</sup> *Armour & Co. v. United States*, 402 F.2d 712, 721 (7th Cir. 1968).

<sup>41</sup> *See, e.g., Swift & Co. v. United States*, 393 F.2d 247 at 253 (7th Cir. 1968).

<sup>42</sup> 7 U.S.C. § 192(a).

<sup>43</sup> 7 U.S.C. § 192(b).

monopoly.”<sup>44</sup> These provisions clearly require a balancing test of some sort and in some cases suggest that justifications of business necessity might be appropriate.

However, the provisions of the PSA at issue in this case, declare that a buyer’s manipulation of prices is, in itself, a violation of the Act: “It shall be unlawful . . . to: (e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices. . . .”<sup>45</sup> Not only does this statutory language bar any kind of balancing, it also does not even suggest that once a violation is found, there is any way to excuse such conduct.<sup>46</sup> The plaintiff bears the burden to prove the violation, but once those facts are established, the plain language of the statute requires absolute condemnation. Indeed, given the many ways in which efficiency enhancing activities can be implemented, it is extremely unlikely that there is any legitimate need to engage in price manipulation in order to accomplish a lawful goal.

Furthermore, the rule-making power of the Secretary includes the power to define the circumstances under which specific market practices, otherwise

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<sup>44</sup> 7 U.S.C. § 192(c).

<sup>45</sup> 7 U.S.C. §§ 192(d)-(e).

<sup>46</sup> By analogy, naked price fixing is illegal regardless of its effect on the market price or any justification. *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 60 S. Ct. 811 (1940).

unlawful, could be fair and reasonable.<sup>47</sup> Rule-making provides a more appropriate method to evaluate the merits of any proposed exception to the general prohibition on manipulative practices. All interested parties, not just those with judicial standing, can participate. A broader range of economic and market information can be considered. The defendant has failed to even seek such a rule-making proceeding. By itself, this illustrates that there is scant basis for any claim of justification for the practices at issue in this case.

The foregoing considerations argue against the introduction of any defense against a practice that has been found to have a price manipulative effect in a PSA proceeding. Nevertheless, given the dynamic nature of the marketplace in general, a defendant should be allowed to demonstrate that any prima facie unlawful price manipulation was the unavoidable result of a legitimate, efficiency-enhancing business practice. This involves two important steps: 1) identifying with specificity the legitimate business justification that motivates and explains the manipulative conduct; and 2) establishing that the prima facie unlawful conduct is the only practical means to accomplish that legitimate goal. Given the language and policy of the PSA, the opportunity to seek administrative rules authorizing such conduct and the capacity of firms to find lawful ways to accomplish efficiency enhancing

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<sup>47</sup> 7 U.S.C. § 228(a).

goals, the defendant should bear the burden of proving both elements. The defendant is also uniquely in possession of the information on the first point and has the greater capacity to explain why any identified alternative could not accomplish the identified legitimate goals.

**D. Application of the PSA to the Present Case.**

The jury verdict and the trial court's opinion confirm that the defendant's use of captive supply resulted in price manipulation in prima facie violation of the PSA. Indeed, the defendant paid lower prices for cattle purchased on the cash market than for captive supply but the cash market cattle were of higher average quality than the captive supply cattle.<sup>48</sup> Thus, this particular manipulation allowed the defendant to buy higher quality beef at lower prices than would have been the case in an unmanipulated public market. Such conduct, unless a clear defense exists, violates the PSA.

Consistent with the trial court's opinion, it is possible that the PSA would allow a price-manipulative practice that clearly enhances efficiency if the party engaging in the manipulative practice bore the burden of proving that the practice did, indeed, enhance efficiency, and that no other means of accomplishing those

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<sup>48</sup> See Trial testimony of Dr. C. Robert Taylor, R-21818:2-13.

efficiencies were possible. But in this case, the record does not establish either factual predicate for such a justification.

*The trial court opinion fails to identify any specific, legitimate function that captive supply uniquely serves.* At most, the defendant's post-trial brief and the trial court opinion list a variety of possible explanations for the use of forward contracts generally to secure supply. This hardly qualifies as the kind of analysis that establishes the first step of the potential defense. To assert such a defense, the defendant must at a minimum identify exactly what business goal(s) underlay its decision to employ captive supply. Without that information, it is impossible to consider either the merits of the justification(s) or the potential for alternative methods to accomplish the same goal(s). A general interest in having a continuous supply of cattle is not, in itself, sufficient or specific enough to justify conduct having proven adverse effects on the integrity of the cash market. Only with a careful and clear articulation of specific business reasons can the fact finder test the internal validity of those reasons and evaluate whether or not there is a clear and convincing connection between the stated goals and the harm that the defendant seeks to justify. Even if assuring future supplies of cattle is a legitimate general objective, neither the defendant nor the trial court explained why the cash market would not suffice. With many feeders supplying cattle, there is no obvious reason

why a meatpacker could not continue to rely on the cash market. This inference is strengthened by the fact that the cash market, in fact, provided higher quality cattle than did the captive supply process. In addition, if the defendant had offered to pay the premiums it paid for captive supply in the cash market, simple economic logic teaches that the supply in that market would increase in response to favorable prices.<sup>49</sup>

A second consideration makes the defendant's claim that it has to use captive supply economically illogical. It is the largest buyer of cattle in the United States, currently purchasing more than 30%. If it terminated its use of captive supply, the trial court and defendant apparently claim that all of these supplies would be taken by the defendant's competitors. This is an illogical assertion. It assumes that the defendant's rivals have enormous excess capacity and that the rivals taking over of the defendant's source of supply will foreclose the defendant to any supplies.<sup>50</sup> In reality, the defendant's rivals, by capturing a portion of existing captive supply,

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<sup>49</sup> The trial court misperceived the relevance of the economic analysis in its footnote 1 when it suggested that suppliers could easily exit captive supply agreements. It would be rational to do so only if cash market prices were higher (they are not) and if the sellers had assurance that they would find buyers. Most cattle producers cannot risk losing their only buyer if they back out of a captive supply agreement before the time specified for delivery.

<sup>50</sup> This is commonly seen as an error in the Supreme Court's opinion in *Brown Shoe v. United States*, 370 U.S. 299, 82 S. Ct. 1502 (1962); cf. Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic*

will have to abandon some of their current captive supply or reduce their cash market purchases. Either way, the supply that defendant needs will remain available. Consequently, the asserted “meeting competition” defense for captive supply is without economic merit. Neither the defendant nor the trial court has given a specific, legitimate reason for the use of captive supply.

The lack of clear explanation for the specific practices makes application of the second step of the analysis easy or unnecessary. Because the defendant has failed to satisfy the first step, there should be no need to evaluate the second step. But if there were, there is no basis to conclude that the defendant could not get all the supplies it needs through the cash market. Further, however, there have been a number of proposals for the creation of forward contracting systems that would be transparent, efficient, open and non-manipulative of prices.<sup>51</sup> Hence, even if forward contracting were essential to modern meatpacking, the defendant’s methods are not essential.

The record provides another basis to reject the defendant’s assertion that its conduct serves some legitimate efficiency enhancing goal. Its use of captive supply

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*Misconception*, 22 U. Chi. L. Rev. 157 (1954).

<sup>51</sup> See, e.g., S. 1044, 103 Cong. 1st Sess., introduced by Senators Enzi, Dorgan, Conrad, Daschle, Johnson and Thomas on May 13, 2003 (bill to regulate forward contracting for livestock).

varied greatly from week to week.<sup>52</sup> This directly refutes the claim that the defendant's captive supply system provided either "reliable" or "consistent" supplies of fed beef." Moreover, the plaintiffs' experts provided extensive econometric analyses of cost information from the defendant's detailed weekly profit and loss statements for the slaughter, processing and hide divisions. Separate analyses were conducted for labor, other variable costs, fixed costs and allocated costs for the slaughter division. Explanatory variables included weekly captive supply slaughter, total head slaughtered, weekly binary variables and lagged variables. Numerous models were estimated. A statistically significant relationship was not shown between the defendant's use of captive supplies and costs. Thus, the models all showed that there were absolutely no efficiency gains from captive supply. The economic evidence also revealed that the defendant did not realize any transaction cost savings from the use of captive supplies. In fact, the cattle the defendant purchased on the cash market were of a higher quality than cattle obtained through captive supplies.

Hence, even if an affirmative defense existed under the PSA for manipulative conduct that was the only feasible way to achieve some legitimate economic objective, the record in this case simply does not support the conclusion that

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<sup>52</sup> Trial exhibit 1210.

defendant has established any element of that defense. Moreover, the trial court erred in its legal definition of the standards that the PSA imposes on price manipulation by meatpackers.

### **III. The Decision Below Effectively Destroys the PSA Protections**

Even if this Court were to reject the foregoing analysis of the standards imposed on meatpackers by the PSA, the trial court's decision is so extreme in its deference to buyers that it would effectively nullify any protection from price manipulation afforded by the PSA. The opinion accepts the jury's verdict that captive supply harmed those selling in the cash market. Thus, the resulting harms are both price manipulation (reduced prices relative to what defendant would have paid in an unbiased market) and unfairness (lower prices were paid for objectively better cattle as a result of depressing the cash market where higher quality cattle were purchased).

The decision to overturn the jury verdict on the merits rests on two propositions both of which are economically illogical and inapplicable in a case such as this. First, the court declared that regardless of the harm inflicted on the protected class, if the defendant can identify any possible legitimate business justification that might be consistent with the harmful conduct, it can escape

liability even if those harms were avoidable.<sup>53</sup> The court rejected the contention that the fact finder had to determine if less harmful alternatives existed by which the defendant could accomplish the same legitimate goal(s). Second, the court asserted that so long as the defendant showed that other buyers used the same or similar methods of buying cattle, it was entitled to do the same thing pursuant to a so-called “meeting competition” defense.

As a general matter of economic analysis, when conduct has demonstrated harmful effect, but also serves a legitimate economic function, the central economic efficiency question is whether the costs (the harms) can be avoided and the benefits still be obtained.<sup>54</sup> If so, then it is socially and economically inefficient to allow the harmful conduct. Consequently, the trial judge’s refusal to consider whether the harms were avoidable is economically illogical. That is especially the case where as here Congress has by statute designated a group, cattle feeders, who

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<sup>53</sup> There are PSA cases applying the “unfairness” and “discrimination” tests that suggest some “reasonableness” standard should apply. But those cases make it clear that the test involves balancing the harms and the benefits of the conduct which necessarily must involve consideration of whether the harm was avoidable. *See, e.g., Swift & Co. v. United States*, 393 F.2d at 254 (unlawful conduct “violates the Act if ‘without reasonable cause.’”) (quoting *Capitol Packing v. United States*, 350 F.2d 67, 80-81 (10th Cir. 1965)).

<sup>54</sup> A good illustration from antitrust law of the proper methodology is found in *Microsoft v. United States*, 253 F.3d 34 (D.C. Cir. 2001) (monopolistic practice that harms competition can be upheld if the monopolist establishes that it has a legitimate business function and there is no less harmful way to accomplish that

are to have the protection of the law from price manipulation causing “unduly and arbitrarily . . . lower prices . . .”.<sup>55</sup>

Not only is the trial court’s failure to consider less harmful alternatives essential to economic efficiency in general, the court’s refusal to do so creates a strong incentive for parties with the ability to manipulate prices or otherwise exploit market processes to do so.<sup>56</sup> Thus, the trial court’s standard invites meatpackers to choose the most manipulative strategy consistent with their legitimate business goals.

There is no finding of fact that either lawful contracting practices or the cash market would not result in a “reliable and consistent supply.” Indeed, the record showed that cash markets produce better quality and lower price cattle and that captive supply fluctuated greatly. In fact, if the defendant refused to use captive supply, this would increase the supply of cattle in the cash market. Moreover, if the defendant bid up the price in the cash market to the level it paid for inferior cattle through captive supply agreements, that would further increase the supply as those selling to the defendant’s rivals would have a greater incentive to sell to the defendant. Hence, basic economic logic tells us that the defendant could easily

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function).

<sup>55</sup> *Stafford*, 258 U.S. at 514-515, 42 S. Ct. at 401.

<sup>56</sup> *See Posner, supra* n.11.

obtain all the cattle it needs on a reliable and consistent basis without using its present captive supply tactics. The trial court opinion has failed to identify a single specific characteristic of the supply market for cattle that mandates or requires the use of forward contracting in the form that the defendant employs.<sup>57</sup>

The importance of this analysis can not be overstated. The question, as discussed previously, is whether the efficiency gain requires the economic cost involved. If the cost can be avoided, then it is inefficient, as well as unfair and manipulative, to impose such costs on those on the other side of the market. Strategic conduct within oligopolies often reflects the desire on the part of such enterprises to entrench themselves and exploit their relative position over other parties in the supply chain. Such activities do not contribute to either productive or dynamic efficiency, but they clearly have a negative effect on allocative efficiency and waste society's resources.

Thus, in enforcing statutes intended to regulate markets in the interest of fair, open, accessible and nondiscriminatory operation, it is essential to look critically at any conduct that causes harm to the process.

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<sup>57</sup> Even assuming that a “reliable and consistent” supply beyond the cash market is essential to the defendant’s business, the record showed and the jury must have agreed that there were other ways to obtain such supplies.

The same analysis with even greater strength applies to the “meeting competition” justification for captive supply. First, this justification is a direct acknowledgment of the kind of harmful, strategic behavior that occurs in oligopolistic markets. Each buyer points to the ways in which its rivals exploit their suppliers by price manipulation and demands the right to do the same thing. Given the legislative goals and express wording of the PSA it is a remarkable stretch to conclude that such an excuse for imposing harms on producers could exist. If such a goal has any validity, it would have to require a rigorous proof that the offending conduct is the only means by which the defendant can preserve its business.

For the reasons discussed above in the context of examining the argument that the defendant needed captive supply in order to have a reliable flow of livestock, there is no reasonable basis to believe that the defendant’s position as the nation’s leading beef processor would be threatened if it ceased to engage in unlawful price manipulation.

The Robinson Patman Act that forbids discrimination in the sale of similar goods to competing resellers has a “meeting competition” defense.<sup>58</sup> It excuses the seller from the prima facie violation of causing a downstream reseller of its goods

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<sup>58</sup> 15 U.S.C. § 13-13b, 21a.

to have higher costs (the disfavored seller) in comparison to a competing reseller that benefited from the discount but only if discount meets, but does not exceed, that offered by a competitor of the seller.<sup>59</sup> The trial court opinion is barren of evidence showing that the defendant's rivals had offered favorable contracts to key suppliers of the defendant and that all the captive supply contracts were directly responsive to such offers.

Moreover, the logic of the Robinson Patman defense makes no economic or business sense in the context of fed cattle markets. After all, the defendant sells beef and the feedlots are not competitors in that part of the business.<sup>60</sup> When a rival meatpacker bids up the price for cattle (increasing its own costs) this, in and of itself, does not cause a harm to the defendant. The defendant can "meet competition" by raising its price to get other supplies. Indeed, it can use the cash market and pay lower prices. Hence, the logic of a "meeting competition" defense directed at immunizing specific kinds of price discrimination in downstream markets for the seller's goods is not appropriate for framing a defense of price manipulation in upstream supply markets. Essentially, this meeting competition

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<sup>59</sup> See *F.T.C. v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 65 S. Ct. 971 (1945); *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S. Ct. 2864 (1978); *Falls City Ind. v. Vanco Beverage*, 460 U.S. 428, 103 S. Ct. 1282 (1983).

<sup>60</sup> For a PSA case involving such an issue, see *Swift & Co. v. United States*, 317 F.2d 53 (7th Cir. 1963) (violation found based on sales to one buyer at 9 to 14

claim is another way to say that the defendant wanted to obtain supplies on favorable terms even if that meant engaging in unlawful price manipulation.

### CONCLUSION

The statutory language of the PSA, its underlying policies and economic logic, all call for the reversal of the trial court's decision and reinstatement of the jury's verdict condemning the defendant's use of captive supply as unlawful price manipulation.

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Respectfully submitted,



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cents a pound below its price to other buyers).

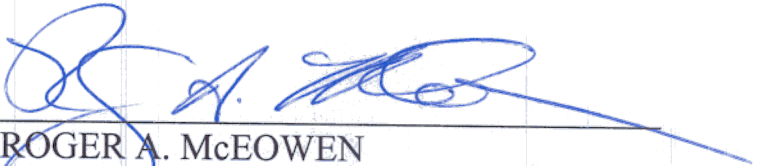
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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in of Fed. R. App. P. 32(a)(7)(B). This brief contains 6,999 words.



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## CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2004, a true and correct copy of the foregoing Brief of *Amici Curiae* Fifty Leading Scholars, Farmers, Ranchers, Farm and Ranch Organizations, Consumer Groups, and Religious Organizations in Support of Plaintiffs-Appellants Supporting Reversal was served by First Class, United States mail, postage prepaid; upon:

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