

THE PROBLEM OF AGRICULTURAL CONCENTRATION: THE CASE OF THE TYSON-IBP MERGER

*David R. Moeller**

I.	Introduction.....
II.	Pre-Merger Notification and Merger Review Processes.....
III.	Brief History of Tyson Foods and IBP
	A. Tyson Foods, Inc.
	B. IBP, Inc.
IV.	The “Chancery” Marriage of Tyson and IBP
V.	The Merged Company of Tyson Foods and Its IBP Fresh Meats Group
VI.	Impacts of the Tyson-IBP Merger on Family Farmers
VII.	Conclusion

I. INTRODUCTION

This article analyzes the merger of Tyson Foods and IBP from the perspective of its potential impacts on family farmers. This article provides an overview of the premerger notification and merger review process, gives a brief history of Tyson Foods and IBP, discusses the merger process for the two companies and the resulting company, and addresses responses to the potential impacts the merged company may have on family farmers.

To my knowledge, there is no other sector of the U.S. manufacturing or service economy in which the federal government plays such a watchdog role with respect to raw material suppliers. And yet, ironically, as the meat and poultry industry operates with this additional, daily, government oversight of our business transactions with livestock producers, we are here today to discuss whether meat packers should

* Staff Attorney with Farmers’ Legal Action Group, Inc. (“FLAG”), St. Paul, Minnesota. This article is dedicated to Senator Paul Wellstone, a tireless advocate for increased competition in agriculture. I would like to thank my wife, Bryce Nixon, for her support and love, and John Smillie, Jon Lauck, Ann Pagel, and Lynn Hayes for their assistance.

receive additional scrutiny, enforcement or business restrictions in order to protect or benefit livestock producers.¹

As meat packers lobby against legislative proposals to increase oversight and regulation of their industry, advocates for family farmers are attempting to address the implications of increased concentration of agricultural sectors, especially livestock and poultry. The recently completed merger of Tyson Foods, Inc. and IBP, Inc. (formerly Iowa Beef Processors, Inc.) that created a “protein powerhouse”² highlights the problem of agricultural concentration and its impacts on family farmers.

II. PRE-MERGER NOTIFICATION AND MERGER REVIEW PROCESSES

Section 7 is primarily aimed at arresting, at their incipiency, acquisitions and mergers that substantially lessen competition or tend to create a monopoly. For this purpose, the language of section 7 is structured such that a violation can occur when there is a *threat or possibility* of substantially lessening competition or creating a monopoly. No restraints, monopolies, or substantial lessening of competition need actually occur to violate section 7.³

Companies contemplating certain-sized mergers or acquisitions must first comply with the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR”), which is found in Section 7A of the current version of the Clayton Act.⁴ HSR requires buyers and sellers of covered transactions⁵ to file “Pre-Merger Notification” forms⁶ with the Federal

1. Sara J. Lilygren, Senior Vice President, Legislative and Public Affairs, American Meat Institute, Testimony Before the Senate Committee on Judiciary (Aug. 23, 2002), *available at* <http://www.meatami.com/Template.cfm?Section=IndustryStructure&NavMenuID=227&template=TaggedContentFile.cfm&NewsID=581>.

2. IBP, THE IBP STORY, *available at* <http://www.ibpinc.com/about/IBPNewHistory.stm> (last visited Jan. 13, 2003) [hereinafter THE IBP STORY] (term used to describe the joinder of Tyson Foods with IBP).

3. *Midwestern Mach., Inc. v. Northwest Airlines, Inc.*, 167 F.3d 439, 442 (8th Cir. 1999) (citation omitted).

4. 15 U.S.C.A. § 18a (West 1997 & Supp. 2002); WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 6.2, at 581 (2002 ed. 2001). *See also* *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 311-23 (1962) (discussing the legislative history of Section 7 of the Clayton Act).

5. After Tyson’s initial cash tender offer to IBP occurred in December 2000, new amendments went into effect on what is a covered transaction. *See* Act of Dec. 21, 2000, Pub. L. No. 106-553, app. b. § 630, 114 Stat. 2762 (2000). The Tyson-IBP merger easily met either definition. Generally, if the acquired company has either \$50 million in voting securities with at least

Trade Commission (“FTC”) and the Department of Justice (“DOJ”).⁷ If the merger or acquisition is through a tender offer only the buyer is required to submit the necessary paperwork.⁸

The parties must then wait a specified number of days before the transaction can be consummated.⁹ The statutory waiting period from the date of filing for a cash tender offer is fifteen days and thirty days for all other types of reportable transactions.¹⁰ These waiting periods can be extended by the FTC or the DOJ (ten days for cash tender offer and thirty days for all other transactions).¹¹ If supplemental information is requested by the FTC or the DOJ, additional time will be added until the companies comply with these requests.¹² Often companies request and receive expedited processing of their HSR application.¹³

Following the submission of all required information, the FTC or the DOJ¹⁴ review the information “to determine whether such acquisitions may, if

\$10 million in total assets or \$200 million in voting securities and assets and does not meet one of several specified exemptions, it is a covered transaction. 15 U.S.C. §§ 18a(a)(2)(B)-(2)(C)(1) (2000); Exemption Rules 16 C.F.R. pt. 802 (2002). Beginning in 2005 these thresholds will be inflation adjusted annually. Prior to the 2001 amendments the transaction threshold was \$15 million in voting securities.

6. Premerger notification information is explicitly exempted from Freedom of Information Act disclosure and the Clayton Act forbids public disclosure “except as may be relevant to any administrative or judicial action or proceeding.” 15 U.S.C. § 18a(h). However, the Clayton Act also states that “[n]othing in this section is intended to prevent disclosure to either body of Congress or to any duly authorized committee or subcommittee of the Congress.” *Id.*

7. *Id.* § 18a.

8. *Id.* § 18a(a); 16 C.F.R. § 801.31(b).

9. 15 U.S.C. § 18a(b).

10. *Id.* § 18a(b)(1).

11. *Id.* § 18a(e); 16 C.F.R. § 803.20(b)(2).

12. 15 U.S.C. § 18a(e)(2); 16 C.F.R. § 803.20(c)(2).

13. See 16 C.F.R. § 803.11(c) (discussing the FTC and DOJ discretion to terminate a waiting period); see also FTC, *Early Termination Notices*, at <http://www.ftc.gov/bc/earlyterm/> (last updated Jan. 9, 2003) (listing daily Early Termination Notices granted).

14. Generally the FTC takes the lead in ensuring the HSR filing requirements are met, though in agricultural merger reviews the DOJ has taken the lead based on more expertise in that area. In March 2002, the FTC and the DOJ announced a *Memorandum of Agreement* concerning which agency would handle which industry with the DOJ taking the lead on Agriculture and Associated Biotechnology. See Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations, app. A (Mar. 5, 2002), available at <http://www.usdoj.gov/atr/public/10170.pdf>. However, the agencies did not consult Congress and, in particular, Senator Hollings from South Carolina. In response to opposition and threats to cut each agency’s budget by Senator Hollings, the agencies announced they would no longer adhere to

consummated, violate the antitrust laws”¹⁵ If in reviewing the HSR filings, the FTC or the DOJ determines further scrutiny is warranted, a merger investigation is opened.¹⁶ The next step is for the DOJ or the FTC to decide whether they will oppose the transaction to prevent and restrain violations of antitrust laws, usually initiated by seeking a preliminary injunction.¹⁷

Remedies available to the DOJ and the FTC include prohibiting the pending acquisition, forcing divestiture of stock or assets, mandating corporate spin-offs, requiring compulsory purchase or sale of needed materials to a divested firm, requiring compulsory sharing of technology and placing temporary restrictions upon the defendant’s own output.¹⁸ If the FTC and the DOJ do not open a merger investigation or close an opened merger investigation, the companies can consummate their merger upon the expiration of the waiting period.¹⁹ It should be noted that state attorneys general or private individuals may still seek separate enforcement of the federal antitrust laws after the FTC or the DOJ approve the merger.²⁰ Also, increasing European Union authorities are reviewing mergers between American companies.²¹

The FTC’s and the DOJ’s review process on agricultural mergers has come under scrutiny for being too weak and not providing adequate review of all potential impacts post-merger.²² Mergers such as Tyson and IBP are generally

the agreement. Press Release, Charles A. James, Department of Justice, Regarding DOJ/FTC Clearance Agreement (May 20, 2002), *available at* http://www.usdoj.gov/atr/public/press_releases/2002/11178.htm.

15. 15 U.S.C. § 18a(d)(1).

16. THOMAS V. VAKERICS, ANTITRUST BASICS § 9.03[2] (2002).

17. 15 U.S.C. § 18a(f).

18. *See id.*; VAKERICS, *supra* note 16, §§ 2.02[5], 2.03[4], 9.03[2].

19. *See* 15 U.S.C. § 18a(b); 16 C.F.R. § 803.11.

20. *See* California v. Am. Stores Co., 495 U.S. 271, 284 (1990) (holding that a state may obtain divestiture as a remedy for a disapproved merger even though the merger had previously been approved by FTC). The Kansas Attorney General stated publicly that she would examine the then-proposed merger between Tyson Foods and IBP, Inc. *Stovall Deputy Says AG Will Review Tyson-IBP Merger*, DODGE CITY DAILY GLOBE, Jan. 17, 2001, *available at* http://www.dodgeglobe.com/stories/011701/sta_stovall.shtml. *See also* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 541-83 (West 1994) (overview of private party enforcement).

21. *See, e.g.*, Michael D. Goldhaber, *Navigating Brussels*, FOCUS EUR., Winter 2002, at 29.

22. *See* Press Release, Organization for Competitive Markets, OCM Tells Senate Judiciary Committee to Strengthen Antitrust Review (August 23, 2002), *available at* http://www.competitivemarkets.com/news_and_events/pressreleases/PR.Testimony.Judiciary.082302.htm (calling

considered horizontal mergers or acquisitions where both firms “operate at the same level of the market structure and within the same product and geographic market area.”²³ To address horizontal mergers, the DOJ and the FTC issued the 1992 Horizontal Merger Guidelines.²⁴ The Horizontal Merger Guidelines look at statistical factors such as the Herfindahl-Hirschman Index (“HHI”)²⁵ and non-statistical factors such as the emergence of new technologies and product substitutability.²⁶ When these guidelines are applied to a merger of companies that dominate their respective industries but do not overlap in the relevant market, the HHI factor and other factors will usually not trigger merger review.²⁷ This could lead to increased overall concentration in the food industry through mergers and

on the Senate Judiciary Committee to strengthen antitrust review).

OCM also requested greater transparency in the merger review process. Merging parties seeking approval for a merger from antitrust authorities generally claim efficiency gains that the government often fails to scrutinize. If those claims, along with the data and analysis justifying the efficiency allegations, are made public, citizens and companies that may be negatively affected by the merger will have a greater opportunity to present opposing evidence. The process will provide more information to antitrust authorities and lessen the likelihood of shoddy merger reviews.

Id. In response to the Tyson-IBP merger Senator Chuck Grassley of Iowa introduced S. 1076, 107th Cong. (2001), that provides specific guidelines for antitrust review of agricultural mergers. Press Release, Senator Chuck Grassley, Grassley Takes Action for Family Farmers as Tyson-IBP Merger Talks Renew: Iowa Senator Leads Response in Congress to Concentration in Agriculture (June 21, 2001), *available at* <http://www.senate.gov/~grassley/releases/2001/p01r6-21.htm>. *See also* U.S. GEN. ACCOUNTING OFFICE, GAO-01-188, JUSTICE’S ANTITRUST DIVISION—BETTER MANAGEMENT INFORMATION IS NEEDED ON AGRICULTURE-RELATED MATTERS (2001), *available at* <http://www.gao.gov/new.items/d01188.pdf>.

23. HOLMES, *supra* note 4, § 6.4 (2002 ed. 2001).

24. FTC, 1992 HORIZONTAL MERGER GUIDELINES, *available at* <http://www.ftc.gov/bc/docs/horizmer.htm> (last visited Jan. 13, 2003). *See also* HOLMES, *supra* note 4, § 6.6, at 598-606.

25. “The HHI is the sum of the squares of the individual market shares of all firms in the market, thus giving proportionately greater weight to the shares of the larger, and presumably more competitively significant, firms.” HOLMES, *supra* note 4, § 6.6, at 603. *See also* FTC, *supra* note 24 (stating that the guidelines “divide[] the spectrum of market concentration as measured by the HHI into three regions that can be broadly characterized as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800), and highly concentrated (HHI above 1800)”).

26. HOLMES, *supra* note 4, § 6.6, at 603-04.

27. *See* VAKERICS, *supra* note 16, § 9.04[1].

other agreements, even if individual markets are not considered highly concentrated.²⁸

The Packers and Stockyards Act of 1921 (“P&S Act”)²⁹ does not grant USDA’s Grain Inspection, Packers and Stockyards Administration (“GIPSA”) authority to review mergers.³⁰ Mergers are currently only reviewed by the FTC and the DOJ as described above. According to GIPSA, “High concentration, in and of itself, is not prohibited under the P&S Act.”³¹ Instead, GIPSA “focuses its investigative and regulatory resources on monitoring industry behavior and identifying anti-competitive practices that may cause economic harm and that violate the P&S Act.”³² For example, GIPSA recently brought an action against IBP for violating the P&S Act through the use of a right-of-first refusal provision in an agreement with a group of feedlots in Kansas.³³ GIPSA argued successfully before USDA’s Judicial Officer that the agreement had “the effect or the potential effect of reducing competition because IBP does not have to participate in bidding after its initial bid, and can obtain a pen of cattle by matching, instead of exceeding, the highest bid.”³⁴ The Eighth Circuit Court of Appeals disagreed and overturned the Judicial Officer’s decision.³⁵ The Eighth Circuit held that the record showed IBP’s bidding practices did not violate the P&S Act because IBP did “participate in the bidding process, even after the initial bid, and [paid] prices that [were] the result of the bidding process.”³⁶

Numerous senators and representatives and farm organizations believe that GIPSA has not done enough to ensure competition in agriculture.³⁷ In 2000,

28. WILLIAM HEFFERNAN, NATIONAL FARMERS UNION, CONSOLIDATION IN THE FOOD AND AGRICULTURE SYSTEM (1999), available at http://www.nfu.org/images/heffernan_1999.pdf.

29. 7 U.S.C. §§ 181-231 (2000).

30. See GRAIN INSPECTION, PACKERS AND STOCKYARDS ADMIN., USDA, ASSESSMENT OF THE CATTLE AND HOG INDUSTRIES CALENDAR YEAR 2000, at 6 (2001), available at <http://www.usda.gov/gipsa/pubs/packers/assessment2000.pdf>.

31. *Id.* at 29.

32. *Id.*

33. See *IBP, Inc. v. Glickman*, 187 F.3d 974 (8th Cir. 1999).

34. *Id.* at 976.

35. *Id.* at 978.

36. *Id.* at 978-79.

37. See, e.g., Press Release, Senator Chuck Grassley, Grassley Stands Up for Family Farmers: Iowa Senator Seeks Effective Enforcement, Competitive Environment (Sept. 21, 2000), available at <http://www.senate.gov/~grassley/releases/2000/p0r9-21.htm>; Press Release, Land Stewardship Project, Campaign for Family Farms Blasts Bush Administration’s Appointee to USDA’s Antitrust Division (Apr. 4, 2002), available at http://www.landstewardshipproject.org/pr/2002/newsr_020402.html. See generally Doug O’Brien, Note, *The Packers & Stockyards Act of 1921 Applied to the Hog Industry of 1995*, 20 J. CORP. L.

the General Accounting Office (“GAO”) issued a report entitled “Packers and Stockyards Programs: Actions Needed to Improve Investigations of Competitive Practices.”³⁸ The report compared GIPSA’s investigatory process with that of the DOJ and the FTC and found “GIPSA does not require investigations to be (1) planned and developed on the basis of a how a company’s actions may have violated the law and (2) periodically reviewed as they progress by senior officials with anticompetitive practice experience.”³⁹ The GAO recommended that in order to improve GIPSA’s investigations of anticompetitive practices, the agency must integrate a better planning process that utilizes a teamwork approach between GIPSA’s economists and USDA’s Office of the General Counsel’s attorneys.⁴⁰ It is too early to tell whether GIPSA’s implementation of the GAO recommendations will alter its approach to enforcing the P&S Act or if additional congressional oversight, and possibly legislation, will be needed.

III. BRIEF HISTORY OF TYSON FOODS AND IBP

A. *Tyson Foods, Inc.*

Tyson Foods, Inc., headquarters in Springdale, Arkansas, is the number one chicken company in the world. We are the world’s largest fully integrated producer, processor and marketer of chicken and chicken-based convenience foods, with 68,000 team members and 7,400 farm families in 100 communities. Tyson has operations in eighteen states and fifteen countries and exports to seventy-three countries worldwide. We are the recognized market leader in almost every retail and foodservice market we serve. Through our Cobb-Vantress subsidiary, Tyson is also a leading chicken breeding stock supplier. In addition, Tyson is the nation’s second largest maker of corn and flour tortillas under the Mexican Original brand, as well as a leading provider of live swine.⁴¹

651 (1995) (discussing the need for increased oversight of competitiveness in the meat packing industry).

38. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-00-242, PACKERS AND STOCKYARDS PROGRAMS: ACTIONS NEEDED TO IMPROVE INVESTIGATIONS OF COMPETITIVE PRACTICES (2000), available at <http://www.gao.gov/new.items/rc00242.pdf>.

39. *Id.* at 6.

40. *Id.* at 22-23.

41. TYSON FOODS, INC., 2000 ANNUAL REPORT, available at <http://www.tysonfoodsinc.com/IR/publications/annualreport/pdf/00ar.pdf>.

Tyson Foods, Inc. was founded by John Tyson in the 1930s.⁴² He started the Springdale, Arkansas based company by transporting poultry to major Mid-western cities such as Kansas City, St. Louis and in 1936, Chicago.⁴³ Before long Tyson expanded into baby chick incubators, commercial feed mills, and company-owned broiler farms.⁴⁴ In 1947, Tyson Feed and Hatchery was incorporated.⁴⁵ By the end of the 1950s, Tyson built and operated its first processing plant.⁴⁶ The company went public in 1963 and changed its name to Tyson Foods.⁴⁷ In 1977, Tyson Foods purchased hog-production facilities in North Carolina and by 1979 was the nation's largest hog producer, shipping 7,500 hogs a week.⁴⁸ Tyson continued expanding in the 1980s with the purchase of new product lines including Holly Farms, a beef and pork processor.⁴⁹ In 1998, "Tyson solidified its position as the world's largest poultry producer by merging with long-time competitor Hudson Foods."⁵⁰

Tyson's integrated poultry systems produce seven billion pounds of chicken and chicken-based foods annually.⁵¹ This production comes from 6,500 contract growers.⁵² Tyson's chicken operations are fully vertically integrated.⁵³ Until recently, Tyson also had substantial hog contract operations. On August 18, 2002, Tyson announced that it will reduce its total number of sows from 100,000 to approximately 70,000 and will reduce finishing farms by eighty-three percent.⁵⁴ Tyson will discontinue its relationships with 132 contract hog produc-

42. *Id.* The current Chairman and CEO is also named John Tyson. He is the grandson of the founder.

43. *Id.*

44. *See id.*

45. *Id.*

46. *See id.*

47. *Id.*

48. *Id.*

49. *See id.*; see also *In re Holly Farms S'holders Litig.*, 564 A.2d 342 (Del. Ch. 1989) (discussing the sale of Holly Farms).

50. TYSON FOODS, INC., TYSON TIME LINE, at <http://www.tysonfoodsinc.com/corporate/history/default.asp> (last visited Feb. 5, 2003).

51. TYSON FOODS, INC., TYSON COMPANY INFORMATION, available at <http://www.tysonfoodsinc.com/corporate/info/today.asp> [hereinafter TYSON COMPANY INFORMATION] (last visited Feb. 5, 2003).

52. *See id.*; see also Neil D. Hamilton, *Broiler Contracting in the United States—A Current Contract Analysis Addressing Legal Issues and Grower Concerns*, 7 DRAKE J. AGRIC. L. 43 (2002) (containing legal information on contract poultry growers).

53. TYSON FOODS, INC., 2001 INVESTOR FACT BOOK 6, available at <http://www.tysonfoodsinc.com/IR/publications/factbook/factbook01/factbook01.pdf> (last visited Feb. 5, 2003).

54. Rod Smith, *Tyson Moves to Exit Finished Hog Production*, FEEDSTUFFS, Aug. 26,

ers in Arkansas and eastern Oklahoma.⁵⁵ Tyson will retain its hog breeding operations that provide weaned feeder pigs to finishing operations in the Midwest.⁵⁶ In response, more than eighty hog farmers sued Tyson for undetermined damages arising from Tyson's cancellation of their hog contracts.⁵⁷

Tyson has also recently experienced ethical and legal problems. "In December of 1997, Tyson Foods . . . pled guilty to one felony count of illegally giving United States Secretary of Agriculture, Mike Espy, approximately twelve thousand dollars in gifts and favors, including football tickets, trips, and food."⁵⁸ Tyson's hiring practices of immigrants at its processing plants has also come under scrutiny for allegedly violating immigration and labor laws. In December of 2001, Tyson Foods was indicted for conspiracy to violate United States immigration laws.⁵⁹ Tyson pled not guilty to all charges and has publicly disputed the DOJ's charges.⁶⁰

2002, at 1.

55. *Id.*

56. *Id.*

57. Press Release, Hare, Wynn, Newell and Newton, L.L.P., Pork Producers File Suit Against Tyson (Sept. 12, 2002), *available at* http://www.hwnn.com/news_articles/tyson_release.pdf. Tyson is disputing the lawsuit and claiming that the hog contract growers must arbitrate any disputes. *See* Regina Smith, *Arbitration Isn't Valid, Farmers Say*, COURIER NEWS, Oct. 19, 2002, *available at* <http://www.couriernews.com/archivedstory.asp?ID=573>; *see also* Ward v. Tyson Foods, Inc., No. Civ. 2002-497 (Cir. Ct. Pope County, Ark. filed Sept. 2, 2002), *available at* http://www.hwnn.com/court_docs/tyson.pdf.

58. John D. Copeland, *The Tyson Story: Building an Effective Ethics and Compliance Program*, 5 DRAKE J. AGRIC. L. 305, 306 (2000). The two Tyson employees that were prosecuted by the Independent Counsel received full and unconditional pardons from President Clinton and the United States Court of Appeals for the District of Columbia vacated all judgments against one of the employees, Archibald R. Schaffer III. *See generally* John D. Copeland, *The Tyson Story: An Update*, 6 DRAKE J. AGRIC. L. 257 (2001); *see also* United States v. Schaffer, 240 F.3d 35, 38 (D.C. Cir. 2001). A jury acquitted Secretary Espy of all charges against him. *See* United States v. Espy, 31 F. Supp. 2d 1, 1 (D.D.C. 1998).

59. Press Release, United States Department of Justice, INS Investigation of Tyson Foods, Inc. Leads to 36 Count Indictment for Conspiracy to Smuggle Illegal Aliens for Corporate Profit (Dec. 19, 2001), *available at* http://www.usdoj.gov/opa/pr/2001/December/01_crm_654.htm.

60. Press Release, Tyson Foods, Inc., Justice Department Letters Contradict Conspiracy Allegations: Tyson Pleads Not Guilty to All Charges (Jan. 24, 2002), *available at* <http://www.tysonfoodsinc.com/corporate/news/viewNews.asp?article=931>. *See also* Trollinger v. Tyson Foods, Inc., 214 F. Supp. 2d 840 (E.D. Tenn. 2002) (discussing the United States District Court for the Eastern District of Tennessee's recent dismissal for failure to state a claim in a class-action lawsuit brought against Tyson under the Racketeer Influenced and Corrupt Organizations Act ("RICO") for allegedly engaging in a scheme to reduce labor costs by hiring illegal immigrants

B. *IBP, Inc.*

Since our beginning in 1960, Tyson's IBP Fresh Meats Group has created change. Through the development of modern plants, unprecedented innovations such as boxed meat and the strong work ethic of our Team Members, we have set the pace for the meat industry. And, our story is far from over. IBP Fresh Meats will always be at the forefront of the industry, bringing the next generation of change to people everywhere.⁶¹

Founded in 1960, IBP began in 1961 with a single plant in Denison, Iowa.⁶² The original company name was Iowa Beef Packers, Inc.⁶³ According to IBP, the company set out to process meat with a new approach that incorporated three basic principles: "plant location, plant construction and experienced managers."⁶⁴ Unlike the historic packing plants in Chicago and other Midwestern urban centers that were built near major stockyard terminals, IBP put their plants "near large livestock producing areas" in order to shorten transportation distances.⁶⁵ The plants were constructed or remodeled to be "more than just slaughterhouses; they were automated meat factories."⁶⁶ From the 1960s and early 1970s, IBP expanded its operations with new facilities across the Midwest and began shipping boxed beef.⁶⁷ Boxed beef is the process of breaking down the carcass into small portions for packaging and shipping.⁶⁸ In 1970, to reflect this new production system, IBP changed its company name from Iowa Beef Packers, Inc. to Iowa Beef Processors, Inc. "IBP's full-fledged entry into the pork business took place in 1982 with the purchase of a major pork plant at Storm Lake, Iowa."⁶⁹ With the acquisition of additional plants, IBP was the nation's largest

to work in a particular plant).

61. IBP, A WORLD OF OPPORTUNITIES, *available at* <http://www.ibpinc.com/about/worldofopp.stm> (last visited Feb. 5, 2003).

62. THE IBP STORY, *supra* note 2, *available at* <http://www.ibpinc.com/about/IBPNewHistory.stm>.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *See id.*

68. Agriculture Dictionary, *at* <http://www.agriculturelaw.com> (last visited Feb. 5, 2003).

69. THE IBP STORY, *supra* note 2, *available at* <http://www.ibpinc.com/about/IBPNewHistory.stm>.

processor of fresh pork in 1990.⁷⁰ By 2000, IBP had expanded its operations internationally and through branded food products such as Thomas E. Wilson⁷¹ to become the nation's largest beef processor and the nation's second largest pork processor.⁷² In 2000,

IBP was preparing to butcher meat itself, which would be shipped 'case ready' – that is, ready to put into the supermarket case. This was a new endeavor that was hoped to yield higher margins and reduce the overall cyclical nature of IBP's business.⁷³

In addition, IBP, through forward contracts and marketing agreements, has cattle under its control prior to slaughter, otherwise known as “captive supplies.”⁷⁴

IV. THE “CHANCERY” MARRIAGE OF TYSON AND IBP

But the most important reason that Tyson slowed down the Merger process was different: it was having buyer's regret. Tyson wished it had paid less especially in light of its own compromised 2001 performance and IBP's slow 2001 results.⁷⁵

On October 1, 2000, IBP and Donaldson, Lufkin and Jenrette, Inc. (“DLJ”) jointly announced that a wholly owned subsidiary of DLJ, Rawhide Holdings Corporation, had agreed to a leveraged buy-out of IBP at \$22.25 a share in cash.⁷⁶ The impetus being IBP management's belief that IBP's stock

70. *Id.* See also SMITHFIELD FOODS, INC., at <http://www.smithfieldfoods.com> (last visited Jan. 14, 2003) (stating that Smithfield Foods is currently the world's largest pork processor).

71. See Rod Smith, *Tyson Drops Wilson Name to Pursue Tyson Strategy*, FEEDSTUFFS, Sept. 2, 2002, at 1. Tyson is dropping the Thomas E. Wilson brand from its product line.

72. See *Evening Business: Tyson Bids for IBP*, CHI. TRIB., Dec. 4, 2000, at 3.

73. *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 24-25 (Del. Ch. 2001).

74. Whether this control violates the Packers & Stockyards Act of 1921 is the source of a class action lawsuit being litigated in the United States District Court for the Middle District of Alabama. See *Pickett v. IBP, Inc.*, No. 96-A-1103-n, 2001 U.S. Dist. LEXIS 22453, at *1 (M.D. Ala. Dec. 26, 2001); David Bowser, *Attorney in Captive Supply Case Seeks Cattlemen's Help*, KANSAS CATTLEMEN'S ASS'N, available at <http://www.kansascattlemen.com/archives/00000022.htm>. The Eleventh Circuit Court of Appeals recently denied an appeal on the redefined definition of class members and remanded the case back to the district court. According to the plaintiffs' attorney, the case has gone through extensive discovery and is set for trial.

75. *In re IBP, Inc. S'holders Litig.*, 789 A.2d at 22.

76. Archer Daniels Midland (“ADM”) was part of the buyout group. See Dan Ackman, *Men of Meat*, FORBES, Jan. 2, 2001, available at

price was undervalued and that taking the company private was the best available means to realize the full value of the company. This action triggered a bidding war between Tyson Foods, the nation's leading chicken distributor, and Smithfield Foods, the nation's leading pork producer. On November 13, 2000, Smithfield started the bidding at twenty-five dollars a share in stock.⁷⁷ After a meeting of Tyson's and IBP's top executives on November 24, 2000, Tyson officially entered the contest on December 4, 2000 with an offer to acquire IBP for stock and cash at twenty-six dollars a share with 50.1% of the acquisition through a cash tender offer.⁷⁸ "Tyson trumpeted the fact that its offer was preferable to Smithfield's, in no small measure because Tyson did not face the same degree of anti-trust complications that Smithfield did and could thus deliver on its offer more quickly."⁷⁹ Analysts believed anti-trust implications were possible due to Smithfield and IBP being the nation's number one and two pork processors. Tyson's pork operations were number six in the nation, but according to analysts, were not enough to impact the overall competitive balance in the pork industry.⁸⁰

Both companies announced in mid-December that they had filed for federal regulatory approvals under HSR.⁸¹ Because Tyson's offer was a cash tender

<http://www.forbes.com/2001/01/02/0102topnews.html>.

77. Press Release, Smithfield Foods, Smithfield Foods Offers to Acquire IBP in Stock-for-Stock Transaction Valued at \$25 Per Share (Nov. 13, 2000), *available at* http://www.smithfieldfoods.com/news/news_001113.htm. In response, the United Food and Commercial Workers International Union ("UFCW") sent a letter to then-Attorney General Janet Reno objecting to the proposed Smithfield offer. *See* Letter from Douglas H. Dority, International President, UFCW, to Janet Reno, Attorney General, United States Department of Justice (Nov. 20, 2000) (on file with author). Likewise, the Organization for Competitive Markets ("OCM") issued a press release opposing the Smithfield-IBP planned merger. *See* Press Release, Organization for Competitive Markets, OCM Calls for Moratorium on Packer Mergers (Nov. 14, 2000), *available at* http://www.competitivemarkets.com/news_and_events/pressreleases/smithfieldrelease120700.htm.

78. *In re IBP, Inc. S'holders Litig.*, 789 A.2d at 29-32.

79. *Id.* at 31. Smithfield retained Joel Klein to advise it on the antitrust implications of the then-proposed acquisition. Klein was the former head of the antitrust division of the DOJ. *Missouri Rural Crisis Center and Campaign for Family Farms Vow to Fight Smithfield Buyout of IBP: Groups Label Smithfield's Hiring of Former Antitrust Chief "Corrupt,"* IN MOTION MAG., Dec. 3, 2000, *available at* <http://www.inmotionmagazine.com/smithfld.html>.

80. *See* Victor Epstein, *Tyson Makes Offer for IBP: The \$4.2 Billion Bid Would Create the World's Largest Combined Producer of Beef, Pork, and Chicken*, OMAHA WORLD HERALD, Dec. 4, 2000, at 1.

81. "The Department of Justice in 2003 filed a lawsuit against Smithfield for violating the HSR requirements prior to acquiring IBP stock." Press Release, United States Department of Justice, Justice Department Files Lawsuit Against Smithfield Foods for Violating Premerger Notification Requirements: Department Seeks \$5.478 Million Civil Penalty (Feb. 28, 2003), *available*

offer, the shorter HSR time period applied.⁸² On December 12, 2000, the DOJ submitted a request to open a preliminary investigation of Tyson Foods' proposed acquisition of IBP.⁸³ The FTC clearance to allow the DOJ to open the investigation was granted on December 20th.⁸⁴ On December 27th, the DOJ served a Civil Investigation Demand ("CID") on IBP primarily related to IBP's hog operations.⁸⁵ IBP's responses submitted on January 16, 2001, apparently satisfied the DOJ since on January 26, 2001, Constance K. Robinson, Director of Operations and Merger Enforcement, closed the DOJ's investigation.⁸⁶

"On December 21, J.P. Morgan [on behalf of IBP] sent Tyson and Smithfield bid instructions which called for them to submit best and final bids, along with proposed merger contracts, by 5:00 p.m. on December 29, 2000."⁸⁷

at http://www.usdoj.gov/opa/pr/2003/February/03_at_125.htm. Smithfield denies it violated HSR requirements and stated it will defend the DOJ lawsuit. See Press Release, Smithfield Foods, Smithfield Foods to Defend Suit by Department of Justice (Feb. 28, 2003), available at http://www.smithfieldfoods.com/news/news_030228.html.

82. See 15 U.S.C. § 18a(b)(1) (2000).

83. Request to Open Preliminary Investigation: Proposed Acquisition by Tyson Foods, Inc. of IBP, Inc. from Joan S. Huggler, Attorney, Transportation, Energy and Agriculture Section, Antitrust Division, United States Department of Justice, to Roger W. Fones, Chief, Transportation, Energy and Agriculture, Antitrust Division, United States Department of Justice (Dec. 12, 2000) (redacted copy on file with author).

84. *Id.*

85. Letter from Joan S. Huggler, Attorney, Transportation, Energy and Agriculture Section, Antitrust Division, United States Department of Justice, to Robert L. Peterson, CEO, IBP, Inc. (Dec. 27, 2000) (on file with author). In particular, the DOJ asked IBP to: "Describe or submit documents sufficient to describe the process by which hogs your company slaughters are born, bred, raised, finished, and otherwise prepared for slaughter and further processing and packing." *Id.* ¶ 2. The CID went on to ask IBP to list for each pork processing facility the total number of hogs slaughtered with a breakdown by: (1) IBP owned hogs; (2) hogs purchased on contract; (3) hogs purchased on the spot market by the live weight method; and (4) hogs purchased on the spot market by the carcass merit pricing method. *Id.* ¶ 3. Apparently the DOJ asked for similar information from Tyson, though these documents were not produced by the DOJ in response to a Freedom of Information Act request by this author. According to a Tyson spokesperson, the Second Request to Tyson was related to Tyson's pork operations, "which he [Tyson spokesman Ed Nicholson] called only a tiny part of the giant poultry processor's business." S.P. Dinnen, *Tyson Raises Its Offer for IBP to \$4.3 Billion*, DES MOINES REG., Dec. 30, 2000, at D1.

86. Recommendation to Close Investigation: Proposed Acquisition by Tyson Foods, Inc. of IBP, Inc. from Joan S. Huggler et al., Attorney, Transportation, Energy and Agriculture Section, Antitrust Division, United States Department of Justice, to Constance K. Robinson, Director of Operations and Merger Enforcement (Jan. 22, 2001) (redacted copy on file with author). The memorandum has a notation that the file was "CLOSED 1/26/01 PER CKROBINSON".

87. *In re* IBP, Inc. S'holders Litig., 789 A.2d 14, 36 (Del. Ch. 2001).

Smithfield responded on the evening of December 29th with an all stock bid of thirty dollars a share.⁸⁸ The next day IBP informed John Tyson “[t]hat if Tyson bid \$28.50 in cash it would have a deal.”⁸⁹ When informed of Tyson’s latest offer, on December 31st, Smithfield increased its all stock bid to thirty-two dollars a share.⁹⁰ “Tyson Foods went to the well again and drew out another \$1.50 a share, increasing its bid to \$30 per share.”⁹¹ IBP agreed and this time the price stuck.⁹² On January 1, 2001, Tyson announced that it had acquired IBP for \$3.2 billion in cash and stock.⁹³ IBP was valued at \$4.7 billion,⁹⁴ including \$1.5 billion of IBP debt.⁹⁵

A few days after the agreement was signed, Tyson received a copy of a letter sent by the Securities and Exchange Commission (“SEC”) to IBP.⁹⁶ The letter informed IBP that it may have to restate previously filed financial reports related to its DFG Foods, Inc. (“DFG”) subsidiary.⁹⁷ On January 12, 2001, Tyson’s board of directors and shareholders approved the merger.⁹⁸ Tyson announced on January 29, 2001, “that the waiting period for [HSR] federal regulatory review of its planned acquisition of [IBP had] expired without further actions being taken by [the DOJ].”⁹⁹ Senators Chuck Grassley and Paul Wellstone issued press releases that questioned the DOJ for not taking any anti-trust action in the pending merger.¹⁰⁰

88. *Id.* at 39.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. John McCormick, *Tyson Gets IBP Under Its Wing*, DES MOINES REG., Jan. 2, 2001, at A1.

94. Press Release, Tyson Foods, Inc., Tyson Foods Signs Definitive Merger Agreement to Acquire IBP (Jan. 29, 2001), available at <http://www.tysonfoodsinc.com/corporate/news/viewNews.asp?article=696>.

95. McCormick, *supra* note 93, at A1.

96. *In re IBP, Inc. S'holders Litig.*, 789 A.2d at 43-45.

97. *Id.* at 39. “In 1998, as part of its strategy to grow IBP’s higher-margin food processing business, IBP management purchased a specialty hors d’oeuvres, kosher foods, and ‘airline food’ business for \$91 million, including assumed debt.... Within IBP, the business became known as DFG Foods, Inc. or ‘DFG.’” *Id.* at 27-28.

98. *Id.* at 44-45.

99. Press Release, Tyson Foods, Inc., Tyson Foods’ Acquisition of IBP Clears Waiting Period Under Hart-Scott-Rodino Antitrust Improvements Act (Jan. 29, 2001), available at <http://www.tysonfoodsinc.com/corporate/news/viewNews.asp?article=715>.

100. See Press Release, Senator Chuck Grassley, Comment on Expiration of Waiting Period for Tyson-IBP Review (Jan. 29, 2001), available at <http://www.senate.gov/~grassley/releases/2001/p01r1-29.htm>; Press Release, Senator Paul

In February and March, IBP continued to address the SEC letter and formally filed its restatements to certain financial statements.¹⁰¹ In response, Tyson stated, “it was continuing to look at IBP’s business and noted its weak first quarter results.”¹⁰² Without warning on March 29, 2001, Tyson’s General Counsel sent a letter to IBP terminating its proposed acquisition of IBP and Tyson filed suit in the Chancery Court of Washington County, Arkansas, alleging fraud and breach of contract by IBP in the merger agreement.¹⁰³ The next day, March 30, 2001, IBP cross-complained against Tyson, claiming Tyson had breached the acquisition agreement.¹⁰⁴ IBP brought its complaint in a previously filed shareholder suit in Delaware Chancery Court that IBP had previously moved to dismiss. On April 18, 2001, the Court of Chancery of Delaware ruled that Tyson’s motion to dismiss or stay the Delaware proceeding was denied.¹⁰⁵ The Delaware court held that Tyson’s filing in Arkansas and IBP’s filing in Delaware were contemporaneous and that Tyson did not show Delaware was a *forum non conveniens* for litigating the merger dispute.¹⁰⁶ The companies then proceeded on an expedited schedule to conduct a two-week trial in May 2001.¹⁰⁷

After the trial the Delaware Chancery Court issued its ruling that required Tyson to proceed with its aborted merger with IBP and pay thirty dollars a share.¹⁰⁸ The court summarized its ruling as follows:

The Merger Agreement and related contracts were valid and enforceable contracts that were not induced by any material misrepresentation or omission;

Wellstone, Wellstone Blasts Justice Department Over Tyson/IBP Merger – Vows to Push Ag Merger Moratorium in 107th Congress (Jan. 29, 2001) (on file with author). In 1999, Senator Wellstone also attempted to impose a merger moratorium on larger agribusiness mergers. See *Agribusiness Merger Moratorium*, The New Rules Project, Institute for Local Self-Reliance, at <http://www.newrules.org/agri/merger.html> (last visited Jan. 15, 2003).

101. *In re IBP, Inc. S’holders Litig.*, 789 A.2d at 49.

102. *Id.*

103. *Id.* at 50-51.

104. *In re IBP, Inc. S’holders Litig.*, 2001 Del. Ch. LEXIS 40, at *18-20 (Apr. 18, 2001).

105. *Id.* at *35-37.

106. *Id.* at *37.

107. *In re IBP, Inc. S’holders Litig.*, 789 A.2d at 23.

108. *Id.* at 84. See generally Recent Cases, *Contract Law-Mergers and Acquisitions – Delaware Chancery Court Addresses Default Interpretation of Broadly Written Material Adverse Effect Clauses – In re IBP, Inc. Shareholders Litigation v. Tyson Foods, Inc.*, No. 18373, 2001 Del. Ch. LEXIS 81 (June 15, 2001), 115 HARV. L. REV. 1737 (2002); Brandon Grinsted, *The Evolution of Court Ordered Mergers: An Equitable Remedy or a Marriage Made in Hell*, 53 MERCER L. REV. 1647, 1661-1671 (2002).

The Merger Agreement specifically allocated certain risks to Tyson, including the risk of any losses or financial effects from the accounting improprieties at DFG, and these risks cannot serve as a basis for Tyson to terminate the Agreement;

None of the non-DFG related issues that the SEC raised constitute a contractually permissible basis for Tyson to walk away from the Merger;

IBP has not suffered a Material Adverse Effect within the meaning of the Agreement that excused Tyson's failure to close the Merger; and

Specific performance is the decisively preferable remedy for Tyson's breach, as it is the only method by which to adequately redress the harm threatened to IBP and its stockholders.¹⁰⁹

Having determined that Tyson was basically suffering from "buyer's regret" and could not prove a material adverse effect from any of the information disclosed by IBP, the court still struggled with the impact of ordering that the Merger Agreement be enforced through specific performance.¹¹⁰ In particular the court stated,

[A specific performance] order will require a merger of two public companies with thousands of employees working at facilities that are important to the communities in which they operate. The impact of a forced merger on constituencies beyond the stockholders and top managers of IBP and Tyson weighs heavily on my mind.¹¹¹

While not considering the antitrust impacts of the merger, this language does imply that the two companies positively impact their respective communities. In the end the court found that the two companies could effectively merge and that the "[i]mpact on other constituencies of this ruling also seems tolerable."¹¹²

The court ordered that the two parties collaborate and present a final order by June 27, 2001.¹¹³ On June 18, 2001, Tyson announced that it held a positive meeting with IBP and that "both parties agreed to work toward completing a merger of the two companies on financial terms identical to those previously agreed."¹¹⁴ Tyson and IBP reached an agreement to consummate the merger.¹¹⁵

109. *In re IBP, Inc. S'holders Litig.*, 789 A.2d at 23.

110. *Id.* at 82.

111. *Id.*

112. *Id.* at 84.

113. *Id.*

114. Press Release, Tyson Foods, Inc., Tyson and IBP Meet on Proposed Merger (June

The merger between Tyson and IBP was finalized on September 28, 2001, by IBP shareholders at a special stockholders meeting.¹¹⁶

V. THE MERGED COMPANY OF TYSON FOODS AND ITS IBP FRESH MEATS GROUP

The ever-increasing integration in agriculture destroys competitive markets for independent producers. By allowing agribusiness conglomerates to increase their bargaining power, independent farmers have fewer buyers to choose from, and less leverage to get a good price.¹¹⁷

According to Fortune Magazine, Tyson Foods is currently the world's 468th largest company with annual revenues in 2001 of \$10.75 billion and profits of \$87.8 million.¹¹⁸ These numbers include IBP, in 2000 the 291st ranked company by Fortune. Tyson Foods employees 120,000 persons around the world.¹¹⁹ According to Beef Magazine, "Tyson Foods Inc. expects to garner 28% of the U.S. beef market, 23% of the chicken market and 18% of the pork market."¹²⁰ If these market percentages are realized, the average American consumer will have approximately 4.5% of their grocery bill for meat products controlled by one company, Tyson Foods.¹²¹ This merger is Tyson Foods' first step in fulfilling

18, 2001), available at <http://www.tysonfoodsinc.com/IR/newsInfo/viewNews.asp?article=779>.

115. Stipulation and Order, *In re* IBP, Inc. S'holders Litig., No. 18373 (Del. Ch. June 27, 2001), available at <http://www.tysonfoodsinc.com/IR/ibp/order.pdf>.

116. *In re* IBP, Inc. S'holders Litig., 793 A.2d 396, 401 (Del. Ch. 2001).

117. Press Release, Senator Paul Wellstone, Statement of Senator Paul Wellstone (D-MN) on the Merger Agreement Between Tyson Foods and IBP (Jan 2, 2001) (on file with author).

118. *The Fortune Global 500*, FORTUNE, July 22, 2002, at F-10.

119. TYSON COMPANY INFORMATION, *supra* note 51, available at <http://www.tysonfoodsinc.com/corporate/info/today.asp>.

120. Clint Peck, *Tyson Talks to BEEF*, BEEF, Oct. 1, 2001, available at http://beef-mag.com/ar/beef_tyson_talks_beef_2/index.htm.

121. NOEL BLISARD, USDA, FOOD SPENDING IN AMERICAN HOUSEHOLDS, 1997-98 (2001), available at <http://www.ers.usda.gov/publications/sb972/sb972.pdf>. Calculation based on application of Tyson market percentages to average American household at home food expenditures for 1998. Blisard estimated that on average \$1,094 was spent per person on food consumed at home in 1998 with \$87.77 spent on beef, \$57.89 on pork, and \$55.99 on poultry. *Id.* The 4.5% figure does not include expenditures for other Tyson Foods' products such as its Mexican Original products. *Id.*

John Tyson's vision "to dominate the meat case of America's supermarkets and be the 'premier protein center-of-the-plate provider' in the world."¹²²

VI. IMPACTS OF THE TYSON-IBP MERGER ON FAMILY FARMERS

The world is in the midst of a rapid restructuring and consolidation of the global food system. Consolidation and change have been both horizontal and vertical. Horizontal concentration has occurred from internal growth of firms, and from mergers and acquisitions of other firms competing in the same market. Vertical integration and development of vertical supply chains have occurred with agribusinesses expanding upward into processing, wholesaling, distribution and retailing, and expanding downward into farm inputs such as seed and chemicals.¹²³

One major concern that farm organizations had with the merger is that Tyson would integrate and seek to control the cattle and pork industries the same way it did to the poultry industry.¹²⁴ In urging the DOJ to reject the merger, the

122. *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 31 (Del. Ch. 2001). See also Rod Smith, *IBP, Tyson Complete Merger; Accomplish Vision*, FEEDSTUFFS, Oct. 8, 2001, at 6 (stating "The adventure begins as IBP, Inc. and Tyson Foods, Inc. have now officially united—creating the most powerful protein provider in the world in merging the world's largest meat company with the world's largest poultry company and organizing what officials promise will be the world's most innovative assembly line for consumer-focused, high-quality, high-value meat and poultry products"). Tyson's most recent earnings report for the 2002 fiscal fourth quarter showed that IBP had helped Tyson weather falling prices in the hog market. See Press Release, Tyson Foods, Inc., Tyson Reports Fourth Quarter and Fiscal Year 2002 Results, (Nov. 11, 2002), available at <http://www.tysonfoodsinc.com/corporate/news/viewNews.asp?article=1075>.

123. C. Robert Taylor, *Restoring Economic Health to Contract Poultry Production*, Agriculture and Resource Policy Forum (2002), available at <http://www.competitivemarkets.com/library/academic/>.

124. See John M. Morrison, *The Poultry Industry: A View of the Swine Industry's Future?*, in PIGS, PROFITS, AND RURAL COMMUNITIES (Kendall M. Thu & E. Paul Durrenberger eds., 1998) (describing the historical phases of the poultry and swine industries and comparing Tyson's poultry and swine contract operations). See also Press Release, Senator Paul Wellstone, Wellstone Calls for Close Anti-Trust Scrutiny of Announced Merger Between Tyson Foods and IBP (Dec. 4, 2000) (on file with author) (stating "I am troubled by recent reports that Tyson may also be considering acquisition of IBP . . . Tyson Foods has a long history of vertical integration which could be potentially devastating if applied to the beef and pork markets"). For an overview of the beef, pork, and poultry industries, see ECON. RESEARCH SERV., USDA, LIVESTOCK, DAIRY AND POULTRY OUTLOOK, available at <http://usda.mannlib.cornell.edu/reports/erssor/livestock/ldp-mbb/> (last visited Apr. 14, 2003); ORG. FOR COMPETITIVE MKTS., A FOOD AND AGRICULTURAL POLICY FOR THE 21ST CENTURY (Michael C. Stumo ed. 2000), available at <http://www.competitivemarkets.com/library/academic/21stcentury/index.htm>. For an overview of the cattle industry, see ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-

Western Organization of Resource Councils (“WORC”) bluntly stated these concerns:

Through ruthless exploitation of chicken growers, who were reduced to being indentured servants, Tyson became the leading chicken marketer. If the proposed buyout is approved, Tyson would become the leading marketer of beef, pork and chicken. Tyson can only benefit from the acquisition of IBP by bringing these same methods of exploitation to the hog and cattle industries.¹²⁵

Tyson’s recent liquidation of most of its hog contract operations may signal its decrease use of contracting in the pork industry, though substantial pork packing operations still are capable of exercising control over farmers who must market their hogs somewhere.¹²⁶ For the beef and pork industries, Tyson Chairman and CEO John Tyson stated in an interview that:

I would not want to vertically integrate the cattle business like what we see in the poultry business. But relationships between suppliers and the processing industry will change based on the type of animal being produced and the demand we create

AMERICAN MEAL (2001); Terence P. Stewart et al., *Trade and Cattle: How the System Is Failing an Industry in Crisis*, 9 MINN. J. GLOBAL TRADE 449 (2000). For an overview of the hog industry, see MARLENE HALVERSON, *THE PRICE WE PAY FOR CORPORATE HOGS* (2000), available at <http://www.iatp.org/hogreport/indextoc.html>; LAND STEWARDSHIP PROJECT, *KILLING COMPETITION WITH CAPTIVE SUPPLIES: A SPECIAL REPORT ON HOW MEAT PACKERS ARE FORCING INDEPENDENT FAMILY HOG FARMERS OUT OF THE MARKET THROUGH EXCLUSIVE CONTRACTS* (1999); JOHN D. LAWRENCE & GLENN GRIMES, *PRODUCTION AND MARKETING CHARACTERISTICS OF U.S. PORK PRODUCERS*, 2000 (Iowa State Univ., Staff Paper No. 343, 2001), available at http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=3795&ftype=pdf. For an overview of the poultry industry, see FARMERS’ LEGAL ACTION GROUP, *ASSESSING THE IMPACT OF INTEGRATOR PRACTICES ON CONTRACT POULTRY GROWERS* (2001), available at <http://www.flaginc.org/pubs/poultry.htm>; Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers*, 25 U. MEM. L. REV. 1207 (1995).

125. Letter from Shane Kolb, Chair, Agriculture Issue Team, Western Organization of Resource Councils, to Douglas Melamed, Acting Assistant Attorney General, Antitrust Division, United States Department of Justice (Jan. 12, 2001) (on file with author).

126. Peter C. Carstensen, *Concentration and the Destruction of Competition in Agricultural Markets: The Case for Change in Public Policy*, 2000 WIS. L. REV. 531, 538 (2000). See also *Tyson Foods, Inc. v. Davis*, 66 S.W.3d 568, 570 (Ark. 2002) (holding Tyson liable for \$891,660 in damages to one of its contract hog producers for contract misrepresentations that caused the farmer to make substantial investments in his hog growing facilities); GRAIN INSPECTION, PACKERS AND STOCKYARDS ADMIN., USDA, *CONCENTRATION IN THE RED MEAT PACKING INDUSTRY* (1996), available at <http://www.usda.gov/gipsa/pubs/packers/conc-rpt.htm> (overview of antitrust meat packing issues from the Government’s perspective).

as we take the primary products up the value chain. I don't think we can help grow the beef and pork industries if we spend our money trying to integrate the "animal end" of the business versus spending money in product development, innovation, marketing and promotion. If we take what we've learned about customer expectations and apply it to beef and pork, we'll have a deeper impact, and sooner, on the beef and pork industries.¹²⁷

Mr. Tyson's statement appears to indicate that Tyson Foods wants to exercise market power through the select purchase of cattle and hogs instead of outright packer ownership or integrator control through the use of production contracts. What remains to be seen is whether independent family farmers can survive either type of control.¹²⁸

While Tyson's complete vertical integration is the model for the poultry industry, procurement practices that mandate production standards through marketing agreements or other contractual arrangements could also threaten independent family farmers who have traditionally sold their products on an open, competitive market to the highest bidder. To address this concern, in 1996, WORC petitioned the USDA to enact a rule that restricts certain livestock procurement practices by meat packers such as Tyson-IBP.¹²⁹ The proposed rule, which the USDA has yet to act on, would restrict the use of forward contracts and some aspects of packer ownership of livestock.¹³⁰ Tyson's phasing out of hog contracts also shows a danger in contract production where hog contract producers are reliant on one company for their livelihood.¹³¹ It remains to be seen whether these 132 contract operations will be able to continue finishing hogs under contract with another integrator or as independent hog operations or obtain redress from Tyson through litigation.¹³²

127. Peck, *supra* note 120.

128. See, e.g., William Greider, *The Last Farm Crisis*, THE NATION, Nov. 20, 2000, available at <http://www.thenation.com/doc.mhtml?i=20001120&s=greider&c=1>.

129. Filing of a Petition for Rulemaking: Packer Livestock Procurement Practices, 62 Fed. Reg. 1845 (Jan. 14, 1997) (to be codified at 9 C.F.R. pt. 200).

130. *Id.* at 1847-48.

131. Bob Fountain & Duane Thurman, *Agribusiness Looks to be Repeat of 2002*, FEEDSTUFFS, Nov. 11, 2002, at 1 (stating "Tyson's actions show that contract producers appear to have surprisingly little job security"). See also NEIL D. HAMILTON, A FARMER'S LEGAL GUIDE TO PRODUCTION CONTRACTS 131-33 (1995); Edward P. Lord, Comment, *Fairness for Modern Farmers: Reconsidering the Need for Legislation Governing Production Contracts*, 33 WAKE FOREST L. REV. 1125, 1129-36 (1998).

132. Tyson's announcement noted that "many are diversified farming operations, which have other farming activities." Press Release, Tyson Foods, Inc., Tyson Foods, Inc. to Restructure Live Swine Operation (Aug. 18, 2002), available at <http://www.tysonfoodsinc.com/IR/newsInfo/viewNews.asp?article=1033>. Tyson's view of the impact on these contract producers is that they

Another concern is that this merger will continue the trend of farmers receiving less and less of the retail dollar for their products. For example, hog farmers' share of the pork retail dollar has decreased from 42.5% in 1996 to just 30.1% in 2001.¹³³ Likewise, beef producers have seen a decrease, though not as substantial as pork.¹³⁴ The beef farmer's share of the beef retail dollar has decreased from 48.1% in 1996 to 45.8% in 2001.¹³⁵ Poultry contract growers have

will "have the option to contract with other pork production companies, or the *opportunity* to become independent producers." *Id.* (emphasis added). According to one news article, the Tyson hog contract was their primary source of income for many hog farmers and that they will now lose their farms and move somewhere else. See Sunni Thibodeau, *Swine Song: A Texarkana Gazette Special Report: No. 2 Food Producer Will Trim 200 Jobs from Pork Division*, THE TEXARKANA GAZETTE, Sept. 2, 2002.

133. ECON. RESEARCH SERV., USDA, PORK VALUES AND SPREADS, available at <http://www.ers.usda.gov/briefing/foodpricespreads/meatpricespreads/pork.htm> (last updated Jan. 16, 2003); see also Michigan Pork Producers Ass'n v. Campaign for Family Farms, 229 F. Supp. 2d 772, 776 (W.D. Mich. 2002). The excerpt below describes how the recent downturn in hog prices has producers questioning pork retail prices:

With the collapse of cash hog prices, producers wonder why they have not seen an associated drop in retail pork prices. Instead, the retail spread has been widening, leading some lawmakers to request some "jawboning" to try to bring prices into some kind of historic alignment. That is sending interested producers and other parties to monthly government price spread data to start to document what is happening. USDA's Economic Research Service provides a detailed accounting of the breakdown for retail pork values and spread items in a monthly report. The next update is scheduled September 18, 2002, to reflect August numbers. The farmers' share of retail value has slid from 42.5% recorded for the entire year of 1996 to 30.1% for all of 2001. Obviously, the 2002 numbers are on track for a very low percentage by the end of the year. The break in prices in August and early September has not yet shown up in the tabulations. Month-to-month breakdowns show farmer share values in August, 2001 at 33.5%, reflecting a pork retail value of 276.3 and a net farm value of 92.6. By comparison, this past July, the total pork retail value was 264.2 and the net farm value was 71.8. That calculated to 27.2 percent for farmers' share. The lowest farmers' value share in the past 12 months was 22 percent in April, 2002. The highest share in the past 24 months was attained in June, 2001, at 35.8 percent.

Retail Pork Spreads Come into Question, AgWeb (Sept. 4, 2002), at http://www.agweb.com/news_show_news_article.asp?articleID=91183&newscat=GN.

134. See ECON. RESEARCH SERV., USDA, CHOICE BEEF VALUES AND SPREADS AND THE ALL-FRESH RETAIL VALUE, available at <http://www.ers.usda.gov/briefing/foodpricespreads/meatpricespreads/beef.htm> (last updated Apr. 16, 2003).

135. *Id.*

experienced very limited returns, while integrators such as Tyson have experienced increasingly greater returns.¹³⁶ Putting the industry leaders of beef and poultry along with the number two pork processor under one roof could see producer returns continue to decline. Apparently, John Tyson believes that the problem of consolidation does not rest with Tyson Foods, but further up the chain to retailers such as Wal-Mart. Mike Callicrate, a beef producer and plaintiff in *Pickett v. IBP*, stated he had the following encounter with John Tyson:

Last year in San Antonio, TX, in a discussion with John Tyson, CEO, Tyson Foods, I explained the class action lawsuit, now awaiting a trial date, against IBP. I explained to him that the lawsuit, if successful, could cost his company more than IBP's total market capitalization. He very indignantly responded, "You should be suing Wal-Mart [instead of IBP], they are the problem. They tell us what they will pay and we have no choice but to pay you less."¹³⁷

Whether the problem is Wal-Mart or Tyson, the current reality is that farmers are receiving less and less of the retail dollar for the livestock and poultry they raise and sell making profitability more difficult.

Lastly, farmers are concerned that the Tyson-IBP merger will accelerate the trend of increased concentration by agribusiness with limited government oversight. While mergers such as Tyson-IBP did not substantially increase concentration in any one agricultural sector, it does increase overall concentration in meat packing and processing and therefore increases the potential for buyers to exercise oligopsony market power over farmers.¹³⁸ Legislators and farmers are attempting to stem this tide through legislation and lawsuits. For example, Senator Michael Enzi of Wyoming introduced the "Captive Supply Reform Act" that would require fixed based pricing in formula contracts and that all contracts be traded in open, public markets.¹³⁹ If enacted, this legislation could alleviate problems related to farmers' lack of information about whether their contract is fair and also the ability of companies to lock up production without having to bid in

136. Taylor, *supra* note 123.

137. Mike Callicrate, *Wal-Mart - Tyson/IBP Represent Economic Destruction*, available at http://www.nobull.net/legal/news/walmart_tysonl.htm (last visited Jan. 15, 2003).

138. See generally Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449 (1999) (discussing the interaction of agriculture and antitrust law and its effects).

139. Captive Supply Reform Act, S. 2021, 107th Cong. (2002), available at <http://thomas.loc.gov>. See also Farmers and Ranchers Fair Competition Act of 2000, S. 2411, 106th Cong. (2000), available at <http://thomas.loc.gov>. Section 5 would have provided for a pre-merger review process designed to assess the impact of the proposed agribusiness merger on the present and future viability for family farms and ranches and rural communities.

the open market.¹⁴⁰ In addition, Senator Chuck Grassley of Iowa introduced the Transparency for Independent Livestock Producers Act that would require packers to procure at least twenty-five percent of their daily kill on the open or spot market.¹⁴¹ Recently cattle ranchers from three states filed a class action lawsuit against the nation's four largest meatpackers, including Tyson Foods, accusing them of insider trading.¹⁴² According to press reports, the suit alleges that the four meat packers manipulated the price for boxed beef by not correcting a USDA reported price.¹⁴³ These legislative and legal efforts may be a first step in lessening the impacts of the Tyson-IBP merger and other problems associated with agricultural concentration.

VII. CONCLUSION

Without much doubt, the greatest economic threat to farmers as independent entrepreneurs is the deadly combination of concentration and vertical integration. Producers are vulnerable to a combination of high levels of concentration in input supply and output processing and high levels of vertical integration from the top down.¹⁴⁴

Dr. Harl's warning may foretell the consequences of the Tyson-IBP merger. With Tyson Foods, farmers may soon be facing this deadly combination in one single company. Tyson's successful efforts to fully integrate the chicken industry and, at least on the processing end, bring this vision to beef and pork may come at the expense of family farmers who will see loss of independence

140. WESTERN ORG. OF RESOURCE COUNCILS, FAMILY FARMS AND RANCHING, *at* <http://www.worc.org/issues/famfarms.html> (last visited Jan. 15, 2003).

141. S. 2867, 107th Cong. (2002), *available at* <http://thomas.loc.gov>; Press Release, Senator Chuck Grassley, Grassley Continues Fight for Fair Markets for Independent Producers (July 15, 2002), *available at* <http://www.senate.gov/~grassley/releases/2002/p02r7-15a.htm>.

142. *See* Schumacher v. Tyson Foods, Inc., No. 02-CV-1027 (D.S.D. filed July 1, 2002), *available at* http://corporate.findlaw.com/scripts/full_dkt.pl?court=sdd&dk_num=1%3A2002cv01027.

143. Bernard McGhee, Associated Press, *Ranchers File Suit Against Nation's Largest Meatpackers* (July 1, 2002), *available at* <http://www.kansascity.com/mld/kansascity/news/local/3582499.htm>. *See also* Rod Smith, *Cattle Feeder Suit Charges Packers in Price Deception*, FEEDSTUFFS, July 8, 2002, at 1.

144. Dr. Neil E. Harl, *The Structural Transformation of The Agricultural Sector*, in A FOOD AND AGRICULTURAL POLICY FOR THE 21ST CENTURY 52 (Michael C. Stumo ed., 2000), *available at* <http://www.competitivemarkets.com/library/academic/21stcentury/index.htm> (available under Chapter IV, Section 4).

through production contracts and marketing agreements and loss of marketing options with increased concentration in the meat processing sector. While the government let Tyson acquire IBP, it should not sit idly by if Tyson-IBP exercises undue market power over independent family farmers and consumers.