



REPORT: COMPETITION

Protecting livestock producers and chicken growers

Recommendations for reinvigorating enforcement of the Packers and Stockyards Act

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Washington Center *for* Equitable Growth

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Contents

Fast facts	3
Overview	6
Chapter 1: Overview of the meatpacking industry	18
Chicken	18
Cattle	23
Chapter 2: Limitations of current Packers and Stockyards Act jurisprudence	31
Overview of the Packers and Stockyards Act and comparison to general antitrust laws	32
Recent court decisions have required proof of harm to competition	33
Courts have rejected the USDA interpretation that the Packers and Stockyards Act does not always require proof of competitive harm	36
Critiques of Packers and Stockyards Act jurisprudence demonstrate the ambiguities, contradictions, and misunderstanding of the scope of the act	38
Chapter 3: The Packers and Stockyards Act reaches market abuses in addition to addressing anticompetitive harm	46
Section 202 of the Packers and Stockyards Act is broader than the antitrust laws	50
Section 202 addresses market abuses	54
Limitations of the Packers and Stockyards Act	57

Chapter 4: Using the Packers and Stockyards Act to address market abuses	58
Deception	59
Unfair acts	60
Unjustly discriminatory and undue or unreasonable preference/prejudice or advantage/disadvantage	65
Protecting the competitive structure of livestock and poultry markets	71
Chapter 5: Using the Packers and Stockyards Act to address anticompetitive harm	74
The Packers and Stockyards Act can address oligopsony conduct beyond the reach of the Sherman Act	75
Rules related to traditional antitrust violations	77
Chapter 6: Procedural reforms and strategies to improve enforcement of the Packers and Stockyards Act	86
Seeking U.S. Supreme Court review	87
Adopting a strategic enforcement agenda	88
Using regulations to strengthen enforcement of the Packers and Stockyards Act	92
Leveraging cooperation with the Department of Justice to maximize enforcement activity	96
Conclusion	99
About Author	101
Acknowledgements	101
Glossary of terms	104
Endnotes	106

Fast facts

For more than a decade, ranchers, contract chicken growers, and other livestock producers have expressed concerns about the actions of the meatpackers who buy the livestock and slaughter it, and the chicken integrators who contract with growers to raise chicks. They warn that those actions make it increasingly difficult for small producers to survive.

Some of these concerns are antitrust issues. Allegations are growing that meatpackers are conspiring to lower the prices they pay for cattle. Big commercial “aggregators” of chicken meat face more widespread allegations. Other concerns are related to market abuses, such as deception and unfair acts and unjustly discriminatory actions. There are also concerns that the current market structure undermines the resiliency of the food supply system, and certain conduct seems to inevitably frustrate congressionally mandated goals to protect family farmers and livestock producers.

In 1921, the U.S. Congress passed the Packers and Stockyards Act to, among other things, protect livestock producers from both anticompetitive conduct and market abuses, with a later amendment to the law to include chicken growers. Currently, however, the Packers and Stockyards Act plays little role in addressing any of those issues. This report offers recommendations for revitalizing the act.

This report begins by describing broiler chicken and cattle markets in detail and then examines Section 202 of the Packers and Stockyards Act, which limits how meatpackers and chicken integrators can treat livestock producers and chicken growers. The key takeaways are:

- Four U.S. circuit courts have required plaintiffs to prove conduct harms competition in order to establish a violation of Section 202. If that interpretation were to require proof that the challenged conduct would violate the antitrust laws, then Section 202 would not protect producers from marketplace abuses, such as deception, unfair practices, or market manipulation.
- That narrow interpretation is not a consensus. Other U.S. circuit courts have explicitly or implicitly rejected the harm-to-competition standard, and there is no agreement on the meaning of harm to competition.

- In applying Section 202, too many courts have made additional mistakes that counterproductively limit the act.

The report then takes a fresh look at Section 202. Harm to competition has no well-established meaning. It must be understood within the context of the Packers and Stockyards Act. Based on the statute, a broad examination of the case law, and academic commentary, Section 202 addresses two types of harms:

- **Market abuses**—actions such as deception, unfairness, and discrimination, which deprive livestock producers of the benefits of the market
- **Anticompetitive harms**—actions that limit rivalry between firms and are violations of the antitrust laws

A critical distinction between the two is that market abuses do not necessarily require proof of market power or anticompetitive effect. The report then shows how the U.S. Department of Agriculture can use Section 202 of the Packers and Stockyards Act to address these market abuses.

The report first offers a detailed set of recommendations of how the U.S. Department of Agriculture can:

- Adopt rules defining unfairness and deception similar to the Federal Trade Commission’s definitions, which would address many types of problematic conduct
- Where justified by the evidence, adopt rules that target specific conduct that harms livestock producers and chicken growers
- Develop rules to better define “unjustly discriminatory” in these markets
- Pursue acts that artificially lower prices for livestock as a form of manipulating prices in violation of Section 202
- In determining whether a violation of Section 202 has occurred, consider how conduct undermines congressionally mandated goals and programs that USDA officials are responsible for administering, such as promoting small producers, biodiversity, and supply chain resiliency

The report then turns to potential remedies on the antitrust side of Section 202 of the Packers and Stockyards Act. Critically, compared to the Sherman Antitrust Act of 1890, Section 202 has a stronger provision to address oligoposony behavior,

in which purchasers are so few that the actions of any one of them can materially affect price and the costs that competitors must pay, where there are few buyers in a market. Further, the report suggests that the U.S. Department of Agriculture:

- Develop rules to focus analysis on the critical issues within the industry
- Issue rules on what constitutes monopsony power in cattle and poultry markets
- Provide guidance for how it will assess whether specific conduct is anticompetitive

The report concludes by offering suggestions on how the U.S. Department of Agriculture can adopt a successful targeted, strategic enforcement agenda. The final set of recommendations include:

- Using procedural rules to optimize enforcement in the cattle and poultry markets
- Coordinating with the U.S. Department of Justice to take legal action against anticompetitive practices and antitrust violations in these markets

Together, the report's research, analysis, findings, and recommendations provide multiple paths for the U.S. Department of Agriculture—sometimes in league with other market enforcement agencies of the federal government—to address the market power and market abuses in the U.S. markets for poultry and cattle that present a growing threat not only to our nation's ranchers and chicken growers, but also to the resiliency of our food supply chains and to congressionally mandated and funded programs to promote small producers and protect the supply chain.

Overview

Concerns about the livestock industry in the United States are as old as the nation's antitrust laws themselves. By the late 19th century, a few large stockyards with close access to railroad networks were the key markets for livestock producers of cattle, swine, hogs, sheep, and even goats to sell their animals, usually dependent on agents and dealers who worked on commission. The buyers were the meatpackers who would slaughter and sell the meat to wholesalers, and there were five dominant packers doing most of the buying.

The dominance of a few stockyards and a few meatpackers, their suppression of competition, and their exploitation of livestock growers caught the U.S. Congress' attention. In 1890, Congress enacted the Sherman Antitrust Act, and a U.S. Senate committee found that the big five packers—Swift & Co., Armour & Co., Cudahy Packing Company, Wilson & Co., and Morris & Co.—were fixing prices and dividing territories. A government lawsuit followed, obtaining an injunction prohibiting the conduct.¹

In 1911, three of the five—Armour, Swift, and Morris—merged, forming the National Packing Company. The government indicted National Packing on a criminal antitrust violation. Although the jury acquitted National Packing, it agreed to dissolve into its three component parts to avoid a civil antitrust case.²

This was only the beginning of more than a century of conflict over the fairness of the animal protein industry—now comprising cattle, sheep, goats, hogs, and broiler chickens, and a vital part of the U.S. food supply. The goals of legislation and enforcement have not changed over the past century: Those who raise livestock—ranchers, contract chicken farmers, and hog farmers, or, collectively, growers—should, as much as possible, benefit from buyers competing to buy their cattle, chickens, hogs, and other livestock. Growers also should not be subject to market abuses that deprive them of the full value of their livestock or poultry.

This report discusses the market competition issues and enforcement strategies at play today, arguing that current law gives the federal government wide authority to regulate competition beyond general antitrust provisions. Before turning to the present, however, understanding the evolution of the industry and past efforts to regulate it helps identify both the challenges facing effective enforcement of the Packers and Stockyards Act, as well as potential solutions.

The Packers and Stockyards Act of 1921: An industry-specific statute to address anticompetitive conduct and market abuses

After the dissolution of the National Packing Company, the meatpacking industry continued to clash with the federal government's growing effort to promote competition in livestock markets and protect livestock growers from market abuses. By 1920, this included three separate laws: the Sherman Antitrust Act of 1890, the Clayton Antitrust Act of 1914, and the Federal Trade Commission Act of 1914. Congress passed the Clayton Act to correct judicial errors in interpreting the Sherman Act. The Federal Trade Commission Act created the named agency and empowered it with investigatory and enforcement powers to stop unfair methods of competition.

One of the Federal Trade Commission's first investigations, at the request of President Woodrow Wilson, was to examine the meatpacking industry. In 1919, the commission issued a three-part report on the meatpacking industry. Part one documented the consolidation of the industry, finding that five companies controlled 70 percent of the livestock slaughtering of cattle and hogs.³ Part two described the collusive activity in which meatpackers engaged. The FTC concluded that "during the 22 years of [the meatpackers] combination's history, it has grown greatly, not only in size but in the proportion of the meat and food industry it controls."⁴

The Federal Trade Commission found "a mass of evidence relating to combinations among packers." Three of the big five meatpackers had agreed to a national market division scheme for the purchase of livestock. All five regularly shared confidential information to control and manipulate livestock markets. They used a variety of market procedures to control the prices of livestock. Their coordination reached to South America and to the sale of fresh meat.⁵ Part three of the FTC report examined individual practices packers used to dominate and control the industry.⁶

In response, the U.S. Department of Justice, in 1920, sued the five largest meatpackers and entered a broad consent decree.⁷ The packers could not be vertically integrated: They could no longer own or control stockyards that held the livestock before their sale or the railroads that transported cattle. The decree also prohibited them from competing in other aspects of the food industry, such as fish or fresh produce.⁸

The U.S. Congress still was not satisfied,⁹ and in 1921, it passed the Packers and Stockyards Act. According to the congressional conference report, Congress intended to exercise the fullest control over meatpackers and stockyards that the

Constitution permits.”¹⁰ The act was “to be more aggressive than all previous anti-trust or trade regulation” in dealing with meatpackers.¹¹

Broadly speaking, the Packers and Stockyards Act looks like an amalgamation and expansion of existing trade regulations but applied to only one industry. It incorporates and expands language from the Sherman Act and the Federal Trade Commission Act but also addresses conduct that restrains commerce or that is unfair or deceptive. Additionally, it adopts language from the Interstate Commerce Act dealing with unjust discrimination and undue preference.

Over the next 50 years, the big five meatpackers lost control of the industry. By 1935, their share of the cattle market had fallen from 80 percent to 65 percent.¹² In the late 1970s, the four largest packers accounted for only 25 percent of the cattle market, 31 percent of the hog market, and 22 percent of the poultry market.¹³

How much did antitrust enforcement drive these dramatic changes? According to Peter Carstensen, professor of law emeritus at the University of Wisconsin, changes in technology were critical. The development of highways, cattle trucks, and refrigeration trucks meant that meatpackers did not need to be located near a stockyard. Those stockyards had served as a bottleneck, largely located in urban centers with railway access, such as Chicago, Oklahoma City, and Kansas City, with limited real estate for meatpackers. Beginning in the 1950s, packers began locating closer to suppliers. This opened the door for competition, and these new entrants often had “new and better techniques than the old, multi-story facilities” of the incumbents, as Carstensen explains.¹⁴

At the same time, the 1920 consent decree, which lasted until the 1970s, alongside tougher merger enforcement, limited the ability of the big five meatpackers “to deter the growth of their rivals.”¹⁵ Incumbents could not acquire new entrants, nor could they use exclusionary conduct to prevent their growth.

Concentration returns

All of that changed in the 1980s. Meatpackers built new plants and expanded capacity. Multiple mergers occurred, and smaller packers closed their businesses.¹⁶ Total slaughtering capacity fell by 14,000 cattle per day between 2000 and 2015.

Today, meatpacking is more concentrated than it was in the early 20th century. In 2018, the top four beef packers—Tyson Foods Inc., Cargill PLC, JBS SA, and National Beef—controlled 85 percent of the wholesale beef, or boxed beef, market.

Nationally, the markets for chicken and hogs are less concentrated. The top four chicken processors controlled 54 percent of the broiler market, or chickens used for meat as opposed to egg growing, and the top four hog processing firms controlled 70 percent of their market.¹⁷

The big stockyards are gone, but vertical integration has returned. In poultry processing, chicken integrators, who perform a similar function to packers, control almost every step of production, from breeding to slaughtering. Chicken growers are contract farmers. They sign contracts to grow chicks on a roughly 6-week basis and must agree to substantial capital commitments. Each integrator provides the chicks, the feed, and the veterinarian care to their contract farmers.

After 6 weeks, each integrator picks up the chicks, weighs them, and slaughters them. The farmer's compensation depends on a "tournament," in which each integrator grades their contract farmers' production against each other. Chicken growers don't own the chickens they raise or the feed they use. Hog production has a similar dynamic.

The cattle market is less integrated than the poultry or hog industries, but it is moving in that direction. Most cattle go to feedlots before being sold for slaughter. Not long ago, spot markets dominated the industry—multiple meatpackers competed to buy cattle at feedlots on a weekly basis. Now, less than a third of all cattle transactions occur in those cash-negotiated spot markets.

In some regions, weeks go by with so little activity that the U.S. Department of Agriculture cannot publish prices due to confidentiality requirements.¹⁸ Instead, the packers sign supply contracts, known as captive supply agreements or alternative marketing agreements, in which the feedlot commits cattle before knowing the price. Larger feedlots may sell most of their inventory to the same buyer week after week.

The meatpacking industry and some researchers believe the consolidation of today is far different from that of the early 20th century. Bigger packing plants running at peak capacity have lower costs than even slightly smaller plants, so, the argument goes, a few large plants should mean lower-cost beef, chicken, and hogs. In turn, packers want a constant and secure supply, so they prefer to contract with growers and not rely on the spot market. Further, according to the meatpacking industry, vertical integration, whether by contract or internal expansion, allows beef packers and chicken integrators to promote better quality and comply with health and environmental regulations.

There is some evidence for these propositions. Larger plants do seem to have lower costs. And the quality of beef has improved over the past decade. Those

developments can explain why individual packing plants have grown. According to one estimate, about 50 meatpacking plants slaughter and process close to 98 percent of the livestock in the United States.¹⁹ Lower costs, however, do not explain why only four companies would control all of the largest plants. There is no evidence that multi-plant ownership, particularly to the degree it exists, lowers costs or improves efficiencies.

From a different perspective, however, something has gone seriously wrong in the livestock and poultry markets of the United States. Many chicken growers and hog farmers express frustration and anger at their treatment. Steve Moline, an assistant state attorney general for Iowa, concluded that contract farming “was just a titch over serfdom.” At joint hearings conducted by the U.S. Department of Agriculture and the U.S. Department of Justice in 2010, poultry farmers explained how they were forced to take on debt, had little security that their contracts would last long enough for them to pay off the debt, and faced retaliation, such as losing the contracts, if they complained.²⁰

Ranchers worry they are on the road to being treated like chicken and hog farmers. They testified that the cash market no longer reflects the true value of their cattle. Packers were not competing in the cash market: Because most cattle are now sold through alternative marketing agreements, ranchers and feedlots are increasingly tied to a specific meatpacker, depriving ranchers and feedlots of their independence. Or, as Bob Mack, a cow-calf producer and feeder put it, “Because of the influence of the packers over these large lots, they’ve been kind of joined at the hip and actually magnified the effect of that concentration.”²¹

Contract chicken farmers, ranchers, and independent feedlots identify the lack of competition as at least partially responsible for these developments. More than half of chicken growers have only one or two potential integrators in their area, and growers claim that even when there are multiple integrators in the area, they do not, as a matter of practice, compete for growers. On the beef side, feedlots rarely see substantial competition and often have only one bidder for their cattle. As one feedlot owner puts it: “If you’ve got that one bid there, you’re a seller. Many times, I wouldn’t call you willing. I mean it’s almost like having to do it with a gun to your head.”²²

Some policymakers are concerned that consolidation has made the supply chain too fragile, pointing to the dramatic impact on producers and consumers of even a single event, such as a fire at a packing plant, a ransomware attack, or the spread of COVID-19 within one facility. Taxpayers also have spent billions of dollars on pandemic rescue packages for farmers.²³ Others worry that ever-larger packers or integrators require ever-larger hog farms, poultry farms, and cattle production, which are more likely to damage the environment.

Obstacles to enforcing the Packers and Stockyards Act

Where does the enforcement of the Packers and Stockyards Act stand today in response to these developments? Broadly speaking, the key section of the statute bars meatpackers from unfair, unjustly discriminatory, and deceptive acts; undue or unreasonable preferences; and various anticompetitive acts. Originally, the act applied to cattle, sheep, swine, horses, mules, and goats. In 1935, Congress amended the act to cover the poultry industry.²⁴ In 1976, Congress created a private right of action, permitting any person to recover damages caused by a violation of the act.²⁵

Summarizing a century of enforcement is beyond the scope of this report. But briefly, by 1990, 80 percent of the USDA investigations involving the Packers and Stockyards Act focused on buyers' failure to make prompt payment to livestock sellers.²⁶ And a few cases targeted large packers. In 1991, the Government Accountability Office warned that "a rise in concentration may increase the opportunities for buyers to use anticompetitive practices that could lower the prices paid to producers to below the level that would be set in a competitive market."²⁷ The U.S. Department of Agriculture did bring a limited number of cases challenging anti-competitive and unfair business practices, with mixed success.²⁸

A far more important development occurred after the turn of the 21st century. In a number of private actions, courts have seemingly limited the reach of the Packers and Stockyards Act by requiring proof of harm to competition. Those decisions have made it far more difficult to prevent both abusive and anticompetitive behavior in livestock markets.

Attempts to revitalize the Packers and Stockyards Act have moved forward in fits and starts. In the 2008 farm bill, Congress required the U.S. Department of Agriculture to define key terms of the statute that would allow the act to address abuses by chicken integrators. That same year, the Antitrust Division of the U.S. Department of Justice blocked JBS's proposed acquisition of National Beef, which would have combined two of the four largest beef packers in the United States,²⁹ and the two companies abandoned the transaction.³⁰ JBS, however, did acquire Smithfield Foods Inc.—the fifth-largest U.S. meatpacker—the same year.³¹

In 2010, the U.S. Department of Agriculture and the Antitrust Division of the U.S. Department of Justice held a series of hearings on competition in agricultural markets, including one on cattle markets and one on poultry markets. Then-Attorney General Eric Holder explained: "I don't think the Department of Justice, again, quite frankly has been nearly as active as it needed to be."³² And the top antitrust

enforcer at the U.S. Department of Justice at the time, Assistant Attorney General Christine Varney, signaled a renewed commitment to protecting livestock producers, saying “from the highest level of the Obama Administration this has been something that we care deeply about.”³³

The budget for the DOJ Antitrust Division of enforcing the Packers and Stockyards Act increased between 2005 and 2008, from \$37 million to \$44 million.³⁴ The two agencies also created the Agriculture Competition Joint Task Force to address competition problems in agricultural markets.³⁵

Despite these ambitious pronouncements, the two agencies were largely thwarted in their efforts to move forward. In 2010, the U.S. Department of Agriculture released a proposed rule that rejected the harm-to-competition requirement under the Packers and Stockyards Act and proposed specific rules to protect poultry farmers.³⁶ A fierce battle ensued, with chicken integrators and some growers marshaling congressional opposition to the rules.

In 2011, Congress passed a provision, known as a rider, that prohibited USDA enforcers from using any resources to finalize “the most contentious provisions of the rule.”³⁷ The agency then issued a scaled-down version of its rule consistent with the rider. Some of the proposed rules were abandoned. Those that remained simply identified criteria that the secretary of agriculture would consider in determining whether a violation had occurred.³⁸ Congress renewed the rider in subsequent years.

In 2013 and 2015, Congress also required the U.S. Department of Agriculture to rescind three provisions in the final rule. The agency subsequently “permanently removed the three rescinded provisions.”³⁹ But then, the comedian John Oliver, in 2015, devoted an episode of his TV show, *Last Week Tonight*, to the treatment of chicken growers and criticized the rider.⁴⁰ The next year, Congress did not pass the rider. Opponents of the rider credited Oliver’s segment with helping defeat the ban.⁴¹

With time running out on the Obama administration, the U.S. Department of Agriculture released three scaled-down interim final rules at the end of 2016. They addressed specific practices and defined key parts of Section 202, which is the section of the Packers and Stockyards Act that applies to meatpackers and chicken integrators.⁴² The Trump administration promptly withdrew the rules and, in 2019, issued its own, narrow rule, which identified four criteria it would consider in determining whether differential treatment that would violate the Packers and Stockyards Act had occurred: whether a cost savings, meeting a competitors’ prices or terms, or a reasonable business reason justified treating producers differently.⁴³

Less came from the Agriculture Competition Joint Task Force. The Antitrust Division of the U.S. Department of Justice did target a merger of two chicken integrators in western Virginia in 2011, even though the acquired facility was small and losing money.⁴⁴ There were no major antitrust actions in the livestock industry, and the U.S. Department of Agriculture brought a limited number of Packers and Stockyards cases, mostly focused on buyers' failure to pay sellers on a timely basis or not complying with the act's trust fund requirements.

A new attempt at enforcement

The Biden administration has renewed the focus on livestock markets. The U.S. Department of Agriculture has announced that it is working on three rules to strengthen enforcement of the Packers and Stockyards Act.⁴⁵ One rule will define critical terms in the statute, such as unfair and deceptive practices, undue preferences, and unjust preferences. A second rule will address the "tournament" system that chicken integrators use to compensate farmers. A final rule will address the scope of the Packers and Stockyards Act.

This report contributes to this renewed effort to revitalize enforcement of the Packers and Stockyards Act. A USDA-Washington Center for Equitable Growth cooperative agreement supported the research and writing of this report. The findings and conclusions in this report are those of the author, however, and should not be construed to represent any official USDA determination or policy or U.S. government determination or policy. (See the Acknowledgments section of this report for more details.)

There are serious issues in the livestock industry. Any renewed enforcement will face significant challenges. Most notably, four U.S. circuit courts require proof of harm to competition to establish a violation of the Packers and Stockyards Act. Meatpackers and chicken integrators will argue that this means the Packers and Stockyards Act prohibits only conduct that would violate the antitrust laws. The implications for this limited interpretation are substantial. It would mean the act provides no protection to producers when packers or integrators lie to them, or force producers to bear unreasonable risks that all but guarantee the producers will go bankrupt, or retaliate against producers—unless the producer can show that the conduct also would violate the antitrust laws.

Less discussed but equally frustrating, even under that limited scope, is that some courts are applying incorrect antitrust analysis to the Packers and Stockyards Act. In other words, in some decisions, conduct that would violate the Sherman Act does not violate the Packers and Stockyards Act.

These challenges are not insurmountable. Success, however, depends on a strategic enforcement agenda that focuses on the leeway that exists in the current case law, identifying strong cases on which to base enforcement, and using adjudication and regulation to reinforce each other to improve enforcement. The harm-to-competition jurisprudence rests on a weak foundation. Contrary to the often-stated assertion that eight U.S. circuit courts have adopted the requirement, two of those eight—the 9th and 8th Circuit Courts—have found violations without requiring proof of anticompetitive harm. The 7th Circuit has held that anticompetitive harm can be sufficient to prove a violation, not that is a necessary requirement in all cases. The 4th Circuit’s decision was unpublished and has no precedential value.

More importantly, requiring harm to competition begs the question: What does harm to competition mean in the context of the Packers and Stockyards Act? Whatever consensus exists about requiring harm to competition, there is none as to its meaning. One court implies that harm requires a showing of a broad market effect, while others appear to require antitrust harm, and another court takes a broader view, finding that refusing to pay a producer is a violation.

This confusion provides an opportunity for the U.S. Department of Agriculture. As the administrator of the Packers and Stockyards Act, the agency can clarify the statute’s meaning and improve enforcement. The Packers and Stockyards Act on its plain meaning is broader than the Sherman Act. Therefore, harm to competition under the act must be broader than anticompetitive harm under the Sherman Act. Otherwise, the judicially created harm-to-competition requirement is abrogating substantial portions of the Packers and Stockyards Act.

Harm to competition for the purposes of the Packers and Stockyards Act is broader than the types of harm the antitrust laws address. Like the antitrust laws, harm to competition addresses anticompetitive conduct, or acts that limit rivalry between firms and are violations of the antitrust laws. But it also includes market abuses, or acts that deprive livestock producers of benefits of the market. Market abuses do not require proof of anticompetitive effects or market wide effects. Nor should efficiencies necessarily be a defense to market abuses.

Finally, the term includes conduct that frustrates congressionally mandated goals or that harms market structure necessary to achieve those goals. The Packers and Stockyards Act applies to specific industries, and competition in livestock and poultry markets does not occur in a vacuum. Congress mandates that the agency promote specific market structures and outcomes, such as promoting supply resiliency or protecting family farms, and has appropriated billions of dollars in 2021 alone to achieve those goals. The conduct of meatpackers and poultry integrators that undermines or frustrates those goals or harms the competitive structures can violate the statute.

This legal framework allows the U.S. Department of Agriculture to police a broad range of conduct. Market abuses include fraud, deception, and other acts that unfairly deprive producers of the value of their livestock. Some conduct, such as deception, always violates the statute. Other conduct may be unfair or unjustly discriminatory only when the meatpacker or chicken integrator has market power. Other practices may increase the risk of disruptions to the U.S. food supply or nullify the value of congressionally authorized loan guarantees, which also can violate the act.

As to anticompetitive conduct, the Packers and Stockyards Act is broader than its predecessor antitrust statutes. In particular, the Packers and Stockyards Act forbids acts that restrain trade.⁴⁶ This is a broader range of conduct than covered by the Sherman Act, which, as noted earlier, forbids agreements that restrain trade. This language gives the U.S. Department of Agriculture an additional tool to address oligopsony behavior that harms livestock producers but does not involve an agreement in restraint of trade.

Given the state of the livestock industry, there are many practices that could be prioritized for enforcement, as this report will discuss. But there are too many to be addressed simultaneously. In the face of such challenges, this report recommends that the U.S. Department of Agriculture adopt a strategic enforcement agenda that targets specific problems and devotes resources to developing the best test cases to resolve these problems. It should use both adjudication and rulemaking and should continue to coordinate with the U.S. Department of Justice, and particularly with its Antitrust Division.

Together, these approaches offer the best chance to restore competitive and fair livestock markets—markets that ensure that producers receive the true value of their livestock—while protecting consumers' interests.

Chapter-by-chapter overview of this report

Virtually all Packers and Stockyards enforcement actions target poultry, cattle, or hogs, and the vast majority involve poultry or cattle.

Chapter 1 describes those markets in detail. It defines terms and traces the path from birth to slaughter. It describes the justifications for and concerns about the existing market structures. Finally, it offers suggestions for additional research that would improve our understanding of these markets.

Chapter 2 describes Section 202 of the Packers and Stockyards Act, which is the section that applies to meatpackers and chicken integrators. Recent case law suggests that Section 202 requires, in all cases, proof of harm to competition. This chapter critiques that approach, pointing out its weaknesses, its ambiguities, and the mistakes that courts have made when applying this requirement under the act.

Chapter 3 unpacks the text of Section 202, showing how it clearly addresses market abuses in addition to antitrust violations. From there, the chapter develops the argument that, even if a harm-to-competition requirement exists, it must encompass the full scope of Section 202, and harm to competition therefore must encompass market abuses and conduct that undermines market structures that Congress requires the U.S. Department of Agriculture to promote.

Chapter 4 discusses how specific provisions of Section 202 can address market abuses and explores using Section 202 to address different issues. This chapter explores how the U.S. Department of Agriculture can adopt rules that target problematic conduct, while addressing concerns that the operative terms are vague. In the case of unfairness or deception, the rules could define the general requirements for a violation or address specific conduct. The U.S. Department of Agriculture also can use case law and regulations to define other relevant terms, such as “unjustly discriminatory” and “undue preference.” Section 202 also gives the agency the authority to address market manipulation when it occurs. Finally, in determining whether conduct violates Section 202, the U.S. Department of Agriculture should consider how conduct impacts congressionally mandated goals and programs that the department is responsible for administering, such as promoting small producers, biodiversity, and supply chain resiliency. How practices affect those goals could affect whether the conduct violates the Packers and Stockyards Act.

Chapter 5 addresses the antitrust side of Section 202. It explains how the Packers and Stockyards Act provides tools to address oligopsony behavior. Further, because Section 202 applies to only a single industry, the U.S. Department of Agriculture can develop rules to focus analysis on the critical issues within the industry. The agency, for example, could provide guidance for how it will assess whether

specific conduct is anticompetitive or issue rules on what constitutes monopsony power in cattle markets. (When this report refers to monopsony, or monopsony power, it refers to any situation in which a buyer can obtain a price below competitive levels due to a lack of competition and is not limited only to situations where there is a single buyer.)

Chapter 6 concludes the report, offering suggestions on how to maximize the possibility of a successful enforcement agenda. This begins with a targeted, strategic enforcement agenda, using procedural rules to optimize enforcement, and coordinating with the Justice Department.

Chapter 1: Overview of the meatpacking industry

Section 202 of the Packers and Stockyards Act addresses the relationship between those that produce animals for meat and those that slaughter and process animals, primarily beef, hogs, or poultry. Although there are similarities in how each industry works, there are significant differences in the separate cattle, poultry, and hog industries, and they each use different terms.

Because this report focuses on the application of the Packers and Stockyards Act to the broiler (chicken) and beef industries, this section describes the key features of those two industries as they relate to the Packers and Stockyards Act, summarizes the issues arising in each industry, and offers suggestions for additional research. This report does not detail the hog industry; however, that industry faces similar issues.

Chicken

Within the animal protein industry, chicken production is the most integrated. Poultry integrators exercise the most control over the chicken growers, also known as contract farmers. The producers are contract farmers, and their compensation depends on how well they perform against other growers. They compete against each other in the industry's so-called tournament system. This section describes the market, discusses potential reasons for its development, and raises areas of potential research that the U.S. Department of Agriculture should consider.

Chicken production market

Chicken growers are part of a highly integrated ecosystem in which the integrators control the process, from genetics to slaughter. The integrators, such as Tyson's Food

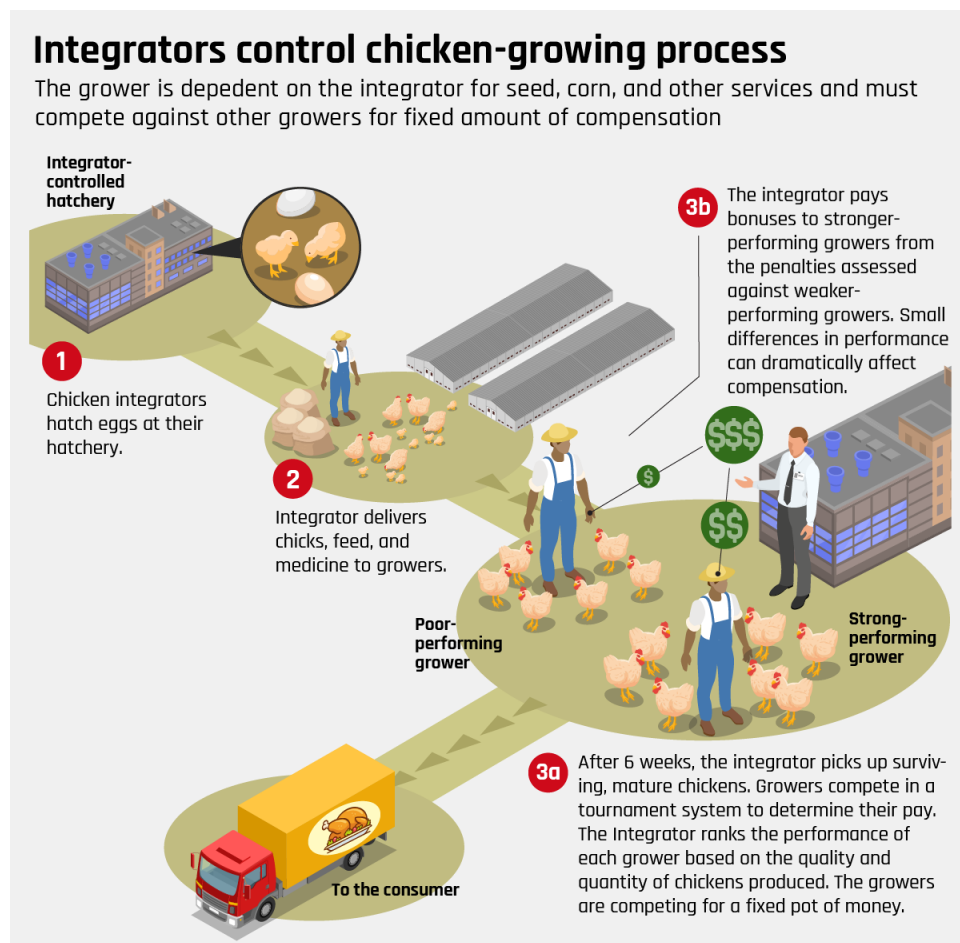
Inc. or Pilgrim's Pride Corp., have substantial—nearly complete—control of the production process. These two and other integrators develop breeds of chicken that will produce meat that consumers want and that can grow quickly. Eggs are hatched at an integrator-owned hatchery. The integrator then delivers the chicks to the farmer.⁴⁷ The integrator provides the feed and determines what, and how much, medicine the chickens receive, also providing veterinarian care and technical assistance.⁴⁸

After 6 weeks, the integrator returns, picks up the chickens, and takes them to be slaughtered and processed.⁴⁹ And the cycle begins anew.

Although chicken growing is one of the few parts of the process that the integrator does not own, integrators have tight control over the growing process by contract.⁵⁰ The integrator even retains ownership of the chicks, the medicine, and the feed. Chicken growers sign contracts to raise chickens for the integrator. The duration of the contract varies from flock-to-flock to multiyear agreements.⁵¹ Those contracts often require or encourage the grower to make substantial capital improvements.⁵²

The contract chicken grower provides the land, the barns where they raise the chickens, and the day-to-day care of the chicks. More modern barns can be 36,000 square feet or more.⁵³ They require ventilation and temperature control, as chicks cannot maintain their body temperature until they are roughly 14 days old.⁵⁴ Barns costs hundreds of thousands of dollars to build. With the cost of the acreage needed for farming, starting a chicken farm can require \$2 million or more.⁵⁵

Compensation for all the chicken growers' investments and labor depends primarily on the tournament system. The grower's contract specifies a base pay rate, which is really a starting point and not a guaranteed base. When the integrators pick up the grown chickens, they measure the grower's performance. Although the formulas are complicated, the key determinant is how many pounds of chicken the grower provides based on the number of chicks, feed, and medicine the grower received.⁵⁶ Each grower's performance is compared to a group of other growers for a set pool of money. Those who perform best among the group receive a bonus that the integrator takes from those who perform worse. The integrator's total payments to the group, therefore, are the same regardless of how the individual contract farmers perform. (See Figure 1 on next page.)

**FIGURE 1**

Compensation for all the chicken growers' investments and labor depends primarily on the tournament system.

Source: Author's interpretation of the chicken-growing process, as explained in Michael Kades, "Protecting livestock producers and chicken-growers: Recommendations for reinvigorating enforcement of the Packers and Stockyards Act" (Washington: Washington Center for Equitable Growth, 2022), available at <https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/>.

Reasons for and concerns about the current poultry market

Several reasons can explain the development of contract growing and the tournament system, both good and bad. According to the chicken integrator side of the poultry industry, contract farming provides benefits to both the poultry grower and the poultry processor. The contract guarantees farmers have a market for the chickens they raise for the integrator. It also protects farmers from the risk of fluctuating feed and retail, chicken prices, and other costs, such as veterinarian care.

Providing technical assistance can increase the adoption of best practices that lower the cost and raise the quality of chicken farming.⁵⁷ An industry-sponsored study finds that farmers increased production—measured by pounds per square feet—by almost 21 percent between 1989 and 2015.⁵⁸

The tournament system, in theory, also encourages and rewards performance. Chicken growers who take better care of their contract chickens and upgrade their

barns with better ventilation and temperature control should come out better in the tournament and be rewarded for their performance. The tournament creates an incentive for the growers to make investments that will improve performance while giving the integrator control over the total amount it will pay growers.⁵⁹ A tournament protects producers from risks of common shocks that affect all the participants.⁶⁰ If a cold snap affects all participants in the tournament, for example, then its impact on how many or how large the chickens are does not affect the outcome or the producer's payment.

But there also are concerns about chicken broiler markets and how they have developed. Although the current system protects producers from some important risks, such as variability in feed prices, the grower bears other important risks. Growers take on substantial debt that leaves them open to potential bankruptcy and in a weak negotiating position with the integrator. The integrator can require substantial investments in upgrading a grower's chicken barns. If the grower complies, then it can take years to pay off the debt, but the contract may last only a few weeks or years. Even longer contracts may not protect the farmer if the integrator does not guarantee a supply of chicks or if the integrator terminates the contract, which is easily done. Or if overall demand for chicken falls, for example, then growers may receive fewer flocks per year, which can mean financial ruin.

In determining whether an integrator has violated the Packers and Stockyards Act under USDA regulations issued in 2011, the agency considers whether the contract grower can reasonably expect to recoup the additional investment, among other factors.⁶¹ Yet the regulation does not explain whether that criterion is ever dispositive—for example, is recoupment one factor the agency will consider, or will it find a violation if a grower cannot reasonably expect to recoup the additional investment? At any rate, the agency has not brought any cases challenging an integrator's requirement that the grower make additional capital investments.

Contract farmers allege that the integrators exploit this dynamic. The growers claim that the integrators will retaliate against growers who advocate for themselves or seek to organize the grower side of the poultry industry, regardless of their performance.⁶² In 2018, the U.S. Small Business Administration's Inspector General concluded that integrators' encompassing control over contract growers "overcame practically all of a grower's ability to operate their business independent of integrator mandates."⁶³

The tournament system also raises concerns. Being in a cohort with a disproportionate share of well-performing producers penalizes a contract farmer. Further, their performance depends on the quality of the chicks, feed, veterinarian care, and technical assistance they receive. If a grower consistently receives lower-quality chicks, they will perform worse through no fault of their own. The same is true if

they receive less or worse feed or subpar veterinarian care or technical assistance. Some growers claim some integrators use this mechanism to penalize or terminate growers for inappropriate reasons.

In recent years, the chicken industry has been subject to a flurry of antitrust activity. The DOJ Antitrust Division, in 2020, charged 10 senior executives from major chicken integrators with price fixing for 7 years, both to lower the prices they paid to farmers and to raise the prices of the products they sold.⁶⁴ Pilgrim's Pride pled guilty and paid a \$108 million fine.⁶⁵

Koch Industries Inc. also faces a criminal indictment for fixing prices on broiler products.⁶⁶ In February 2021, after a hung jury in the first trial, the U.S. Department of Justice went to trial against 10 current and former executives including representatives from Tyson's, Pilgrim's Pride, and Koch Foods.⁶⁷ The second trial also resulted in a hung jury, but the department has announced it will try the case a third time against five of the executives.⁶⁸ Multiple private actions allege anticompetitive agreements among integrators and are either pending or have been settled.⁶⁹

The integrators frequently have substantial market power, or monopsony power, over their contract farmers, which contributes to some of these issues. Integrators will generally only contract with growers in a small area to avoid storage and transportation costs. Although not well-documented empirically, most chicken growers have only one or a few potential contractors. A USDA survey in 2011 found that more than 50 percent of farmers—measured by either the number of farms or chickens produced—had only one or two integrators in their area.⁷⁰

While there is evidence of integrators with monopsony power paying farmers less for growing chickens,⁷¹ they often use their power in other ways, such as shifting risk to the producers or imposing unfavorable contract terms. Brian Callaci, chief economist at the Open Markets Institute, has identified a similar phenomenon in franchisor-franchisee relationships.⁷²

Areas for research

Much of the existing research on the dynamics of poultry markets is dated.⁷³ The U.S. Department of Agriculture did a report on the industry, published in 2014, that relied on a 2011 study. Although helpful, those data are now more than a decade old, and the report was descriptive. The agency and policymakers need a current picture of poultry growing, as well as the relationship between growers and integrators today. It would help to understand whether integrator concentration impacts prices, performance, and contract terms. For example, in the 2014 study,

the U.S. Department of Agriculture found that grower contracts were shorter in areas where growers had more integrators.⁷⁴

Examining how contracts and pay differ based on integrator concentration has two advantages. First, it could provide an indication of contracting provisions that allow the integrator to exploit its market power. Second, the existence of different terms and conditions in markets with more competition provides evidence that integrators can address the issue more equitably.

Cattle

According to the U.S. Department of Agriculture, “Cattle production is the most important agricultural industry in the United States, consistently accounting for the largest share of total cash receipts for agricultural commodities,” and was projected to account for 17 percent of the total value of all agriculture commodities in 2021.⁷⁵ The process, from herding to retail sales of beef products, takes years. The length of time, demand, and weather all affect cattle production, which moves in an 8–12-year cycle, with supply increasing and then decreasing.⁷⁶

Although ranchers, also known as cow-calf operations within the beef industry, retain the most autonomy among livestock producers, they face a consolidating industry. Beef packers have vertically integrated by agreements with feedlots. The use of contracts may lower costs, promote quality, and provide certainty in supply, but packers could be using their monopsony power to harm ranchers in multiple ways, refusing to compete against each other or using contracts to manipulate and lower prices for cattle.

Cattle markets

There are three major steps in cattle production: growth, feedlot, and slaughter. Cow-calf operations own a herd of cattle and raise calves.⁷⁷ The gestation period for a calf is roughly 9 months. As of 2017, the average cattle herd had 43.5 cows. Only 9.9 percent of beef operations had more than 100 head of cattle, but they accounted for 56 percent of the beef cow inventory.⁷⁸ The calves are weaned after 3–7 months.⁷⁹

Some cattle may stay on the ranch and graze for a few more months. Others enter a stocker program, where they graze on grass for 30–60 days. Alternatively, they can be “backgrounded,” where the cattle are placed in pens and receive forage,

silage, and grain. Others go through a brief “precondition program,” where they are treated to ensure that they are healthy for the feedlot.⁸⁰

After the growth phase, most cattle go to a feedlot. Cattle spend 90 days to 300 days in the feedlot, and each cow individually weighs 600 lbs. to 800 lbs. when it enters a feedlot; at slaughter, they individually weigh between 950 lbs. and 1,300 lbs., and are typically between the ages of 15 months and 24 months.⁸¹ Most feedlots have a capacity of fewer than 1,000 head of cattle but account for only 15 percent to 20 percent of cattle sold. Forty percent of cattle sold are from feedlots with a capacity of 32,000 cattle or more.⁸²

Feedlots sell cattle to beef packers through a variety of methods, but two dominate the industry: negotiated trade and formulary (or alternative marketing agreements). The methods are as follows:

- **Negotiated or cash trade.** The buyer and seller agree on a purchase price for cattle to be delivered within 30 days.⁸³ Negotiated trade is a spot market where, in theory, multiple buyers compete against each other for cattle. Buyers come to the feedlot to examine the cattle and make an offer; the feedlot may also take bids by phone. There is no adjustment for quality, so the price reflects the average quality of the beef, as the buyer and seller see it.
- **Negotiated grid.** The buyer and seller negotiate a base price, as well as a series of premiums and discounts based on how the carcasses are graded after slaughter. Both the base price and the size of the premiums and discounts are agreed to at the time of the transaction. The unknown is the number of cattle that will fall into each category.⁸⁴ Delivery is expected within 14 days.⁸⁵
- **Forward contract.** The producer agrees to supply a set number of cattle in the future. Sometimes the price is agreed to at the time of the contract for cattle delivered in 31 or more days in the future. Or the price is based on the cattle futures market, and the producer can choose when to lock the price.⁸⁶
- **Formulary.** This method is any advance commitment of cattle for slaughter that does not fit in the other three categories. This includes **alternative marketing agreements**, a type of vertical agreement, which has largely replaced cash transactions over the past 15 years. Under these agreements, the beef packer agrees to buy a certain number of cattle in the future and the price is determined on a future date. According to anecdotal reports, the price is commonly pegged to the spot market price on a given date between the contract and delivery date, adjusted by premiums and discounts based on the cattle grading and weight.⁸⁷ (See Figure 2.)

Alternative marketing agreements reduce the cattle available for cash transactions

Packers acquire cattle through different types of transactions

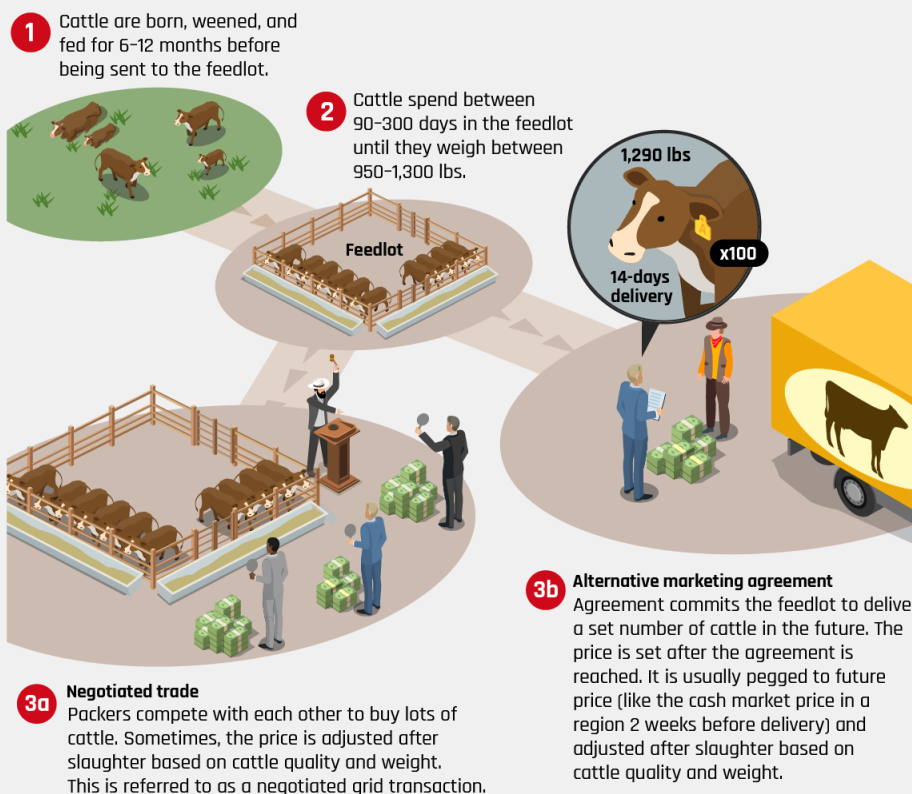


FIGURE 2

Feedlots sell cattle to beef packers through a variety of methods, but two dominate the industry: negotiated trade and formulary (or alternative marketing agreements).

Note: There can be multiple steps between the birth of the calf and when it arrives at the feedlot, including entering a stocker program, being backgrounded, or going through a precondition program, which are not shown in the figure. They can also go straight from the cow-calf operation to the feed information. For more information, see the full report.

Source: Author's interpretation of the cattle-growing process, as explained in Michael Kades, "Protecting livestock producers and chicken growers: Recommendations for reinvigorating enforcement of the Packers and Stockyards Act" (Washington: Washington Center for Equitable Growth, 2022), available at <https://equitablegrowth.org/research-paper/protecting-livestock-producers-and-chicken-growers/>.

In 2005, beef packers acquired roughly 55 percent of their cattle through cash negotiations and 30 percent through formula agreements. By March 2021, cash negotiations accounted for about 20 percent of cattle purchases, and formula agreements accounted for 65 percent.⁸⁸ Cash negotiations vary by region: In Nebraska, the spot market accounts for 30 percent to 35 percent of cattle sold; in contrast, less than 10 percent of cattle are sold that way in the region including Texas, Oklahoma, and New Mexico.⁸⁹

Reasons for, and concerns about, the current cattle market

The cattle market has changed dramatically over the past 50 years. Concentration is higher than it was in the late 19th century and early 20th century, and the beef packers have integrated vertically by contract. Packers and many agricultural economists see these developments as a natural reaction to market forces. As they see it, there are large economies of scale, which require large packing facilities.

Professor Darrell S. Peel, the Charles Breedlove professor of agribusiness in the Department of Agricultural Economics at Oklahoma State University, concludes: “The largest packing plants have considerable cost advantages over smaller (but still large) packing plants even half that size.”⁹⁰

The expansion in the size of beef packing plants happened over the course of the 20th century, however, and would not explain increases in the packers’ rising market power over the past 20 years. There is little empirical evidence of cross-plant, scale economies, and single-plant efficiencies would not explain why four firms control more than 80 percent of slaughtering capacity. Although some agricultural economists concede that packers have market power, they argue that the “small but significant negative price impacts of market power are outweighed by several magnitudes in cost efficiencies that benefit producers and consumers,” according to Darrell Peel, professor of agricultural economics at Oklahoma State University.⁹¹ This explanation does not address whether there are efficiencies from owning multiple packing plants.

Packers and some agricultural economists also see the alternative marketing agreements as critical to the development of the beef industry. A 2021 collection of essays by the Agricultural and Food Policy Center at Texas A&M University, partly funded by a cooperative agreement with the U.S. Department of Agriculture, titled “The U.S. Beef Supply Chain: Issues and Challenges,” concluded that alternative marketing agreements were beneficial.⁹² They identified two categories of benefits: for producers and feedlots.

First, by guaranteeing supply ahead of time, formula agreements allow feedlots and packers to be more efficient and lower costs. Although the book provides more information on the impact of alternative marketing agreements on packers’ costs, the essays rely on a 2007 survey (likely because of data limitations) done for the U.S. Department of Agriculture on these agreements to conclude that at least some feedlots see benefits from them. According to the 2007 results, both packers and feedlots identified alternative marketing agreements as allowing them to operate at fuller capacity.⁹³

Second, alternative marketing agreements encourage and reward feedlots for better-quality cattle.⁹⁴ One essay explains that, as these agreements became more common, the percentage of choice, branded, and prime beef also increased.⁹⁵ Although the authors of the essay explicitly acknowledge they have no causal evidence, they proceed to argue that these agreements improve the quality of beef.⁹⁶

Other academics, cattle producers, and some feedlot operators see a very different national beef market. Recently released work funded by Equitable Growth,

titled “Buyer Power in the Beef Packing Industry: An Update on Research in Progress,” by Francisco Garrido at the Instituto Tecnológico Autónomo de México’s Department of Business Administration and his co-authors at Georgetown University and The Ohio State University, finds that between 2015 and 2019, the spread between what packers pay for cattle and the prices the packers charge retailers more than doubled.⁹⁷ The authors see no plausible cost-based justification for the increase and contemplate whether concentration is the cause.

A broad consensus agrees that livestock markets are concentrated, and that packers have market power. “In some important cattle producing market regions (e.g., Texas-Oklahoma-New Mexico), during certain weeks no negotiated cash price information is reported by the USDA,” according to Ted C. Schroeder, university distinguished professor of agricultural economics at Kansas State University and his co-authors.⁹⁸

As one feedlot operator explains, in a 1-year period for the Texas-Oklahoma-New Mexico region, there were more weeks where they had no bidders (6 weeks) than weeks where they had four bidders (2 weeks). For almost half the year, they had fewer than two bidders.⁹⁹ Other feedlots report a persistent lack of competition: The same packer wins the cash negotiations every week, meaning either the alternative packers do not bid or simply offer a lower price.¹⁰⁰

A recent civil antitrust class-action lawsuit alleges that the lack of competition is the result of an agreement among the beef packers and violates the antitrust laws.¹⁰¹ The Antitrust Division of the U.S. Department of Justice is also investigating the packers’ conduct.¹⁰² Absent an agreement by the packers not to bid against each other, this conduct would not violate the Sherman Act, but it does suggest packers have buying power.

There is also controversy over the use of alternative marketing agreements. If the agreements peg the contract price to a negotiated cash price and the packer has monopsony power, then the contract can harm sellers, both the contract seller and the cash seller. The packers have committed to buying a set number of cattle under the contract. When the packer bids in the cash market, that bid reflects more than the cost of the cattle it buys in the cash transaction. The negotiated price dictates the price for the committed cattle.¹⁰³

These concerns reflect strategic conduct and game theory—both well-accepted economic principles that are missing from the collection of essays in the 2021 book on the U.S. beef supply chain.¹⁰⁴ According to the model in the “Buyer Power in the Beef Packing Industry” paper, as the use of alternative marketing agreements increases within a market, cattle prices fall. The co-authors find that, given

current market facts, alternative marketing agreements may roughly double the packers' markdowns. A markdown is the difference between the price of beef that a packer sells and the cost of producing that beef, which includes both the cost of the cattle and the cost of processing and packing the beef.¹⁰⁵ In contrast to the 2021 book and consistent with the theory, Robert Taylor, the Alfa Eminent scholar and professor of agricultural economics at Auburn University, finds that in weeks when more formula contracts are due, cash market prices are lower.¹⁰⁶

Another concern is the relationship between the structure of the beef industry and the resiliency of the food supply chain. In 2019, a fire at a Tyson Foods packer plant in Holcomb, Kansas eliminated 6 percent of the nation's slaughter capacity. It shocked the markets. Prices for steers in Kansas were projected to be negative.¹⁰⁷ Overall, negotiated feed-cattle prices fell roughly 20 percent over the next 6 weeks, reflecting the feedlots' prices to packers, and packers' margins increased to a then-record amount.¹⁰⁸

The impact on actual output was minimal, however, because packers added Saturday shifts. During the first 3 weeks after the fire, total fed cattle harvest was 5,000 head higher than the 3 weeks before the fire.¹⁰⁹

Throughout the COVID-19 pandemic, slowdowns and plant closures also reduced packers' demand for beef, while the resulting reduced supply of finished meat products increased retail prices.¹¹⁰ Last year, a cyber attack forced JBS, the second-largest beef processor in the United States, to halt cattle slaughter at all of its U.S. packing plants, and packer output fell roughly 20 percent.¹¹¹ Some policymakers believe that the high levels of concentration makes the packing industry more susceptible to such catastrophic events.

Areas for research

Much of the research on cattle markets is old or relies on old data. There are many areas that would benefit from more research. First, although there are reliable statistics on market share at the national level, the market for cattle is local.¹¹² It would be helpful for the U.S. Department of Agriculture to study the concentration in local cattle markets.

Second, the existing research examines agreements that fall into the formulary category, not specifically alternative marketing agreements, in part due to data limitations. Formulary is a catch-all definition: It applies to any contract that does not meet the U.S. Department of Agriculture's definitions of cash-negotiated trade, forward contract, or negotiated grid.

The concerns with alternative marketing agreements, however, deal with a specific type of contract that pegs the contract price to a market price over which the packers have monopsony power. Such packers have the incentive and ability to impose contract terms that limit competition, manipulate the cash market price, and reduce prices for livestock. Research on whether this dynamic is occurring would be helpful.

This gap in the existing research is problematic. In their introduction to the “The U.S. Beef Supply Chain: Issues and Challenges,” Bart L. Fischer, research assistant professor with Texas A&M AgriLife Research, and Joe L. Outlaw, professor and extension economist with Texas A&M AgriLife Extension Service, assert that alternative marketing agreements do not create market power because they do not change underlying supply and demand.¹¹³ A rich body of economics literature explains a variety of ways that exclusive agreements can be anticompetitive without altering the underlying supply and demand. The U.S. Department of Agriculture should incorporate these explanations into its understanding and analysis of contractual agreements in the cattle industry.¹¹⁴

It would also be helpful to understand more broadly how forward contracts work. How often is a specific price agreed to at the time of the contract? How often is the price tied to a national market versus a regional one?

Another promising area for new research is the use of alternative marketing agreements by region. As discussed, these agreements are much more common in areas with a higher concentration of buyers.¹¹⁵ It would be helpful to know why. If these agreements bring value to feedlots, then their use should not vary by buyer concentration. Further, much of the research frames the question as a dichotomy: either no alternative marketing agreements allowed or no limitations on alternative marketing agreements.¹¹⁶ But this is not an either-or situation in the marketplace.

There may be alternative ways to promote quality and protect producers. Some proposals would require supply contracts to have a firm base price determined at the time the contract is signed. Justin Tupper, the vice president of the United States Cattlemen’s Association, proposed, in congressional testimony, using base prices “that are established using liquid, actively traded markets (e.g., live cattle futures).”¹¹⁷ Tying the contract price to the futures market on the date the agreement is reached or to the wholesale price of beef or some other metric could be less susceptible to manipulation.¹¹⁸ In hog markets, for example, some contract formulas peg the contract price to the wholesale price for pork.¹¹⁹ It would be helpful to understand which alternative pricing formulas eliminate the incentives and ability to manipulate prices.

Further, the U.S. Department of Agriculture should consider whether the asserted benefits of alternative marketing agreements can be achieved through different mechanisms. Negotiated grid transactions are alternatives to alternative marketing agreements that would seemingly address concerns about market manipulation while maintaining incentives for quality.¹²⁰ These are rarely mentioned in the literature and dismissed as unworkable.¹²¹ Similarly, defenders of these agreements argue that they allow feedlots to mitigate the risk of changes in feed price, but would hedging corn prices provide similar protection for the feedlots?

Finally, there is increasing concern that concentration in the livestock and poultry industries makes the supply chain fragile. Unexpected shocks, such as a fire that shuts down a plant, a cyber attack, or a pandemic, may pose increased risks. Although there has been some research, more is needed.¹²²

The purpose of this report is not to resolve the policy and factual disagreements about the various animal protein industries. Rather, it aims to address what types of harm the Packers and Stockyards Act covers, what evidence should establish a violation, and offer recommendations to improve enforcement of the act. To this, we now turn.

Chapter 2: Limitations of current Packers and Stockyards Act jurisprudence

A first reading of recent Packers and Stockyards Act court decisions suggests that, for good or ill, the case law is settled. Every claim under Section 202 of the act—which regulates the conduct of packers, chicken integrators, and hog contractors—requires proof of harm to competition, which means only acts that violate or are likely to violate the general antitrust laws are raised.

The judicial consensus, however—if one exists—is both narrower and weaker than it initially seems. As a matter of statutory interpretation, even if Section 202 requires proof of harm to competition, there is no consensus on the term’s meaning in the context of the act. Courts cannot abrogate portions of a statute through interpretation. Section 202 is broader than the general antitrust laws. The term “competitive injury” thus must be broader than what the general antitrust laws cover.

The use of similar-sounding phrases without clear definitions contributes to the appearance of a consensus. Anticompetitive harm, competitive harm, and harm to competition are not necessarily synonyms, and their meanings depend on the context in which they are used. The terms “harm to competition” or “competitive harm” are judicially created requirements for proving a violation of Section 202 of the Packers and Stockyards Act. They do not appear in the statute. As discussed below, courts define the terms differently.¹²³

Although some courts explicitly or implicitly define harm to competition as conduct that violates the antitrust laws, or anticompetitive harm, others take a broader view. When this report discusses harm to competition or competitive harm, it refers to what is required for a violation of Section 202. When it discusses anticompetitive harm, anticompetitive effect, or anticompetitive conduct, it refers to the type of harm or conduct required for an antitrust violation.

This chapter of the report first begins with a description of Section 202 of the Packers and Stockyards Act and compares it to the general antitrust laws, emphasizing that language and structure of the Packers and Stockyards Act is broader than the antitrust laws. The second section of this chapter examines the case law requiring proof of harm to competition for a violation of Section 202 and those decisions' refusal to defer to the USDA interpretation.

The third section critiques those decisions. The harm-to-competition requirement is not universally accepted. Eight circuit courts have neither accepted this requirement, as more recent decisions suggest, nor adopted the harm-to-competition test. Even among courts that have adopted the term, they disagree about when it applies and what it means. Further, these courts rely on contradictory reasoning for adopting the requirement.

The final section of this chapter discusses how some courts have interpreted harm to competition as even more restrictive than the antitrust laws.

Overview of the Packers and Stockyards Act and comparison to general antitrust laws

The Packers and Stockyards Act applies to livestock—cattle, sheep, swine, horses, mules, or goats—and poultry, or chickens, turkeys, ducks, geese, and other domestic fowl, markets.¹²⁴ Title II regulates the conduct of packers, swine contractors, and live poultry dealers, and Title III regulates the conduct of stockyards, dealers, and market agencies.¹²⁵

This report focuses on Title II and, specifically, Section 202 (7 U.S.C. §192), which is the operative provision of Title II. Section 202 prohibits seven types of conduct by packers, swine contractors, and live poultry integrators:¹²⁶

1. Using/creating unfair, unjust discriminatory or deceptive practices or devices
2. Giving undue or unreasonable preferences or disadvantages
3. Apportioning supply of livestock that has the tendency or effect of restraining commerce or creating a monopoly
4. Selling or buying any article with the purpose or effect of manipulating or controlling prices, creating a monopoly, or restraining commerce

5. Engaging in any act or course of business with the purpose or effect of manipulating or controlling prices, creating a monopoly, or restraining commerce
6. Conspiring, combining, agreeing to apportion territory, apportion sales, or manipulate or control prices
7. Conspiring, combining, agreeing, or arranging to violate, or aid or abet any violation of, the act

The U.S. secretary of the Department of Agriculture can enforce the act directly against beef packers and hog contractors. Where the secretary of agriculture has reason to believe a violation has occurred, the secretary, or the secretary's designee, commences a formal administrative hearing. After the hearing officer renders a decision, either party can appeal to the judicial officer.¹²⁷ The U.S. Department of Agriculture, upon finding a violation, can order the practice stopped and assess a civil penalty of up to \$29,616 per violation (as of May 2021).¹²⁸ The packer may appeal the decision to the U.S. Court of Appeals.

The U.S. Department of Justice has three roles in this process. If a company or person fails to pay a civil penalty, then the U.S. Department of Agriculture can refer the matter to the Justice Department to collect the penalty.¹²⁹ Only the Department of Justice has authority to bring actions against poultry dealers, although USDA regulators can and do issue rules on the application of the Packers and Stockyards Act to poultry integrators.¹³⁰ Finally, the U.S. attorney general shall bring an appropriate proceeding in federal court when the U.S. Department of Agriculture refers the matter.¹³¹

In 1935, Congress amended the act to cover poultry markets.¹³² Then, the 1958 amendments clarified the jurisdictional boundaries between the U.S. Department of Agriculture and the Federal Trade Commission.¹³³ In 1976, Congress created a private right of action, permitting any person to recover damages caused by a violation of the act.¹³⁴

Recent court decisions have required proof of harm to competition

Over the past 15 years, four U.S. appeals courts have addressed the scope of the provisions of Section 202 of the Packers and Stockyards Act. In these decisions,

courts have focused less on the precise language of Section 202 and its relationship to the language in the antitrust statutes. Instead, an underlying policy judgment has driven the courts' interpretations. In each case, the plaintiffs alleged the defendant engaged in unfair conduct, conduct that gave undue or unreasonable preference to one or more producers at the expense of others, or conduct that manipulated or controlled prices.

In each case, the courts accepted that the defendant's conduct was harming producers, treating some producers differently than others, or affecting the market price for livestock or poultry. None of the plaintiffs invoked the provisions that require proving a restraint on commerce or monopolization. These appeals courts have then acknowledged that the Packers and Stockyards Act, in theory, prohibits a broader range of conduct than the antitrust laws.

Nonetheless, each court ruled that a violation of Section 202 requires proof that the conduct harms competition. The consensus, to the degree it exists, is found in five recent decisions.

In *Wheeler v. Pilgrim's Pride Corp.*, a group of chicken growers proved that Pilgrim's Pride required all but one grower to sign contracts and participate in a tournament system. One producer—Pilgrim's Pride's founder and chairman—received a different arrangement. He would raise his own chickens and buy seed and other supplies. Pilgrim's Pride would then buy his chickens at either 102 percent of his costs or a quoted market price, whichever was less.¹³⁵ The entire 5th Circuit, *en banc*, accepted that Pilgrim's Pride was giving preferential treatment to one grower over the others but held that the plaintiffs must show “injury, or likelihood of injury, to competition.”¹³⁶

In *Been v. O.K. Industries Inc.*, chicken growers challenged several provisions in the standard chicken grower contract that O.K. Industries required growers to sign, arguing that they were unfair and violated Section 202 (a) of the Packers and Stockyards Act. The 10th Circuit ruled that a violation of Section 202 (a) occurs only if the plaintiff shows “that the practice injures or is likely to injure competition.”¹³⁷ According to the court, the plaintiff must prove that “the monopsonist's practices have caused or are likely to cause ... the arbitrary manipulation of market prices by unilaterally depressing seller prices on the input market with the effect (or likely effect) of increasing prices on the output market,”¹³⁸ a more stringent standard than required under the Sherman Act.¹³⁹

In *Terry v. Tyson Farms Inc.*, the plaintiff poultry grower alleged that Tyson Farms had engaged in unfair and discriminatory conduct in violation of Sections 202 (a) and (b) of the Packers and Stockyards Act. Allegedly, Tyson did not allow Terry to

be present at the weighing of his flock, as required by contract and by the Packers and Stockyards Act; delayed a delivery of birds that cost Terry \$30,000; terminated his contract; and prevented him from being able to sell his farm in retaliation. Terry claimed Tyson took these actions to retaliate against him for having organized chicken growers and for his complaints to the Packers and Stockyards Administration (an agency within the U.S. Department of Agriculture) and that the acts violated specific USDA regulations.¹⁴⁰

The 6th Circuit dismissed the action because Terry did not allege an adverse effect on competition: “He makes no allegations regarding the effect of Defendant’s actions on the pricing of poultry or on overall competition in the poultry industry.”¹⁴¹ The court never addressed explicitly the alleged violations of the USDA regulations.

In *London v. Fieldale Farms Corp.*, the jury found that the defendant had terminated the plaintiff grower’s contracts without economic justification. According to the 11th Circuit, the termination was insufficient to prove a violation. The plaintiff had not presented any evidence that the termination of their contracts “adversely affected or was likely to adversely affect competition.”¹⁴²

In *Pickett v. Tyson Fresh Meats Inc.*, the plaintiff ranchers attacked vertical supply agreements, referred to earlier in the report as alternative marketing agreements or captive supply agreements. The plaintiffs argued that alternative marketing agreements allowed Tyson to lower the price of the cattle it purchased both in the cash market and by the agreements. According to the plaintiffs, the agreements allowed Tyson to manipulate the market in violation of Section 202(e) of the Packers and Stockyards Act, 7 USC § 192(e). The 11th Circuit ruled that subparagraph e, like subparagraph a, required proof of harm to competition. The court reluctantly affirmed the jury’s finding that the agreements had lowered prices, but it held that the plaintiff had to—and failed to—disprove every purported justification.¹⁴³ The court dismissed the claim.

In requiring proof of harm to competition, the courts in all five of these cases adopted similar reasoning—preferencing policy arguments over the text of the statute. Increasingly, courts assert that the legal issues have been settled. The *Terry* court described the precedent as a tidal wave “in which all appellate courts that have addressed this precise issue” have “required proof [of] likely or actually adverse effect on competition.”¹⁴⁴ According to these courts, Congress must have intended to require plaintiffs to prove harm to competition because Congress declared that the primary purpose of the Packers and Stockyards Act was “to assure fair competition and fair trade practice.”

Despite recognizing that the Packers and Stockyards Act is “broader than antecedent antitrust legislation,” these courts concluded that the statute “incorporates the basic antitrust blueprint of the Sherman Act and other pre-existing antitrust legislation such as the Clayton Act and the [sic] Fair Trade Commission Act.”¹⁴⁵ Finally, they argue that language, such as “unfair” and “unjustly discriminatory,” in Section 202 (a) is vague and ambiguous. Without requiring proof of competitive harm, the Packers and Stockyards Act would turn every breach of contract claim into a federal case.¹⁴⁶

The courts, out of a fear of an avalanche of litigation, are rewriting the act. In doing so, the courts risk eliminating protections from packer abuses that Congress intended to provide to producers.

As discussed below, the term “harm to competition” lacks a clear or consensus definition, but the strictest definition—the one strongly suggested by the 11th and 5th Circuits—largely erases Section 202’s role in protecting producers from market abuses. For instance, let’s say the U.S. Department of Agriculture concludes that a chicken integrator lied about the quality of the chicks it provided to a contract farmer, and that contract farmer has performed worse in the tournaments and was forced into bankruptcy. It appears that the 5th and 11th Circuits would find a violation of the Packers and Stockyards Act only if there was also proof that the deception eliminated competition and created market power.

Courts have rejected the USDA interpretation that the Packers and Stockyards Act does not always require proof of competitive harm

The U.S. Department of Agriculture has long taken the position that Sections 202 (a) and (b) do not require proof of harm to competition. The agency is responsible for administering the Packers and Stockyards Act, has authority to issue regulations, and adjudicates violations by packers and swine contractors. Typically, courts would give deference to the USDA interpretations of ambiguous terms of a statute it administers and enforces.¹⁴⁷ Terms such as “unfair,” “unjust,” “manipulation,” and “discriminatory” seem like the precise type of ambiguous words that the agency has discretion to define. The agency filed amicus briefs advocating its view in both the *London* and *Wheeler* court cases, but those courts gave the agency’s view no weight. The *Been* decision recognized the department’s position but rejected it as well.

The courts provided four related reasons. The courts in the *London* case and the concurrence in the *Wheeler* case concluded that the statute's plain meaning was clear: "Because Congress plainly intended to prohibit only those unfair, discriminatory or deceptive practices adversely affecting competition, a contrary interpretation deserves no deference."¹⁴⁸ In *London*, the court also concluded no deference was due because the Packers and Stockyards Act does not give the U.S. Department of Agriculture the power to adjudicate claims involving poultry;¹⁴⁹ those claims must be brought in federal court.

The *Been* court added that the agency has articulated its position in briefs, but courts owe deference to agency interpretations only if promulgated through agency rulemaking or agency adjudication.¹⁵⁰ And in *Wheeler*, the court rejected deference because courts, in its view, universally require competitive injury, and Congress has never corrected that view.¹⁵¹

All these reasons seem contrived. Even the majority of judges in the *Wheeler* and *Been* cases rejected the idea that terms such as "unfair," "unjust," "undue," and "unreasonable" are unambiguous.¹⁵² Acknowledging the ambiguity should have led those courts to give some deference to the USDA interpretation.

The *Been* court's refusal to defer rests on a tenuous basis. Although the U.S. Department of Agriculture does not have authority to adjudicate violations by poultry integrators, it has explicit authority over beef packers and hog contractors. Under the *Been* court's approach, the same statute terms could have different, or even opposite, meanings depending on whether the respondent is a beef packer or a poultry integrator.

The dissent in *Been* pointed out the oddity of this argument. If the cases were about beef packers or hog contractors, which the agency does have authority to adjudicate, then the USDA interpretation would deserve deference.¹⁵³ The *Been* court also ignored the agency's adjudicative decisions holding that harm to competition is not required under Section 202.¹⁵⁴

Finally, given the wide disagreement about the meaning of Section 202, one should not infer from Congress' inaction that it has endorsed the harm to competition requirement.

Critiques of Packers and Stockyards Act jurisprudence demonstrate the ambiguities, contradictions, and misunderstanding of the scope of the act

Despite recent decisions, the consensus over harm to competition is weak and flawed. Not all courts have adopted the requirement. The courts adopting the test disagree about when the requirement applies and what it means. Finally, some courts' application of the harm-to-competition test is inconsistent with their own antitrust rules that they claim to be applying.

A harm-to-competition requirement is not universally accepted

According to the majority opinion in each of the cases discussed above, courts have uniformly required proof of harm to competition. Of the eight circuit courts that the *Terry* court claimed require proof of harm to competition only four have seemingly defined harmed to competition in the limited sense of anticompetitive harm: the 4th, 5th, 6th, and 11th. The 4th Circuit, however, in *Philson v. Goldsboro*, upheld jury instructions that required proof of anticompetitive harm, but it is an unpublished decision and has no precedential value.¹⁵⁵ A district court in the 4th Circuit rejected *Philson* as binding precedent and did not require proof of harm to competition.¹⁵⁶

Of the remaining four, two courts—the 8th and 9th Circuits—have found violations of Section 202 without requiring proof of harm to competition. A third court, the 7th Circuit, and the 9th Circuit have held that proof of harm to competition is sufficient for proving conduct is unfair, which is different than requiring proof for all claims alleging unfairness. As discussed in the next chapter, the 10th Circuit has expressly embraced the term “harm to competition” but defines it broader than anticompetitive harm.

Other courts have required proof of harm to competition based on the specific claim the plaintiff has raised. Those cases do not support a requirement of harm to competition in every case under Section 202.

As the dissent in *Wheeler* explains: “In short, although several circuits have held that practices that harm competition are unfair within the meaning of the Packers and Stockyards Act, these holdings do not necessarily support this court’s holding that §192 (a) and (b) require a showing of competitive injury.”¹⁵⁷ In *Farrow v. United States Department of Agriculture*, the 8th Circuit found an agreement among pack-

ers not to bid against each other was unfair under Section 202.¹⁵⁸ Rather, those circuits have held only that competitive injury is sufficient to prove a violation, not that it is necessary in all cases. If the plaintiff alleges that the conduct is unfair because it is anticompetitive, then the plaintiff must prove the conduct, in that case, is anticompetitive.

The 7th Circuit, in *Armour & Co. v. United States*, for example, required the government to prove that the defendant's price discounting harmed competition to establish the practice was unfair.¹⁵⁹ As the court explained, discounting prices is the essence of competition, and the court would not condemn a specific instance of discounting without evidence that it harmed competition. Requiring proof of anticompetitive harm when the plaintiff alleges it is different than requiring such proof in every case.

Similarly, the 9th Circuit, in *De Jong Packing Co. v. United States Department of Agriculture*, found proof of anticompetitive harm to be sufficient to prove a violation, not that it is always necessary.¹⁶⁰ Conversely, in *Central Coast Meats, Inc. v. United States Department of Agriculture*, it rejected a finding that the joint ownership of a dealer and a packer was "unfair" unless there was proof of actual or likely effects.¹⁶¹ The court found that the U.S. Department of Agriculture had failed to prove its allegations that the conduct was anticompetitive, not that anticompetitive harm was required for all claims.

And in the *London, Been, Wheeler*, and *Terry* cases, the courts' reliance on the 9th and 8th Circuits is even more misplaced because both have found violations of Section 202 without requiring any proof of anticompetitive harm.


In *Holiday Farms v. United States Department of Agriculture*, for instance, the 9th Circuit found commercial bribery to be a deceptive act without any discussion of anticompetitive harm.¹⁶² In *Bruhn's Freezer Meats v. Department of Agriculture*, the 8th Circuit found mislabeling the grade of the meat and switching the quality and weights of meat delivered to customers were unfair and deceptive acts because "the practices, if allowed to continue, would undermine public confidence in the meat industry generally and undermine the orderly market practices."¹⁶³ The 8th Circuit focused on market abuses, not anticompetitive harm.


District courts in the 4th and 8th Circuits have explicitly held that proof of harm to competition is not necessary under Section 202 (a) of the Packers and Stockyards Act, as has a district court in the 2nd Circuit.¹⁶⁴ A district court in West Virginia, in the 4th Circuit, called the assertion that eight circuits require proof of anticompetitive harm "misleading" in general and rejected the argument that the 4th Circuit had adopted the rule.¹⁶⁵

TABLE 1

Circuit courts do not agree on the role of harm to competition in proving a violation of Section 202

Courts have found violations of Section 202 for conduct that would not violate the antitrust laws

 Court has embraced the rule

 Court has rejected the rule

Circuit courts

Judicial Rule	4th	5th	6th	7th	8th	9th	10th	11th
Harm to competition required in deception cases	<i>Unpublished, nonprecedential decision</i>	<i>Wheeler</i> (591 F.2d 355)	<i>Terry</i> (604 F.2d 272)				<i>Been</i> (495 F.3d 1217)	<i>London</i> (410 F.3d 1295)
Harm to competition required in unfairness cases	<i>Unpublished, nonprecedential decision</i>	<i>Wheeler</i> (591 F.2d 355)	<i>Terry</i> (604 F.2d 272)				<i>Been</i> (495 F.3d 1217)	<i>London</i> (410 F.3d 1295)
Required harm to competition when plaintiff alleges conduct is anticompetitive				<i>Armour</i> (402 F.2d 712)	<i>IBP</i> (187 F.2d 974)	<i>Central Coast Meats</i> (541 F.2d 1325)		
Harm to competition is sufficient to prove conduct is unfair					<i>Farrow</i> (760 F.2d 211)	<i>De Jong Packing</i> , 618 F.2d 1329)		
Bribery violates Section 202						<i>Holiday Food Service</i> (820 F.2d 1103)		
Failure to pay violates Section 202							<i>Hays Livestock</i> (498 F.2d 925)	
Refusing to deal with a specific firm without reasonable cause violates Section 202							<i>Capitol Packing</i> (350 F.2d 67)	
Taking a loan and paying interest to a selling agent violates Section 202							<i>Capitol Packing</i> (350 F.2d 67)	
Mislabeling grade of meat violates Section 202					<i>Bruhn's Freezer Meats</i> (438 F.2d 1332)			
Failure to disclose change in grading system violates Section 202						<i>Excel Corp.</i> (397 F.3d 1285)		

Source: 591 F.2d 355; 604 F.2d 272; 402 F.2d 712; 187 F.2d 974; 495 F.3d 1217; 410 F.3d 1295; 541 F.2d 1325; 760 F.2d 211; 820 F.2d 1103; 618 F.2d 1329; 498 F.2d 925; 350 F.2d 67; 438 F.2d 1332; 397 F.3d 1285.

Note: *Capitol Packing*, *Excel*, *IBP*, and *Hays Livestock* are discussed in Chapter 3.

Even among those courts requiring proof of harm to competition, there is no consensus about its application. Section 202 (a) condemns deceptive practices by packers, in addition to acts that are unfair or unjustly discriminatory. The 5th Circuit in *Wheeler* and the 6th Circuit in *Terry* have strongly implied that deception violates the statute only if there is harm to competition.

The *Been* court explicitly held that competitive injury was necessary to prove that conduct was unfair, but not to prove that conduct was deceptive.¹⁶⁶ As the dissent in *Wheeler* explains, Congress could not have intended this interpretation: “It defies common sense that Congress meant to allow some deceptive practices, so long as they did not adversely affect competition, while prohibiting others that did impact competition.”¹⁶⁷

The table below provides an overview of the differences among the U.S. Circuits in interpreting Section 202 and the role of harm to competition. (See Table 1.)

Harm to competition does not apply to claims alleging unfairness, deception, and unjust discrimination by stockyards or dealers

The alleged consensus is more questionable when considered in the broader context of the Packers and Stockyards Act. While Section 202 addresses conduct involving packers, Section 312 regulates conduct of stockyard owners, market agencies, and dealers. It also prohibits “unfair, unjustly discriminatory, or deceptive” practices.

As the dissent in *Wheeler* explains, courts have not required proof of anticompetitive harm to find that conduct violated Section 312. The 5th Circuit itself found that a stockyard’s failure to make prompt payment was unfair without considering harm to competition.¹⁶⁸ The 10th Circuit, in *Capitol Packing v. United States*, found that a stockyard’s refusal to sell better-quality cattle separately and loaning money to a beef packer were unfair and unjustly discriminatory acts under Section 312, without any consideration of anticompetitive harm.¹⁶⁹

The 8th Circuit also has not required anticompetitive harm for a Section 312 violation.¹⁷⁰ Recently, it reaffirmed this position, finding that a market agent’s conflict of interest violated the section.¹⁷¹

The 9th Circuit, which the *Wheeler* dissent also cites,¹⁷² explicitly rejected the anticompetitive harm requirement for Section 312 in *Spencer v. Department of Agriculture*.¹⁷³ The court found conduct inflating weight, failing to submit accurate

accountings of purchases to principals, and destroying documents were deceptive. The agents argued that there was no proof of “unfair practices of competitors.”¹⁷⁴ The court characterized the argument disparagingly:

*Petitioners stress “of competitors” as though the Act were nothing more than a mirror of the antitrust laws. They argue that since in none of the 17 transactions did the sales price exceed the prevailing market price, there was neither harm nor threat of harm to consumers.*¹⁷⁵

The 9th Circuit rejected the argument because the Packers and Stockyards Act “was not intended merely to prevent monopoly practices but also to protect livestock and poultry markets from unfair and deceptive business tactics.”¹⁷⁶ It concluded that a violation occurs “where the evidence establishes a deceptive practice, whether or not it harmed consumers or competitors.”¹⁷⁷

As a general matter of statutory interpretation, “identical words and phrases within the same statute should normally be given the same meaning.”¹⁷⁸

That rule of interpretation is especially apt here. Congress used the same terms—unfair, deceptive, and unjustly discriminatory—to limit how both packers and stockyards treat producers. Why would those terms have different meanings when applied to the conduct of packers—where conduct must be anticompetitive—versus stockyards, where there is no such requirement?

The *Wheeler*, *Pickett*, and *London* rulings provide no explanation for why the same terms would have different meanings in Sections 202 and 312.¹⁷⁹ *Been* makes a passing reference to *Capitol Packing*, describing only the part of the decision that found a certain practice was not deceptive “in part because the record lacked ‘evidence ... tending to show [order buying] lessens competition.’”¹⁸⁰ According to *Been*, “we have often suggested a showing of competitive harm can be determinative.”¹⁸¹

Being determinative does not mean it is required. More importantly, *Been* did not address that *Capitol Packing* upheld other violations of Section 312 without requiring anticompetitive harm.¹⁸²

The courts adopting the harm-to-competition requirement do not address the precedent defining the terms “deceptive,” “unjustly discriminatory,” and “unfair” under Section 312—a precedent that consistently finds violations without proof of anticompetitive harm. Because that precedent does not require anticompetitive harm for a violation, there is no consensus that Section 202 has such a requirement.

Misapplying antitrust principles in the context of the Packers and Stockyards Act

The 10th Circuit allowed the poultry growers' case in *Been* to proceed but required the plaintiffs to prove that the defendant's conduct had lowered, or was likely to lower, prices for producers in a way that increases retail prices. Antitrust law does not require a plaintiff to prove a price effect in the ultimate market. Rather, the antitrust laws prohibit the improper acquisition and use of market power. The laws protect anyone—a seller, a competitor, or a buyer—from those violations.¹⁸³

Therefore, if a buyer with market power engages in anticompetitive conduct that harms a seller, then that harm is sufficient for a violation of the antitrust laws—and should be sufficient for a violation of the Packers and Stockyards Act, even under the narrowest interpretation of that statute. The 10th Circuit itself, in the context of an antitrust case, has explained that a plaintiff in a monopsony case does have to prove harm to end-users.¹⁸⁴

As a matter of economics, there is no reason to think monopsony power at one level of distribution—the purchase of livestock—would lead to lower prices at the next level, the sale of beef. A packer having extracted below-market price in purchasing livestock will not pass those savings on to its buyers. If the market for beef is competitive, then the packer maximizes its profit by selling its beef at the market price. Lowering its selling price only reduces its profit. It cannot increase its output because that would require it to buy more cattle and increase the price it is paying for cattle.¹⁸⁵

If the monopsonist packer also has market power as a seller, then monopsony power exacerbates the effect in the retail market, leading to even higher prices. The packer buys fewer cattle to obtain the lower price. Because the packer has lowered its supply of cattle, it lowers its output of beef, which will increase prices in the retail market.¹⁸⁶

In contrast, if new technology or increased supply causes livestock prices to fall, to varying degrees, one would expect the packers to pass along all or some of that price decrease. Indeed, that is the difference between monopsony and competition.

Incorrect assessment of procompetitive justifications

Some courts have misapplied the antitrust rule of reason. The rule of reason is the primary test courts apply in determining whether conduct violates the antitrust laws. The plaintiff bears the initial burden of establishing that conduct harms com-

petition. The defendant may then demonstrate that the conduct is reasonably necessary to achieve a legitimate competitive benefit (in antitrust jargon, the restraint must be ancillary to a procompetitive benefit). The plaintiff may then prove either that the benefit could have been achieved with a less restrictive alternative or that the anticompetitive harm outweighs the procompetitive benefits.¹⁸⁷

In determining whether cattle purchase agreements pegged to a cash market price caused harm to competition, the *Pickett* court applied a different legal rule—one that placed a far greater burden on the plaintiff. The court dispensed with the requirement that the restraint at issue furthered the procompetitive benefit. Instead, it required that the contracts have “no pro-competitive justifications.”

The court accepted that the plaintiffs had met their initial burden of establishing a harm to competition based on evidence that agreements with formula pricing lowered prices in both the cash market and overall. In response, the packer argued its contracts provided four benefits:

- They were necessary because the packers’ competitors were using them.
- They provided the company with a reliable and consistent supply of cattle.
- They eliminated the cost of having to negotiate individually for 200,000 pens of cattle a year.
- They permitted the packer to match its purchasers with the needs of its customers.¹⁸⁸

Each of those benefits may justify relying on alternative marketing agreements instead of bidding for cattle in the open market, but the issue was whether pegging the price in the agreement to the cash market price harmed competition. In terms of assessing the benefits, the questions should have been how the pricing mechanism helped achieved the purported benefits and how the feed-lots benefited from the contracts. Any contract would likely achieve the proper benefits. The critical question is why the pricing mechanism, which decreased prices, was related to those benefits. Could the contracts achieve the benefits without suppressing prices? The court did not require any connection between the challenged restraint and the benefits.

Moreover, according to the *Pickett* court, to win its case, the plaintiff had to prove that “none of Tyson’s asserted justifications are real, that each one is pretextual.”¹⁸⁹ Because the plaintiff provided no evidence on three of the four justifications, the court granted judgment in favor of the defendant, the packer. The court deprived the plaintiffs of the opportunity to prove either that a less restrictive alternative

would have achieved similar results or that, on balance, the anticompetitive harms outweighed the procompetitive benefits.¹⁹⁰

Incorrect balancing of harms versus benefits

In addition to the legal errors just discussed, the *Pickett* court also misunderstood the economic evidence in the case. The court accepted that the agreements with formula pricing lowered prices for cattle sold both in cash transactions and by agreement. In addition, the court concluded that the agreements could improve the quality of the cattle.

In other words, feedlots were selling better cattle for a lower price. Those findings should have established that the agreements, on balance, were anticompetitive and harmed the feedlots. Because prices for cattle decreased, the court should have concluded that the anticompetitive harm outweighed the procompetitive benefits. The justifications may have benefited Tyson, but they did not benefit the feedlots.¹⁹¹

A stylized hypothetical example explains how a formula price can reduce costs for the buyer but still harm the rancher. Assume that it costs the packer \$22 to produce a 1 lb. steak. In this example, \$12 reflects the portion of the cattle purchased in a cash transaction, and \$10 reflects the packers' costs—slaughtering, packaging, transportation, and marketing costs—in transforming the cattle into a steak. According to the defendant, using alternative marketing agreements eliminated uncertainty in supply and lowered the transaction cost in purchasing beef. Both of those benefits reduce the packers' costs in acquiring cattle and transforming it into a steak.

Let's then assume those benefits reduce the packer's costs. Instead of spending \$10 to transform the cattle into a steak, it costs only \$5. If the packer continues to buy cattle at the same price (\$12), its total cost falls to \$17 from \$22. The packer might even be willing to increase the price it pays for the cattle. If the packer pays \$15 for the cattle, its overall costs of \$20 would still be less than if it were purchasing cattle through cash transactions. If the alternative marketing agreements are procompetitive, then the ranchers should receive the same or more for their cattle. There is no reason why an agreement that improves the packer's efficiency should lower the price the rancher receives.¹⁹²

Chapter 3: The Packers and Stockyards Act reaches market abuses in addition to addressing anticompetitive harm

Although recent circuit court decisions have required proof of harm to competition for a violation of Section 202 of the Packers and Stockyards Act, that begs the question: What does harm to competition mean under the statute?

Here, no consensus exists—it is hard to find even a clear definition. Arguably, the 5th Circuit has come the closest to defining harm to competition as an antitrust violation, explaining that its jurisprudence “leaves little doubt that §192(e) [Section 203(e) of the act] proscribes only anti-competitive conduct”¹⁹³ and suggests harm to competition requires impeding “genuine commercial rivalry.”¹⁹⁴ The 11th Circuit held that adversely harming competition requires showing that the conduct has “no pro-competitive justifications.”¹⁹⁵

The 6th Circuit has embraced the harm-to-competition standard but provided little explanation of its scope, implying that harm to competition means the conduct affects the marketplace—the plaintiff must show how the conduct affects pricing or “overall competition.”¹⁹⁶ A recent district court decision, *Morris v. Tyson Chicken*, interpreting *Terry*, however, rejected that the act required harm to competition between packers.¹⁹⁷

In contrast, according to *Been*, the Packers and Stockyards Act “intend[s] to prevent those practices that facilitate the packers’ arbitrary manipulation of prices and complete subversion of normal market forces.” Unlike the Sherman Act, in the 10th Circuit’s view, harm to competition under the Packers and Stockyards Act does not require “that monopoly power be acquired willfully,” nor does it require “the power to exclude competitors.”¹⁹⁸

Judicial interpretations, like the harm-to-competition requirement, cannot abrogate a statute. Limiting Section 202's prohibition of unfair or deceptive acts to only the conduct that violates the antitrust laws would have precisely that effect. In upholding the constitutionality of the Packers and Stockyards Act, the U.S. Supreme Court identified two categories of harm that Section 202 addresses:

*The Packers and Stockyards Act of 1921 seeks to regulate the business of the packers done in interstate commerce and forbids them to engage in unfair, discriminatory or deceptive practices in such commerce, or to subject any person to unreasonable prejudice therein, or to do any of a number of acts to control prices or establish a monopoly in the business.*¹⁹⁹

The first category—unfair, deceptive, discriminatory acts or undue preference—is not modified by antitrust language. Only the second category—“any number of acts to control prices or establish a monopoly”—is restricted to anticompetitive conduct. As the 9th Circuit explains, the Packers and Stockyards Act “was not intended merely to prevent monopolistic practices, but also to protect the livestock market from unfair and deceptive business tactics.”²⁰⁰

Within the legislative history, there is support for the two-category approach, although that history is substantial and not uniform. This view is consistent with U.S. Rep. Carl Anderson's (D-OH) statement during debate on the original bill in 1921. He explained how the Packers and Stockyards Act is broader than the Federal Trade Commission Act, saying:

*[The Packers and Stockyards Act] goes further than [the FTC Act] as it affects the public interest to a large extent, and the unfair competition or unfair practice as between the packer and the general public, the packer and the producer or the packer and any other agency connected with the marketing of live stock.*²⁰¹

In 1935, when Congress extended the act to cover poultry markets, the congressional committee report focused on the need to protect poultry growers from market abuses: “The handling of the great value of live poultry ... is attendant with various unfair, deceptive, and fraudulent practices and devices, resulting in producers sustaining sundry losses and receiving prices far below the reasonable value of their live poultry.”²⁰²

A broad consensus of scholarship agrees with this approach. Peter C Carstensen, the Fred W. & Vi Miller chair in law emeritus at the University of

Wisconsin Law School, explains the two goals as ensuring “markets were fair, reasonable and transparent” and as supplementing “the antitrust law’s prohibition on monopoly and conspiracy.”²⁰³

Using a slightly different nomenclature, University of Pennsylvania law professor Herbert Hovenkamp takes a similar view. He argues that Sections 202 (c), (d), and (e) “resemble language contained in Clayton Act provisions,” but “(a) and (b) appear to be tort-like provision[s] that are concerned with unfair practices and discrimination, but not with restraint of trade or threat of monopoly.”²⁰⁴ Attorney Michael Stumo and Douglas O’Brien, a former staff attorney at the U.S. Senate Committee on Agriculture, Forestry and Nutrition, further explain:

*Viewed another way, this statute addresses public policy notions of fairness from two perspectives: (1) in equitable (micro) terms concerning unjustifiable harm to individual farms or ranchers; and (2) in antitrust (macro) terms concerning harms to the overall competitive environment.*²⁰⁵

This report uses the terms anticompetitive harm and market abuses to delineate the two categories. (See Figure 3.)

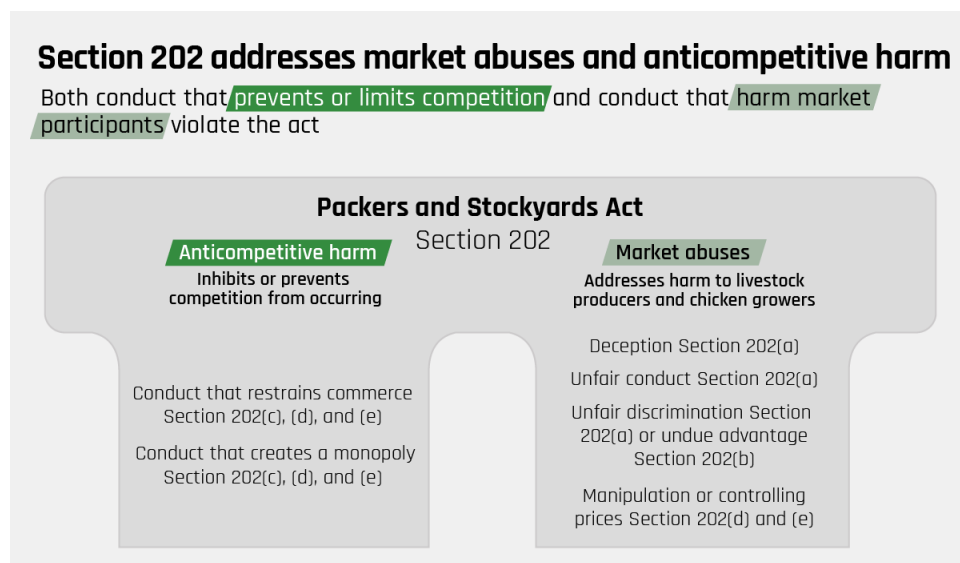


FIGURE 3

Section 202 prohibits a broader range of anticompetitive conduct than either the Sherman Act or the Clayton Act.

Source: Section 202 of the Packers and Stockyards Act, 7 USC Sec. 192.

Both of these categories are broader than the antitrust laws. Section 202 prohibits a broader range of anticompetitive conduct than either the Sherman Act or the Clayton Act. Like the Sherman Act, Section 202 explicitly prohibits agreements in restraint of trade and monopolization, but Section 202 also explicitly prohibits

acts, as opposed to only agreements, that restrain trade. In addition, it identifies the control or manipulation of price as a separate harm from monopolization or restraint of commerce.

The other category of prohibitions within Section 202 addresses unfairness, deception, unjust discrimination, and undue preferences. Unfairness and deception are not terms that appear in the Sherman Act or the Clayton Act. Unlike the antitrust laws, Section 202's prohibitions on unjust discrimination and undue preference are not limited to conduct that destroys or limits competition or creates a monopoly. These provisions address conduct that impedes a well-functioning market and deprives livestock and poultry producers of the true value of their animals. Taken together, these provisions seek to prevent market abuses.

Some of these market abuses can occur in the absence of market power. If a packer deceives the producer, then the deception, not the market, is determining the price. Similarly, a failure to disclose key information may convince a producer not to test the market. Other harms such as manipulating prices threaten market integrity, such as a packer rigging the system to obtain a better price.

Other conduct may be unfair because the packer has monopsony power. Market abuses also include conduct that undermines the competitive structure of livestock and poultry markets, such as undermining supply chain resiliency or other congressionally mandated goals.

A harm-to-competition requirement cannot alter the scope of the statute. While it makes sense to apply antitrust principles to claims alleging anticompetitive activity, whether as an unfair act or an act that restrains commerce, it would abrogate most of the statute to require antitrust harm for all claims under Section 202. That leaves two options:

- First, harm to competition means only anticompetitive harm, as the 5th, 6th, and 11th Circuits have suggested. Then, the requirement can apply only to claims that allege a restraint on competition or monopolization.
- Second, harm to competition encompasses market abuses in addition to anticompetitive harm, which is consistent with the 10th Circuit and would then apply to all claims under Section 202. This approach also limits the reach of Section 202, so that it does not apply to breach of contract or other commercial litigation.

Section 202 of the Packers and Stockyards Act is broader than the antitrust laws

Section 202 of the Packers and Stockyards Act explicitly incorporates the Sherman Act's operative language but expands its reach. The Sherman Act bans agreements that restrain trade and monopolization.²⁰⁶ Sections 202 (d) and (e) of the Packers and Stockyards Act go further. They ban sales, conduct, and courses of conduct that restrain commerce, not just agreements that do so.²⁰⁷

Sections 202 (d) and (e) also ban conduct that manipulates or controls pricing in addition to restraining commerce or creating a monopoly. Section 202 (c) is limited only to conduct—the apportioning of supply—that has “the tendency or effect of restraining commerce or of creating a monopoly” but does not include “manipulating or controlling price.” As a matter of logic and statutory construction, “manipulating or controlling price” is different than restraining commerce or creating a monopoly.

In short, Section 202 of the Packers and Stockyards Act subsumes and expands the reach of the Sherman Act. (See Figure 4.)

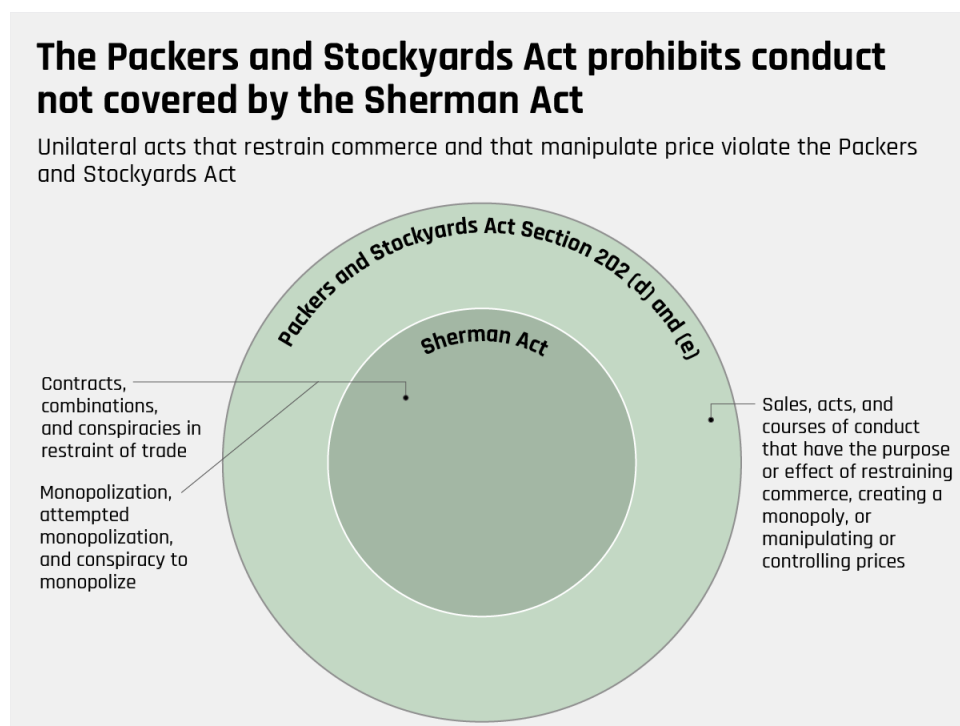


FIGURE 4

Section 202 of the Packers and Stockyards Act subsumes and expands the reach of the Sherman Act.

Source: Section 202(d) and (e) of the Packers and Stockyards Act, 7 USC Sec. 192(e); Section One and Two of the Sherman Act, 15 USC Secs. 1 and 2.

More specifically, Section 202 (a), which prohibits “unfair, unjustly discriminatory, or deceptive acts,” or Section 202 (b), which prohibits giving any undue or unreasonable preference (or prejudice) or advantage (or disadvantage), reach conduct not covered by the antitrust laws. Neither section includes “restraining competition” or “creating a monopoly,” as do Sections 202 (c), (d), and (e). Congress’ decision to include the antitrust language in some sections but not all of them means violations of Sections (a) and (b) do not require proof that the challenged conduct “has the tendency or effect of restraining commerce or of creating a monopoly.”

Further, if unfair conduct always requires proof of anticompetitive harm, then Sections (a) and (b) become superfluous. Any act that would violate Sections (a) or (b) would also violate Section (e). For instance, if a deceptive act were to violate Section 202 (a) only if it were anticompetitive, then it would also violate Section (e)’s explicit prohibition of any act that has the tendency or effect of restraining competition or creating a monopoly. That result contradicts a fundamental canon of statutory constructions: Courts should avoid interpretations that make statutory language superfluous.²⁰⁸

Section 202 (a) is also broader than the Federal Trade Commission Act, as it was understood in 1921, when Congress passed the Packers and Stockyards Act. At the time, the FTC Act barred “unfair methods of competition.” In passing the Packers and Stockyards Act, Congress banned any “unfair” or “deceptive practice”—without mentioning competition.²⁰⁹

Section 202 also has broad prohibitions on discriminatory practices. The Clayton Act has restrictions against price discrimination, but Section 202 applies to all conduct, not just pricing. Further, under the Clayton Act, discriminating on price is illegal only if its effect may be to substantially lessen competition or tend to lessen competition. Sections 202 (a) and (b) of the Packers and Stockyards Act have no limiting language. Section 202 (c) is the closest to the antitrust laws—it prohibits apportioning supply if it has the tendency or effect of restraining commerce or creating a monopoly.

Figure 5 provides a comparison of the statutory language. The red-highlighted text reflects limitations in the antitrust statutes that do not appear in the Packers and Stockyards Act, while the green-highlighted text identifies similar limitations in both the Packers and Stockyards Act and the antitrust statute. (See Figure 5 on next page.)

This report is not the first to document the statutory distinctions between the antitrust laws and the Packers and Stockyards Act. The U.S. Department of Agriculture and the U.S. Department of Justice as *amici* and by private plaintiffs have








Comparison of legislation			
Conduct covered by statutory language across the acts			
 limiting language that DOES NOT appear in the Packers and Stockyards Act  similar limitations in both the Packers and Stockyards Act and the antitrust statute			
 Packers and Stockyards Act	 Sherman Act	 Clayton Act	 FTC Act
Unfair conduct			
Sec. (a): Any unfair practice or device	No	No	Unfair  methods of competition
Deception			
Sec. (a): Any unfair practice or device	No	No	No
Discrimination			
Sec. (a): Unjustly discriminatory	No	Sec. 3: Price discrimination whose effect may be to substantially lessen competition or create a monopoly	No
Preferential treatment			
Sec. (b): Give undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage	No	Sec. 3: Discriminate in providing discounts, rebates, and advertising charges for the purpose of destroying competition or eliminating a competitor	No
Limitation of sales			
Sec. (c): Sales apportioning supply that have the tendency or effect of restraining commerce or creating a monopoly	No	Sec. 3: Sales conditioned on not using the goods of a competitor where the effect may be to substantially lessen competition or tends to create a monopoly	No

FIGURE 5

The red-highlighted text reflects limitations in the antitrust statutes that do not appear in the Packers and Stockyards Act, while the green-highlighted text identifies similar limitations in both the Packers and Stockyards Act and the antitrust statute.

Note: FTC Act as originally enacted in 1914.

Source: Text from the Packers and Stockyards Act, Sherman Act, Clayton Act and FTC Act.

made versions of these arguments. The dissent in *Wheeler* and Judge Hartz, in his concurrence and dissent in *Been*, expounded these arguments.²¹⁰

Yet the majority in *Wheeler* and *Been* and the unanimous courts in *London* and *Terry* rejected them. *London*, *Terry*, and the *Been* majority did not address the language of the statute; rather they relied on their reading of the precedent and policy justifications.²¹¹

The *Been* majority and the concurrence in *Wheeler* did address the arguments of the government and private plaintiffs.²¹² According to these courts, the terms “fair” and “deceptive” would render Sections (c) through (e) superfluous unless they are limited by “harm to competition.” In their view, any violation of Sections (c) through (e) would also be unfair. Instead, the two decisions conclude that Sections (c) through (e) do not cover all antitrust violation. Conduct such as “refusals to deal, boycotts, non-price restraints such as credit or quality terms, tying agreement, even mergers or joint ventures,” for example, would not fall in the scope of those sections.²¹³

According to the *Wheeler* concurrence, therefore Sections 202 (a) and (b) are catch-alls to address anticompetitive activity not covered by Sections (c), (d), and (e). Finally, according to these courts, reading Section (e), which bans acts that restrain commerce or create a monopoly,” to cover all antitrust violations would render Sections (c) and (d), which focus on apportioning supply that have the same effect, superfluous.

That statutory interpretation requires the Packers and Stockyards Act’s prohibition on “any course of business” or “any act” that restrains commerce or creates a monopoly to be narrower than the Sherman’s Act prohibition on agreements in restraint of trade and monopolization.²¹⁴ “Course of business” or “act” are both broader than “agreement.” The *Wheeler* concurrence argued that Section 202 (e) would not capture illegal refusals to deal without explaining how a refusal to deal is neither an act nor a course of conduct. Sections (c) through (e), then, cover all conduct that would violate the antitrust laws. Requiring proof of harm to competition for Sections (a) and (b) would therefore render them superfluous. Any conduct that would violate Sections (a) and (b) under that standard already violates Section (c), (d), or (e).

The *Wheeler* concurrence is also wrong that the plain meaning of “act” and “course of conduct” in Section (e) renders Sections (c) and (d) superfluous. Sections (c) and (d) explicitly cover sales to clarify the scope of Section 202. Without Sections (c) and (d), one could argue that “sales” is a technical term, and the failure to include it explicitly in Section 202 means Section (e) does not apply to sales.

The concurrence in *Wheeler* also explicitly rejected that “unfair” is broader than anticompetitive harm: Congress “intended, and made plain by its language, that injury to competition would be an element of the inquiry.”²¹⁵ According to the concurrence, in interpreting the phrase “unfair methods of competition,” the U.S. Supreme Court, in 1920, (*Federal Trade Commission v. Gratz*) held that the FTC Act required proof of injury to competition.

Because the Packers and Stockyards Act, enacted a year after *Gratz*, was modeled on the Federal Trade Commission Act, the concurrence concludes that Congress

incorporated *Gratz*'s holding into the Packers and Stockyards Act. Although the concurrence admits that the Supreme Court later overruled its interpretation of the FTC Act, the concurrence argues that reversal, coming after the passage of the Packers and Stockyards Act, is irrelevant for interpreting Section 202.²¹⁶

Judge Hartz explained, in his concurrence and dissent in *Been*, the error with that interpretation. The Packers and Stockyards Act condemns “unfair” acts without limitation, while the FTC Act, as drafted at the time, condemned only “unfair methods of competition.” The broader language in the Packers and Stockyards Act suggests Congress did want that statute to be broader than the Supreme Court’s interpretation of the FTC Act.²¹⁷ This view is consistent with Rep. Carl Anderson’s (D-OH) statement during debate on the original bill in 1921, that the Packers and Stockyards Act is broader than the FTC Act.²¹⁸

But the arguments rejected, explicitly or implicitly, in *Wheeler*, *Been*, *London*, and *Pickett* were in a different context. In those cases, the question was whether Section 202 requires harm to competition. Here, the question is whether Section 202 applies only to the type of harm covered by the antitrust laws. The answer is no: Section 202 is broader than the antitrust laws. Therefore, harm to competition must also be broader than antitrust violations. The language and scope of Section 202 defines harm to competition, which the report turns to next.

Section 202 addresses market abuses

The antitrust laws focus on how a company gains or maintains its market power; whether its conduct reduces, eliminates, or impedes actual or potential competition; and causes, or potentially causes, harm. Merely possessing monopoly or monopsony power is legal, as is a monopolist charging a higher-than-competitive price or a monopsonist obtaining a lower-than-competitive price.²¹⁹

A monopsonist’s or a monopolist’s actions violate the antitrust laws when they eliminate or prevent actual or potential competition. Price fixing is illegal because two or more companies are agreeing to eliminate price competition and are trying to raise prices for buyers or lower prices for sellers. Mergers between competitors are illegal when the elimination of the rivalry between the two may alter the market outcomes—create market power, limit innovation, or raise prices. Exclusionary conduct is problematic because a firm is creating or protecting market power by foreclosing an actual or potential competitor.²²⁰

Antitrust violations, however, are not the only way to harm competition. Conduct that prevents an honest give and take in the market deprives market participants of the benefits of competition, or as the Federal Trade Commission puts it, “impedes ... a well-functioning market.”²²¹ As the U.S. House of Representatives report on the 1958 amendments to the Packers and Stockyards Act explains, the statute assures both “fair competition and fair trade.” Its purpose is to protect farmers “against receiving less than the true market value of their livestock.”²²² Subversion of normal market forces by fraud, deception, unfair conduct, or market manipulation undermines the integrity of the market and deprives producers of the true value of their livestock.

The 10th Circuit has effectively applied this broader understanding of harm to competition, condemning acts that subvert normal market forces. In *Excel Corp. v. USDA*, the court ruled that a packer violated Section 202 (a) and a regulation implementing Section 202 (a) by failing to disclose that it had changed its grading system for hogs. The failure to disclose prevented hog producers from being able to compare the defendant’s price to its competitors.²²³

Refusing to honor a draft to pay for livestock also violates Section 202 (a).²²⁴ As the 10th Circuit explains in *Hays Livestock Commission Co. v. Maly Livestock Commission Co.*, the conduct was “an impediment to competition.”²²⁵ And the 10th Circuit upheld the U.S. Department of Agriculture’s finding of a violation of Sections 202 (a) and (b) based on commercial bribery in *National Beef Packing Co. v. Secretary of Agriculture*.²²⁶ In *Been*, adopting the harm-to-competition standard, the 10th Circuit cited both these cases approvingly.²²⁷

Although not discussed explicitly in *Been*, in *Capitol Packing v. United States*, the 10th Circuit found that a packer’s refusal to deal with a specific commission firm without reasonable cause violated Section 202 (a). In the same vein, a packer obtaining a loan and paying interest to an agent was an undue preference under Section 202 (b).²²⁸ None of these cases considered the types of issues that would be critical in an antitrust case: whether the packers had market power, whether the conduct eliminated competition, or whether it had market wide affects. The harm was denying producers the benefits of an open and fair marketplace.

The U.S. Department of Agriculture has taken a similar view of harm to competition. In *Machlin Meat Packing Co.*, for example, the agency found that the failure to make full payment and to comply with the terms of purchase agreements can be an unfair and deceptive practice under Section 202 (a).²²⁹ The agency also considered the rule “long held” and noted its “consistent interpretation of the statute.”²³⁰

The ruling rested on the factual finding that the defendant's conduct was "a deliberate policy of noncompliance" and not "bona fide disputes as to contract terms."²³¹ The agency explained that the conduct was "unfair to sellers" and "unfair competitively with respect to packers."²³² "Unfair competitively with respect to packers" does not mean an antitrust violation; rather, the defendant's action likely prevented honest dealers from purchasing the livestock and inhibited the market.

Check kiting also is a type of conduct that the U.S. Department of Agriculture has held violates Section 202.²³³ Check kiting, a type of fraud in which a person provides a check but does not have funds in the account to cover the amount of the check, places "farmers and ranchers at great risk for financial disaster."²³⁴ The practice therefore violates "the principal provision of the Act."²³⁵ Check kiting both deprives market participants of a market-determined price and creates risks for producers without justification in violation of the act.²³⁶

Other examples of market abuses include manipulating prices or using price-setting mechanisms that deny livestock producers the true value of their livestock. Regulating markets to improve transparency, integrity, and limit abuse by dominant actors is a common feature in U.S. law. Both the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission regulate financial markets to achieve these goals.²³⁷

These types of protections can be particularly important in concentrated markets or where one party has significantly more market power than the other. In markets with large economies of scale, as seems to be the case with processing livestock, increased size can mean lower costs and increased output.

Nevertheless, Steven Y. Wu, associate professor of agricultural economics at Purdue University, and James MacDonald, professor of agricultural and resource economics at the University of Maryland, explain that the distribution of economic gains may not be favorable to growers.²³⁸ Even if markets tend toward consolidation, they conclude, "it is still possible to use law and regulation to limit the capacity of large buyers to exploit their position to the detriment of sellers and the market process over time."²³⁹

Deception, check kiting, and market manipulation all can occur without a firm having market power. Some conduct becomes a market abuse when one party has significantly greater bargaining power than another. In such situations, the government, by law or regulation, may limit how a firm can use its power to harm its suppliers or customers.²⁴⁰ The firm with bargaining power may have to provide reasonable notification of cancellation (as utilities do) or other due process. The rules establish requirements that reflect the protections that market participants would have in a competitive marketplace.

Market power is an extreme case of bargaining leverage. In the context of the Packers and Stockyards Act, the U.S. Department of Agriculture can prohibit conduct by firms with market power that deprive growers and ranchers of those types of market protection. Prevention of these abuses is critical to ensure producers receive the true value of their livestock.

Limitations of the Packers and Stockyards Act

Section 202 does not include every run-of-the-mill contract dispute, every case, or every action that does not benefit producers. Defining harm to competition to encompass protections for market participants and market structure requires proof that conduct has a broader effect than an ordinary commercial or contract dispute. In the *Machlin* case, the USDA ruling specifically found that the failure to abide by the contract was not a bona fide contract dispute but a deliberate policy.

Similarly, some cases involve decisions by packers to reduce their production in response to financial struggles, including potential bankruptcy, and changes in market demand, which leads the producers to close facilities and terminate contracts. The producers successfully defended these actions.²⁴¹ If the packers were merely responding to competitive forces and not exploiting their market power, then their actions do not harm competition and thus are not Packers and Stockyards Act violations.

Chapter 4: Using the Packers and Stockyards Act to address market abuses

The U.S. Department of Agriculture has a critical role in interpreting and applying Section 202 of the Packers and Stockyards Act. Although there is a dispute over how much deference courts should give the agency with regard to acts involving the poultry dealers,²⁴² its formal involvement in developing the law remains the best approach. The Packers and Stockyards Act applies to a specific, heavily regulated industry—livestock and poultry markets.

The agency was “chosen as the overseer of this industry” because of its expertise and the unique dynamics of the industry.²⁴³ As one court put it, “great deference should be accorded the Secretary of Agriculture’s construction of the [Packers and Stockyards Act].”²⁴⁴ The agency’s technical expertise puts it in the best position to judge the impact of conduct and determine whether it is unfair, for example, or otherwise violates the act.

This chapter examines the specific provisions of Section 202 and explores how the U.S. Department of Agriculture, through adjudication or rulemaking, could implement those provisions consistent with both Section 202 and the broader, correct definition of harm to competition that aligns with the statute. The rules may be general, such as a definition of unfairness, or specific to a type of conduct, such as when the termination of a grower contract is unfair.

Finally, the chapter examines the interaction between the statute, the unique features of livestock and poultry markets, and the agency’s responsibility to implement congressionally mandated goals. Congress entrusts the U.S. Department of Agriculture to promote many market outcomes and policies, from protecting small producers to strengthening food-chain resiliency, among others. Those goals, in turn, must inform whether conduct violates the act.

Deception

The prohibition on deceptive acts in Section 202 (a) protects market participants and market integrity. Deception causes harm whether a party has market power or not. For example, FTC policy defines deception as a material representation, omission, or practice that is likely to mislead a reasonable consumer.²⁴⁵ The commission has found a broad range of conduct to fall within the definition of deceptive:

*Practices that have been found misleading or deceptive in specific cases include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations.*²⁴⁶

The U.S. Department of Agriculture could issue a regulation defining deceptive acts under the Packers and Stockyards Act to protect livestock and poultry producers. For instance, chicken integrators failing to disclose material facts about how they compensate growers or knowingly providing sick chicks to contract farmers would be deceptive acts.

Contract farmers have been concerned that chicken integrators will punish farmers who criticize or join associations of contract farmers. One punishment is providing the farmer with sick chickens, which ensures the farmer's production will be suboptimal and, eventually, justify termination.²⁴⁷ As discussed below, retaliation should often be sufficient to prove a violation. But not disclosing that one farmer was receiving worse chicks than others is likely a material omission because the farmers are competing against each other in the tournament.

Similarly, an integrator's failure to disclose that it had changed the quality of chicks it provides a grower would be no different than the failure to disclose a change in the weighing formula condemned in *Excel*.²⁴⁸

Harm to competition, properly defined, should encompass deceptive acts without additional proof. The U.S. Department of Agriculture would, however, face arguments that cases such as *Wheeler* and *London* require that the deception causes harm to competition, which means the conduct is anticompetitive. In neither case was deception at issue, however, so those statements are dicta, not holdings. The reasoning for the requirement, as discussed above, is weak. Further, *Been* explicitly rejected a harm-to-competition requirement for deceptive acts.

Based on the evidence the agency develops regarding certain practices within the industries, it could develop evidentiary presumptions that would lead it to infer that deception occurs.

For instance, the agency could assess how much information farmers should receive about the status of the chicks they receive. It could then develop a rule that identifies what information the contract farmers must receive to effectively compete in the tournament. A failure to provide that information would be deceptive. The rule also could allow a defense if the poultry integrator provides evidence that other growers received the same information or the same quality of chickens. The failure to disclose would not disadvantage any grower.

Unfair acts

Section 202 (a) also forbids any unfair practice or device. Some courts have bristled at the seeming ambiguity of the word “unfair.”²⁴⁹ Requiring harm to competition, particularly when equating it with anticompetitive harm, can be seen as an attempt to address that concern. Unfortunately, harm to competition is equally vague.²⁵⁰

As administrator of the Packers and Stockyards Act, the U.S. Department of Agriculture can and should develop a rule defining unfairness that clarifies its meaning and addresses the underlying concerns about the term’s breadth. It could develop a rule to protect livestock and poultry producers that is similar to the Federal Trade Commission’s unfairness rule, which Congress has codified.

Attorneys Stumo and O’Brien identified the FTC Act and its unfairness rule as a basis for the meaning of the Packers and Stockyards Act.²⁵¹ Unfair conduct would have a three-part test:

- The act or device must cause substantial injury.
- The injury is not reasonably avoidable.
- The injury is not outweighed by countervailing benefits.

This rulemaking approach provides a principled way to analyze conduct. It acknowledges the need to protect producers from marketplace abuse but recognizes the need to assess the benefits a practice can provide. It defines “unfair” in concrete terms, providing an administrable test. It addresses the underlying concerns raised by the *Wheeler*, *Pickett*, and *London* courts: that the term “unfair” is too vague and, without principled limitations, cedes too much discretion to the agency.

Defining unfairness

The Federal Trade Commission has defined, and Congress has codified, unfair practice as an act or practice that “causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”²⁵² A substantial injury can be “economic harm or a threat to health or safety.”

“Substantial” can mean significant harm to one person or a small harm that affects many people.²⁵³ Additionally, “substantial” can depend on the size of the market or the company.²⁵⁴

Requiring that the consumer cannot reasonably avoid the harm indicates that the seller has taken “advantage of an obstacle to the free exercise of consumer decision making.”²⁵⁵ Finally, the Federal Trade Commission will weigh the harms against the benefits of the conduct at issue. The calculus includes considering the cost of preventing the harm, including the impact of the remedy on society.²⁵⁶ The benefits to the defendant are not part of the calculus.²⁵⁷

The commission has used its unfairness authority to stop a variety of practices, among them:

- Failure to disclose potential risk of harm²⁵⁸
- Unilateral breaches of contract terms²⁵⁹
- Inclusion of specific terms in consumer finance agreements²⁶⁰
- Unilateral modifications of contract provisions²⁶¹
- Collection or charging of fees not included in the contract²⁶²
- Limiting internet speeds when the contract did not explicitly allow the practice²⁶³

Courts also have interpreted “unfair” in state consumer protection statutes to include racial discrimination.²⁶⁴

Principles such as the FTC unfairness rule could help address many concerns in livestock and poultry markets. The U.S. Department of Agriculture could define “unfair” to apply to both consumers, as well as livestock and poultry producers. Unfairness could apply to contract terms that shift risk to growers without offsetting benefits or

that impose heavy financial burdens on growers, such as requiring massive investment by the grower with no protection from arbitrary or unjustified termination.

For years, chicken growers have raised concerns that they have no choice but to make substantial investment and then hope and pray that the integrator does not cut them off. Actively pursuing rulemaking around “unfairness” could reduce these fears and level the playing field for contract farmers. This why the U.S. Department of Agriculture could consider a rule along the following lines:

Where a chicken grower has only one or a few options to contract with, it is an unfair practice for the integrator to require a contract farmer to make substantial capital investment and terminate (or fail to renew) the relationship without cause before the grower has had a reasonable opportunity to recover the cost of the investment.

To determine whether substantial injury occurs, the agency would need to determine how long it takes chicken growers to recover substantial capital investments, how often integrators terminate growers’ contracts, and the cost to the farmers. Limiting the rule to a situation where the chicken grower has only one or a few options establishes that the chicken grower cannot reasonably avoid the financial commitment.

The only alternatives would be for them to stop chicken farming altogether or to move to a region with multiple chicken integrators. The agency would need to consider any offsetting benefits of the practice and the costs such a rule might have in making it harder for people to enter and succeed as chicken growers, as opposed to creating a system that churns through growers.

Often, these investments improve the capacity and efficiency of chicken farming, yet those benefits do not by themselves justify shifting risk to the producers. Rather, USDA officials would need to determine how shifting risk to the grower is a benefit. If not, then the risk-sharing looks to be a way for the integrator to take all or nearly all the benefits of investment. Assuming such evidence exists, the agency could conclude that requiring the grower to bear the risk is unfair and develop a rule along the lines above.

If a contract grower had many potential contracting partners, the integrator would be competing for farmers and would need to share the benefits of investments with farmers. The lack of competition creates the opportunity for the buyer to exploit an obstacle to the producers’ decision-making, akin to the concern that the Federal Trade Commission addressed in its unfairness rule.²⁶⁵

The type of rule discussed can address a broad range of conduct and contract terms if there is sufficient evidence. Because livestock and poultry growers usually face significant monopsony power, the chicken producer will be unable to avoid the conduct. In practice, the case will turn on whether the harms of the challenged practice outweigh its benefits. The U.S. Department of Agriculture should be skeptical of claims that assert lower downstream costs as a benefit.²⁶⁶

Depending on the evidence, the USDA rule could address the tournament system used in chicken markets or specific ways integrators implement the tournaments. It could address due process issues, such as notice, termination, and retaliation.

Potential legal challenges

Certainly, this approach would meet resistance in certain circuits. The three-part unfairness test, however, should be acceptable in those circuits that have not adopted the harm-to-competition requirement. Similarly, it should satisfy the 10th Circuit's approach, given the case law that conduct falling in the market abuse category violates the statute.

As long as substantial evidence supports the agency's determination, it could also, by regulation or adjudication, address conduct that undermines market integrity, such as the failure to disclose information, and abuses that, on balance, harm producers, such as imposition of onerous contract terms. This conduct impedes a well-functioning market and deprives producers of the full value of their livestock.

Unlike deception, however, multiple courts have explicitly held that the Packers and Stockyards Act requires proof of harm to competition for an act to be unfair.²⁶⁷ Even in those circuits, however, the U.S. Department of Agriculture could argue that the three-part test addresses harm to competition by undermining the market or exploiting existing monopsony power to the detriment of producers.

If conduct is unavoidable, harms producers, and the harms outweigh the benefits, then that should satisfy any reasonable interpretation of harm to competition, particularly because Congress has codified a similar test. Only by explicitly holding that the Packers and Stockyards Act prohibits only conduct that violates the antitrust law could a court reach the opposite view. Such a holding would create a clear issue for U.S. Supreme Court review.

Through either regulation or adjudication, the USDA interpretation would receive deference from the courts, although how much deference is uncertain. Further, the courts would be dealing with an affirmative definition of "unfair"

rooted in the statutory text, which would provide both guidance and limitations on the scope of the term.

Other potential definitions of unfairness

Using the FTC rule as a model has certain advantages. Courts have accepted it. It is well-understood. The central test of balancing benefits and harm ties the conduct directly to its impact on the market and competition. Yet other definitions of unfairness do exist. In 2010, the U.S. Department of Agriculture issued proposed regulations that follow a different option.

Specifically, the agency reaffirmed that the Packers and Stockyards Act does not require proof of harm to competition. The proposed rules:²⁶⁸

- Clarified that the Packers and Stockyards Act reaches anticompetitive conduct beyond the reach of the antitrust laws
- Interpreted harm to competition as largely the same as antitrust harms
- Defined specific acts as unfair
- Defined the terms “manipulation of prices” and “undue or unreasonable preference or advantage”
- Addressed the use of forced arbitration clauses

Substantively, the 2010 proposed rule and the approach discussed here lead to comparable results. The approach proposed here focuses on what harm to competition must mean to be consistent with the statute. It offers an affirmative definition of unfairness, which likely has more appeal to the current judiciary but may limit the agency’s flexibility to address specific conduct.

Another approach, suggested by some, would be a broader definition of unfairness. Attorneys Stumo and O’Brien propose an unfairness definition based on the FTC cigarette rule:

Any practice by packers, dealers or marketing agencies is unfair if it: (a) violates notions of common law, statutory, or other established concept of unfairness; (b) it is immoral, unethical, oppressive, or unscrupulous; and (c) it causes substantial injury to growers,

*farmers, or ranchers which injury is not reasonably avoidable by growers, farmers, or ranchers.*²⁶⁹

This definition provides more flexibility than the FTC unfairness rule. That flexibility is both a strength and a weakness. Because many courts have imposed limitations on the broad language of the Packers and Stockyards Act, reflected by the harm-to-competition requirement, tying the definition to words such as “immoral, unethical, oppressive, and unscrupulous” may trigger a similar reaction.

This section of the report does not to advocate for a specific rule or rules. Rather, it establishes that the U.S. Department of Agriculture has the authority and opportunity to define the meaning of “unfair” and address issues that harm livestock and poultry growers.

Unjustly discriminatory and undue or unreasonable preference/prejudice or advantage/disadvantage

“Unjustly discriminatory,” which appears in Section 202 (a) and “undue or unreasonable preference,” which appears in Section 202 (b), provide other tools to protect producers from market abuses. The substantial bargaining power, which often involves monopsony power, of packers—particularly hog contractors and chicken integrators—leaves the growers at the whim of the packers. Bars on unjust discrimination and undue preference or disadvantage protect producers from arbitrary decisions that cause substantial harm.

The U.S. Department of Agriculture can use these provisions to deal with a broad range of conduct, such as inappropriate terminations of producers’ contracts.

The terms trace their origins to the Interstate Commerce Act, according to the concurrence in the *Wheeler* ruling.²⁷⁰ Just as the Packers and Stockyards Act forbids “unjustly discriminatory” action, the Interstate Commerce Act forbids “unjust discrimination.” The similarities on undue or unreasonable preference are more striking. Figure 6 compares the statutes, highlighting the similar text. (See Figure 6 on next page.)

The Packers and Stockyards Act provisions on undue preferences track Interstate Commerce Act	
Comparing the similarities of 202 (b) of the Packers and Stockyards Act to Section 3 of the Interstate Commerce Act	
Relevant portions of the Packers and Stockyards Act Section 202 (b)	Relevant portions of the Interstate Commerce Act Section 3
make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect	make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever

FIGURE 6

Just as the Packers and Stockyards Act forbids “unjustly discriminatory” action, the Interstate Commerce Act forbids “unjust discrimination.”

Source: Section 202 (b) of the Packers and Stockyards Act, 7 USC Sec. 192(b); Section 3 of the Interstate Commerce Act.

As the *Wheeler* concurrence explains, “One concerned trains; the other, meatpackers. Otherwise, they are identical.”²⁷¹ Further, according to the concurrence, the meaning of these terms “had been firmly established” under the Interstate Commerce Act and required proof of harm to competition.²⁷²

The cases, however, do not require proof of harm to competition. In all the cases discussed by the concurrence dealing with both terms, the defendant faced charges that it treated customers differently. According to the court, “railway companies are only bound to give the same terms to all persons alike under the same conditions.”²⁷³ If the conditions are different, then different treatment is merited.²⁷⁴

Further, “competition between rival routes is one of the matters which may lawfully be considered in making rates.”²⁷⁵ Differential treatment driven by competitive forces is not a violation. Acknowledging that competition can justify differential treatment of customers is different than requiring the plaintiff to prove anticompetitive harm to establish a violation.

The U.S. Department of Agriculture could incorporate the concept either by requiring proof that competition did not cause the differential treatment or by allowing packers to prove that competition forced the packer to adopt differential treatment. Regulations issued at the end of the Trump administration did incorporate the concept as a factor the secretary of agriculture would consider in determining whether a company was providing an undue or unreasonable advantage or disadvantage, but the rules did not explain what would constitute a violation or a defense.²⁷⁶

Further, these provisions are not absolute prohibitions on treating parties differently. The preference must be “undue” or “unreasonable.” The discrimination must be “unjust.” These terms require definitions. Treating growers differently because of difference in quality, reliability, or performance are appropriate and should not violate this provision.

At the same time, USDA rulemakers could use this provision to address market abuses. If contract farmers receive more onerous terms in markets where chicken integrators have little or no competition, for example, then the more onerous terms could be declared an unreasonable disadvantage or unjust discrimination. Contract terms that an integrator obtains by virtue of its monopsony power unreasonably harm the growers.

Contract termination as unjustly discriminatory

Adopting the competition justification would still leave the U.S. Department of Agriculture with authority to address a wide array of issues. Termination of a grower’s contract provides one example. Because the agency has both industry expertise and investigatory authority, it should be able to develop a principled rule that prevents discriminatory terminations while allowing packers and growers to promote best practices, cost-effective techniques, and quality.

Ideally, it would identify a set of conditions where the termination is presumptively unfair. The rule could take many forms:

- Termination of a grower’s contract is unjustly discriminatory if similarly situated growers were not terminated unless competitive circumstances justify the differential treatment.
- A packer’s termination of a broiler producer’s contract is unjustly discriminatory if the packer has monopsony power, and it did not terminate contract growers that were similarly situated to the terminated grower, unless justified by economic conditions beyond the packers’ control.
- A termination of a grower’s contract is illegal if the grower had only fewer than a set number of potential buyers and if the buyer treated the grower differently than other similarly situated growers. A packer could overcome the presumption by proving that the adverse act had an acceptable business reason.

In developing a rule, the agency would need to define “similarly situated considering all relevant factors,” including whether the producers are in the same situation.

How could this be defined? Producers who raise higher- or lower-quality chickens or who protect the environment to different degrees are not similarly situated. All three of these rules would incorporate a competition defense consistent with Interstate Commerce Act cases. The rules would allow packers to terminate growers because demand has fallen or because the integrator faces bankruptcy.

If, however, an integrator closes a facility in response to economic factors but a willing buyer who would continue the operation exists, then the integrator's refusal to sell would likely violate either this rule or be an unfair practice as defined above.

The justification for any of these rules would be similar. Both Sections 202 (a) and (b) protect contract growers from abusive market practices. When a grower faces a packer with monopsony power, the packer can use its power to extract value from a grower without any offsetting benefits or where the harm to the contract farmer outweighs any benefits.

Specifically, a contract farmer may be terminated for arbitrary reasons, reasons unrelated to their performance, or for no reason at all. Because the grower does not have alternatives, the grower needs protection. These rules would limit the ability of packers to use their economic power indiscriminately.

This approach should satisfy the 9th and 10th Circuits' approaches. Both the 6th Circuit in *Terry* and the 11th Circuit in *London* rejected discriminatory termination claims for lack of harm to competition. In *Terry*, dismissal was appropriate because the plaintiff made "no allegations regarding the effect of Defendant's actions on the pricing of poultry or on overall competition in poultry industry."²⁷⁷ In *London*, the court pointed to the lack of evidence as the total number of growers or buyers or the percentage of the chicken market the buyer controlled.²⁷⁸

The second or third proposed rule above, if supported by the evidence, should satisfy even these more stringent standards. They rest on findings that the buyer has monopsony power, which addresses the concerns raised in *London*. The *Terry* court provided no guidance on what it means by harming "overall competition." If the U.S. Department of Agriculture were to find that arbitrary or retaliatory terminations prevent growers from reporting violations of the act, for example, then they would have a basis for saying the conduct affects overall competition.

The rule would address terminations based on racial discrimination where the packer has a dominant market position. In such a case, the grower could establish differential treatment, and the packer would need to prove an acceptable reason for the differential treatment, which excludes racial or other discriminatory animus.

Addressing racial discrimination

Terminating a chicken grower based on race should violate Section 202 (a) as unjustly discriminatory. The U.S. Department of Agriculture could develop a rule that terminating a grower based on race violates the statute.

Although proof of racial discrimination causing economic harm would likely satisfy the definition of unjustly discriminatory under the statute, providing proof would be challenging. Racial or other discriminatory animus is often unspoken or even hidden by near pretextual justifications. U.S. law has many rules against racial discrimination, such as the *Batson* rule that forbids striking jurors based on race, but there are concerns that the rules often fail to effectively prevent discrimination practice.²⁷⁹

The broader rules offered above might be more effective in addressing racial discrimination despite not explicitly referring to race. Racial animus would be one of many unacceptable justifications, and the burden would be on the integrator to establish a legitimate justification.

Manipulating or controlling prices

The final unique phrase in Section 202 is “manipulating or controlling” prices. The phrase appears only in addition to the phrases “creating a monopoly” and “restraining commerce.” Those later phrases invoke traditional antitrust claims. As such, “manipulating or controlling” must capture conduct that general antitrust laws do not.

Arguably, the 5th Circuit previously discounted the broader conduct argument, appearing to limit control and manipulation to anticompetitive conduct.²⁸⁰ In *Ager-ton v. Pilgrim’s Pride Corp.*, the plaintiffs—contract farmers—alleged that Pilgrim’s Pride had idled a chicken processing facility in the hopes of reducing excess supply and increasing prices. As a result, Pilgrim’s Pride terminated contracts with 163 chicken growers, and the terminated farmers sued, alleging that Pilgrim’s Pride had manipulated or controlled prices in violation of the Packers and Stockyards Act.²⁸¹

The 5th Circuit reversed the judgment in favor of the growers “because PPC’s unilateral decision to reduce production was neither illegitimate nor anticompetitive.” On the facts, as detailed by the court, the result is unremarkable. Any company, in any industry, facing bankruptcy and a glut in the marketplace, as Pilgrim’s Pride was, will reduce its output to reduce its losses.

The 5th Circuit reaffirmed that the Packers and Stockyards Act required proof of anticompetitive harms.²⁸² And it stressed that “it is lawful for a business to independently control its own output.”²⁸³ Nevertheless, the court’s language suggests a broader definition of manipulating or controlling prices. Conduct can manipulate or control price if it is “anticompetitive” or “illegitimate.” In defining manipulation, the court looked to the Securities and Exchange Act, which focuses on conduct that artificially affects prices.²⁸⁴

“Manipulating or controlling” should include market manipulation. Market manipulation is “the creation of an artificial price by planned action” by one or more actors.²⁸⁵ It undermines market integrity and transparency. Although market manipulation can be an antitrust violation and may be more likely when a firm has market power (either monopoly or monopsony power), neither is required.²⁸⁶ Rather, market manipulation involves exploiting market frictions, bargaining leverage, and information asymmetry to artificially increase or decrease the market price. These tactics are most likely to harm smaller participants—retail investors in securities markets, for example.

Financial markets have many rules to prevent manipulation. These rules may mandate disclosure of information (order type), regulate transactions off the exchange, or limit the ability of actors to be on both sides of a transaction. The rules can be very technical. The U.S. Securities and Exchange Commission, for example, requires exchanges to offer the same high-speed data to all investors and traders on the same terms and at reasonable prices.²⁸⁷

The U.S. Department of Agriculture once administered the Commodities Exchange Act.²⁸⁸ It was during that time that courts developed a four-part test for unlawful price manipulation, specifically that:

1. The accused had the ability to influence market prices.
2. They specifically intended to do so.
3. Artificial prices existed.
4. The accused caused the artificial prices.

At a minimum, manipulating or controlling prices should apply to any conduct that satisfies those four elements.

In the *Pickett* ruling, however, the court interpreting this provision held that the plaintiff must “show an adverse effect on competition.”²⁸⁹ It then assessed the case

under antitrust principles, although misapplying antitrust law.²⁹⁰ The *Pickett* decision never addressed why the market manipulation test would not establish harm to competition. Conduct that alters the market price for cattle usurps the market and competition in setting prices.

Had the court focused on market manipulation, the outcome might have been different. The court accepted the jury's finding that the alternative marketing agreements, pegging the contract price to the cash price, did lower prices, which would have satisfied elements 1, 3, and 4 detailed above. The only question would have been intent and would have focused on why the defendant used the price-setting mechanism that it did. If other types of arrangements achieve all or nearly the same benefits as the alternative marketing agreements, then that would create a strong inference that packers were using those agreement to lower prices in cattle markets. The U.S. Department of Agriculture could address the conduct as a form of market manipulation if the evidence shows how a practice short-circuits the market dynamics to lower cattle prices.²⁹¹

This provision gives the agency the authority to police and prevent actions in which market participants exploit market frictions and asymmetries to artificially alter the market price.

Protecting the competitive structure of livestock and poultry markets

The U.S. Department of Agriculture is responsible for developing, implementing, administering, and overseeing programs to achieve a broad range of goals, including protecting small producers, biodiversity, and supply chain resiliency. How practices affect those goals could affect whether the conduct violates the Packers and Stockyards Act.

Harm to competition includes market structures or conduct that would frustrate those goals. For example, the agency's Farm Loan Program provides loans and loan guarantees to "help farmers and ranchers get the financing they need to start, expand or maintain a family farm."²⁹² Loan guarantees eliminate or reduce the risk of default and encourage lending to small farmers in the hopes of protecting their interests. A problem can arise if the farmers, including chicken growers, face either monopsony power in selling or monopoly power when buying supplies.

Similarly, a chicken integrator can impose onerous terms, shift risk, or arbitrarily discriminate against a chicken grower, knowing that if one goes out of business,

the loan guarantees make it easy for another to pop up. The loan guarantees make banks less concerned about the process because their risk is limited.²⁹³

In a competitive market, where livestock or poultry growers have many potential buyers, this dynamic is unlikely to occur because growers will choose buyers who do not extract the benefit. Because these industries—particularly chicken production—are highly concentrated, growers do not have those options. If buyers (chicken integrators) act on those incentives, then they have undermined the goal of the loans and loan guarantees. Instead of taxpayer money directly or indirectly bolstering a vibrant market of smaller producers, it follows a circuitous route from the taxpayer through the farmer to lenders and large packers.

It would be Kafkaesque if the U.S. Department of Agriculture, in implementing programs to promote a specific competitive structure, must sit by as market conduct uses those programs to destroy the very structure Congress charges the agency with promoting. Rather, harm to competition should include conduct that undermines competitive structures that Congress has charged the agency with implementing.

In response to the COVID-19 pandemic, the agency is administering programs that seek to bolster the food supply chain and make it more resilient. It has dedicated more than \$1 billion in American Rescue Plan funds to expand meat- and poultry-processing capacity.²⁹⁴ This includes the Food Supply Chain Guaranteed Loan Program, which creates \$1 billion in loan guarantees to promote “private investment in process and food supply infrastructure.”²⁹⁵ Market conduct that undermines those programs and supply chain resiliency should also be treated as anticompetitive behavior subject to regulation.

Supply chain resiliency poses a particular challenge. Across the economy, since the 1980s, food supply markets have improved efficiency and lowered costs. Just-in-time supply, less inventory, single-source supply, and economies of scale decreased costs. In the short term, those developments were successful and beneficial. But limited supply and fewer outlets increase the impact of a systemic shock.

A coronavirus outbreak at a few or even one meatpacking plant could—and did—cause significant shortages. It may be that packers underestimated the systemic risk in the system prior to the COVID pandemic. Or it may be packers were making decisions that maximized short-term profits. Where a business must balance a lower-cost model that increases profits today versus a more costly model that reduces the risk of systemic shocks, owners and managers may rationally conclude that risk is likely to occur far in the future.

Because the full cost of a fragile supply system falls on everyone, the companies making the decisions do not bear the actual cost of their conduct. These factors all suggest that conduct in livestock and poultry markets will tend to undervalue supply chain resiliency. Such conduct is a harm to competition. The U.S. Department of Agriculture is uniquely situated to consider the relationship of multiple factors within the context of the livestock and poultry industry.

Another concern in livestock markets is the problem with price discovery. As transactions move from negotiated trade to private contracts, packers, given existing concentration, have superior knowledge about pricing than the operators of the feedlots. Such asymmetries also could qualify as harm to competition.²⁹⁶

This report is addressing whether the U.S. Department of Agriculture can include these considerations in enforcing the Packers and Stockyards Act. It is a separate question whether such conduct is occurring and whether the agency should pursue a Packers and Stockyards Act violation. Conduct that undermines supply chain resiliency or other government programs, however, harms competition and can be subject to the Packers and Stockyards Act.

Chapter 5: Using the Packers and Stockyards Act to address anticompetitive harm

There is no dispute that violations of the general antitrust laws, when committed by a packer or chicken integrator, also violate the Packers and Stockyards Act. A violation of Section 202 (c) requires proof that conduct (apportioning supply) has the tendency or effect of “restraining commerce or of creating a monopoly.” Sections 202 (d) and (e) forbid sales and “course of business” or “acts” with the “purpose of effect” of “creating a monopoly” or “restraining commerce.”

So, a claim that a packer or an integrator is contracting with suppliers to foreclose its competitors’ access to a market would violate both Section 202 (c) of the Packers and Stockyards Act and the Sherman Act. Similarly, a claim that packers or integrators agreed to bid on the same basis (subject to passing inspection) would violate the Sherman Act, violate Section 202 (d), and would be unfair under Section 202 (a).²⁹⁷

The Packers and Stockyards Act offers two tools for addressing anticompetitive harm in livestock and poultry markets beyond the general antitrust laws. First, the language of Section 202 is broader than the Sherman Act and could help address anticompetitive harms involving oligopsony conduct that is anticompetitive.²⁹⁸ Second, because the act applies only to livestock and poultry markets, the U.S. Department of Agriculture can develop industry-specific rules to improve enforcement and provide guidance to market participants and courts.

This section of the report examines each of these tools in turn.

The Packers and Stockyards Act can address oligopsony conduct beyond the reach of the Sherman Act

The Packers and Stockyards Act offers a potentially powerful tool to address pricing practices by packers that limit competition even if there is neither an agreement nor monopsony power. The Sherman Act creates a gap between conduct that suppresses competition and causes anticompetitive harm and conduct that is illegal conduct. On one side of the gap, under Section 2 of the Sherman Act, unilateral conduct is illegal only if the defendant has or is likely to obtain monopoly power.

Monopoly power is difficult to prove. It usually requires that the defendant had at least a 50 percent market share or a dangerous probability of achieving that market share, regardless of the conduct's effects. On the other side of the gap, under Section 1 of the Sherman Act, agreements that restrain competition are illegal and do not require proof of monopoly power.

Falling into the gap is anticompetitive behavior by a single firm that lacks monopoly power.²⁹⁹

In the U.S. economy, this gap is wide and deep and often referred to as the oligop-oly problem.³⁰⁰ It also applies to oligopsonies, where there are few buyers in a market. As markets become more concentrated, the remaining firms may not need an agreement to reduce competition. They can simply predict each other's responses and adopt strategies that have a similar or the same effect as if they had agreed to limit competition, called coordinated interaction. The firms individually can take actions that make coordination more likely. Such conduct, or facilitating practices, can take a few different forms: information exchanges or contracting provisions.

From the victim's perspective, the difference may well be academic. Whether buyers are colluding to pay lower prices or buyers have settled into cozy coordination without any agreement that eliminates competition, the impact on the seller is the same.

Yet for the Sherman Act, it makes all the difference. In the first example, the agreement among buyers not to compete is a restraint of trade and violates the Sherman Act. In the second example, without an agreement, there is no violation of Section 1 of the Sherman Act. Although it may have the same effect as an agreement, unilateral conduct does not violate Section 1.³⁰¹ Further, because no firm has a 50 percent market share, there is no monopoly power and no violation of Section 2 of the Sherman Act.

The distinction between an agreement and unilateral conduct is often an esoteric and hyper-technical issue that can seem arbitrary.³⁰² A wink and a nod is enough to create an agreement;³⁰³ competitors exchanging price information followed by price increases is not sufficient to prove an agreement.³⁰⁴ In highly concentrated markets, such as for livestock and poultry, firms can coordinate behavior to increase prices and reduce competition without an agreement. Antitrust law is filled with cases parsing when an information exchange or conduct, such as firms adopting a uniform shipping formula, transforms unilateral conduct into an illegal agreement.

The Packers and Stockyards Act fills that gap. Section 202 (e) says that “any act or course of business” that, among other things, restrains commerce” applies to single firm conduct that would not “constitute single firm monopolization under §2 of the Sherman Act.”³⁰⁵ As the 7th Circuit explains in *Swift and Co. v. United States*, “Under the Sherman Act, it is true that a simple refusal to deal is permissible,”³⁰⁶ but “an individual refusal to buy may be within the prohibitions of the Packers and Stockyards ACT.”³⁰⁷

In *Swift*, three buyers had been bidding against each other to purchase lambs. Two of the buyers stopped bidding, leaving the third company as effectively the only buyer. The two other buyers then started buying from the third company. Despite there being no evidence of an agreement among the buyers, the 7th Circuit found the buyers’ actions unfair and in violation of the Packers and Stockyards Act.³⁰⁸ Although decided under Section 202 (a) as an unfair practice, the analysis should be the same under Section 202 (e).

One challenge to addressing oligopsony conduct that does not involve an agreement is remedy.³⁰⁹ If company A follows company B’s pricing, the remedy cannot be requiring company A to lower its price or price differently. That remedy would be impossible to enforce and might not lead to increased competition. In *Swift*, the court did uphold a remedy that required the packers to compete, but it is unclear whether that remedy was enforceable.

Nevertheless, remedies could be effective where the companies have unilaterally adopted practices that facilitate tacit collusions. Another part of the remedy in *Swift* forbade the packers from buying livestock from each other. Such relief is easy to enforce and made it difficult, if not impossible, for the companies to not buy lamb from the producers.

This approach could be particularly useful in livestock and poultry markets. Multiple court cases involve allegations of price fixing in those industries. A key issue in those cases is whether the plaintiff can prove an agreement.³¹⁰ Even if there is no agreement, a packer or integrator may have violated Section 202 (e) if the individual contract provision reduces price competition.

Rules related to traditional antitrust violations

As discussed in Chapter 3 of this report, some courts misapply established antitrust law in the context of the Packers and Stockyards Act, finding no violation of it when the conduct would have violated the antitrust laws.³¹¹ The U.S. Department of Agriculture can clarify the appropriate antitrust analysis. It would receive no deference on its legal interpretation because it would be applying Sherman Act and Clayton Act principles. The agency could still look to develop the law interpreting “restraining commerce” and “creating a monopoly,” so that it reflects correct antitrust principles.

Further, it can rely on its expertise and understanding of the livestock and poultry markets to develop evidenced-based rules to narrow the focus of the litigation. The Packers and Stockyards Act applies to one industry, and the agency can develop industry-specific rules that target specific conduct. These types of rules are easier to enforce and provide clear guidance. Courts should give substantial deference to the agency’s factual conclusions about how livestock and poultry markets work and their implications for antitrust analysis.³¹²

The potential rules fall into two broad categories: rules that reflect general antitrust principles and rules that address specific conduct or conduct in specific markets.

General antitrust rules

Packers and Stockyards Act claims often involve buyer power over producers, far more frequently than buyer-power issues arise in antitrust cases. The U.S. Department of Agriculture can provide guidance on issues related to monopsony in two specific ways detailed here.

In claims involving monopsony harms, there is no requirement to show that prices increased in the packers’ market or at the retail level

In cases involving monopsony, the focus is solely on the impact within the seller’s market. The plaintiff has no obligation to prove any effect—actual, likely, or tendency to cause an effect—in the market in which the packer sells. The U.S. Supreme Court precedent is clear: Harm to the seller is sufficient for an antitrust violation.³¹³

As a matter of economics, in cases involving a traditional monopsonist, the buyer will not pass lower costs on to its customers.³¹⁴ Even in situations where a buyer

with bargaining power were to pass along the benefits of an artificially low purchase price to the monopsonist's customers, the buyer would simply be sharing the anticompetitive benefit with its customers. That scenario is no different than if a cartel raised prices to customers (obviously bad) and justified it by saying that they shared their newfound profits with their suppliers.

Therefore, harm to the producer should be sufficient for a Packers and Stockyards Act violation. Although the *Been* court did impose upon plaintiffs a burden to prove that the packer increased its prices, it did so without explanation and in contradiction to its own antitrust jurisprudence on antitrust violations involving monopsony power.³¹⁵ The U.S. Department of Agriculture could develop the Packers and Stockyards Act to establish this principle.

Establish a general rule for assessing claims that require proof of anticompetitive harm

The general approach for assessing antitrust claims is well-established. Although courts may disagree on the exact phrasing of each step, the U.S. Department of Agriculture could develop a general approach for analyzing whether conduct restrains commerce or creates a monopoly.

The plaintiff has the initial burden of demonstrating the conduct or agreement at issue harms competition. Plaintiffs can satisfy the burden by either showing the anticompetitive harm directly—that the conduct lowered prices to packers—or indirectly. Indirect proof of harm relies on showing that the defendant has market power and has engaged in conduct that is likely to harm competition. As the 6th Circuit explains in *Realcomp II v. Federal Trade Commission*, “Market power and the anticompetitive nature of the restraint are sufficient to show the potential for anticompetitive effects under a rule-of-reason analysis.”³¹⁶

The defendant then has the burden of demonstrating the procompetitive benefits of the restraint. In this context, the benefit must be economic. A party cannot justify harming competition because it is promoting an unrelated social good: The U.S. Supreme Court has refused to allow defendants' anticompetitive harm “on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.”³¹⁷ The benefit must alleviate the harm otherwise caused by the conduct.³¹⁸ Lowering costs of the buyer or the price to end customers does not justify conduct that otherwise harms producers. Instead, the conduct must be reasonably necessary to achieve the procompetitive benefits.³¹⁹

Then, the burden shifts back to the plaintiff to establish either that a less restrictive alternative exists or that the anticompetitive harms outweigh the procom-

petitive benefits.³²⁰ Such a rule, whether developed by litigation or regulation, is an unremarkable application of antitrust law. It would only apply either when a plaintiff alleges that the packer's conduct either restrains competition or creates a monopoly. Nevertheless, this rule would clarify that simply offering a justification, as the defendants did in *Terry*, is insufficient.

Specific rules

General rules, such as those discussed above, could eliminate basic errors in the application of the Packers and Stockyards Act to claims requiring proof of anti-competitive harm, but the U.S. Department of Agriculture can use its knowledge and expertise to develop specific rules as well. It can tailor rules based on the specifics of livestock or poultry markets.

By relying on a better understanding of the market dynamics than an individual court would have, the agency can develop rules that target anticompetitive behavior. Such rules will also help it conserve resources, focus the analysis on the critical facts, and improve outcomes.

This section discusses two potential rulemakings that deal with the plaintiff's initial burden: requirements for proving monopsony power and rules on conduct that is likely to be anticompetitive.

Monopsony power rule

Market power is the power to control price or limit output and is often central in an antitrust case. This is particularly true in cases involving vertical agreements (agreements between suppliers and buyers) or exclusionary conduct (conduct aimed at driving firms out of the market or preventing competitive entry), which are frequently the concerns raised in livestock markets.

Generally, vertical agreements pose threats only if one firm has market power either in selling or buying, thereby exercising monopsony power. Vertical agreements can offer several benefits, such as rationalizing supply, and are unlikely to be successful in limiting competition. As a result, some courts and scholars treat vertical agreements as largely benign.

Recent economic literature rejects that view: "Decades of economics literature has refuted the robustness" of that opinion, writes Fiona Scott Morton, the Theodore Nierenberg professor of economics at the Yale University School of Management.³²¹ To the contrary, economic research documents both theoretically and

empirically how strategic behavior and vertical agreements can harm competition.³²² Although much of the literature examines seller power, the insights should apply to actions by buyers with monopsony power.

To generalize the current literature, firms with market power have a greater incentive to employ anticompetitive strategies, which, in turn, results in those strategies becoming more likely to be successful and thus more likely to be profitable. For the purposes of the Packers and Stockyards Act, the prevalence of market power on the buyer side is critical. The more prevalent this monopsony power is, the more likely a firm's exclusive agreement or exclusionary conduct is harmful—and the more skeptical the U.S. Department of Agriculture and courts should be of that conduct in an individual case.

This report refers to monopsony, or monopsony power, for any situation in which a buyer can obtain a price below competitive levels due to a lack of competition and is not limited only to situations where there is a single buyer. A significant amount of research accepts that monopsony power is prevalent in livestock and poultry markets.³²³ Some academics, however, dispute whether firms in beef markets abuse their monopsony power.³²⁴

Developing rules on monopsony power would help improve enforcement of the Packers and Stockyards Act. A rule should address three issues: market share, evidence of market power, and, potentially, identifying firms with monopsony power in specific markets.

First, the rule should identify the market share threshold for inferring market power. Courts will infer market power (traditionally on the seller side) if the defendant's market share exceeds a certain threshold, but there is not a consensus on the market-share level that triggers an inference of market power. Some courts will find a firm has market power if it has a 30 percent market share; others require a market share closer to 50 percent.³²⁵

Another measure of market concentration is the Herfindahl-Hirschman Index, or HHI, which market competition enforcers and courts use in merger cases. Under this approach, one squares the market share of each firm and then adds them together. According to the current merger guidelines published jointly by the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice, markets with an HHI above 2,500 are highly concentrated.³²⁶

In Packers and Stockyards Act cases, the issue will often be whether the packer has, or a group of packers have, monopsony power. It is likely that there are many livestock and poultry markets that currently meet this threshold. Nationwide, the

four largest beef packers accounted for 85 percent of cattle purchases, the four largest hog-processing firms accounted for 70 percent of hog purchases, and the four largest chicken integrators accounted for 54 percent of chicken purchases.³²⁷

These levels of concentration are relevant for the markets where packers are sellers, but the livestock and poultry markets (where the packers and integrators are buyers) are likely to be more concentrated and the buyers likely to have significant monopsony power. Markets are local, and there are often few buyers or contractors that are realistic alternatives.³²⁸ The producers have a perishable good; they cannot wait indefinitely for buyers. It is difficult for contract farmers or hog producers to shift to alternative buyers. Different buyers may require distinct types of investment.

Before setting a market-share threshold, the U.S. Department of Agriculture should consider these factors. Then, a variety of rules could address this issue. A rule could say that monopsony power exists if one or more of the following is present:

- A buyer accounts for a threshold percent of purchases in a market.
- A livestock or poultry market with an HHI exceeding 1,500 is highly concentrated.
- For cattle livestock markets involving significant use of captive supply, a lower market share or HHI establishes monopsony power.

The contours of the rule depend on the evidence the agency marshals. Market-share thresholds for finding monopsony power in livestock and poultry markets could be lower than for product markets because of market frictions, such as search costs, sunk investments, and other factors, particularly for contract growers whose market looks more like an employment market than a product market.³²⁹

Second, a rule should identify the facts that establish monopsony power directly. Market share is only one way to establish market power, and it may not be the best way in each case. Sometimes there is direct evidence that a firm is exercising market power. For instance, if the seller's challenged conduct increased price or reduced output, then there should be no need to define a market or examine market share. The conduct establishes the firm's power. Similarly, proof that a buyer's conduct decreased price or lowered quality should be sufficient to establish that a firm has monopsony power.

Other evidence can also establish that a firm has monopsony power. A firm with monopsony power can impose increasingly onerous terms on sellers. If a buy-

er increasingly shifts the cost of performing the contract to the seller without increasing the seller's compensation, for example, then the buyer may have market power. Evidence that a chicken integrator has shifted risk of failure from itself to the chicken grower is a sign of market power.³³⁰

Certain marketplace behavior, although not illegal itself, should establish that a firm has market power. Evidence that competing firms are engaged in coordinated interaction should be sufficient to establish market power. The Horizontal Merger Guidelines published by the Federal Trade Commission and the U.S. Department of Justice define coordinated interaction as "conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others."³³¹ It spans a range of conduct, including explicit agreements to limit competition or fix prices, lock-stop step pricing (without any agreement), and other parallel, accommodating conduct, such as firms not competing in the marketplace.

This range of conduct is not hard to discern. There are allegations, for example, that packers consistently do not compete aggressively in cash markets for cattle, which could be a sign of coordinated interaction. Although this type of conduct may itself violate certain provisions of the Packers and Stockyards Act, it also would establish a firm's monopsony power and could affect the legality of other conduct, such as the use of exclusive contracts. Examples of scenarios covered by these rules would be:

- A buyer who has shifted significant risk to producers by contract without offsetting compensation has monopsony power
- Buyers on a persistent basis, with or without agreement, do not compete against each other in a cash market or in securing contracts with producers

Third, the U.S. Department of Agriculture should consider specific monopsony rules. In *Been*, the 10th Circuit accepted proof that a seller had only one functional buyer as enough evidence to establish monopsony power.³³²

If monopsony power is prevalent across markets, then it makes little sense to require detailed, case-specific analysis. Rather, making a straightforward issue complicated will likely lead to worse results and shift the focus from the real issues at stake. If the U.S. Department of Agriculture concludes, based on the factors discussed in this section, that monopsony power is common, then it should consider clear rules that could take a variety of forms, such as:

- Monopsony power exists when a buyer faces less than a set number of sellers (the number could differ for ranchers and hog producers).

- Identify specific cattle or hog markets in which buyers have monopsony power (for example, hogs sold in a specific region).

Conduct-specific rules

Monopsony power plus conduct that has the nature to exclude meets the initial burden for establishing an antitrust violation. The U.S. Department of Agriculture could identify specific conduct that is exclusionary. In cases involving monopsony power and the identified conduct, the company would have to provide a procompetitive justification. The agency can develop targeted approaches to address specific conduct, such that different rules might govern in beef, pork, and poultry markets.

In developing these rules, the agency should consider, both as a matter of theory and evidence, the potential for the practice to harm competition and the potential for procompetitive benefits. To illustrate this approach, the agency could point to an example—such as the proposal offered by the Western Organization of Resource Councils, a rule on alternative marketing agreements.³³³

There has been significant debate over alternative marketing agreements, in which the rancher or the hog producer agrees to provide a set number of livestock in the future. A key feature is that the agreement ties the purchase price to the cash price. According to critics, if the packer has monopsony power, then the formula pricing tied to the cash price can be problematic. Tying the agreement price to the cash price deters the packer from increasing prices in the cash market.

Increasing the cash market price increases the cost of both the cattle bought on the spot market and through the prior agreement.³³⁴ The pricing formula increases the cost of increasing the bid in the cash market. As a factual matter, the *Pickett* court accepted evidence that alternative marketing agreements lower prices that ranchers receive for their cattle.³³⁵

Others defend the practice. The essays in the 2021 *Beef Supply* book acknowledged that these agreements lower the prices ranchers received for their cattle but concluded that their benefits far outweigh the costs.³³⁶ These were the same types of benefits the *Pickett* court embraced, explaining that alternative marketing agreements had lower transaction costs than negotiation in the spot market, guaranteed supply, and improved quality.³³⁷

But neither the book nor the *Pickett* decision addressed the pricing mechanism. What is the effect and justification for tying the agreement price to the cash price? The *Pickett* ruling's omission followed from its basic legal mistake in its assessment

of justifications. Absent that analysis, neither provide a reason justifying the pricing mechanism, instead of the use of agreements generally.

The U.S. Department of Agriculture could litigate individual cases to determine on a case-by-case basis when alternative marketing agreements are anticompetitive. A potentially better approach would be for it to look at the evidence generally and identify the types of pricing mechanisms that are likely to lower prices for cattle and develop regulations to address the issue. Markets for the purchase of cattle and hogs are local and include few buyers. The impact of supply agreements is likely to be the same across many or most markets. This approach would require the agency to identify the type of agreements that could harm competition, consider how likely and substantial the harm is, how likely and substantial the benefits are, and whether those benefits can be achieved through other reasonable approaches.

Francisco Garrido and the co-authors of “Buyer Power in the Beef Packing Industry: An Update on Research in Progress,” suggest one solution: “As a matter of economic theory, our research suggests that eliminating AMAs or increasing competition among packers—for example by barring multi-plant ownership—could better align the price of fed cattle with the economic value that is provided by feedlots and other upstream participants.”³³⁸ They point out, however, that one should consider the potential benefits of these types of agreements.

An alternative approach would be to develop a rule that prohibits the types of pricing mechanisms that tend to lower prices for cattle but preserve the benefits.

The Department of Agriculture also could ban alternative marketing agreements that tie the formula pricing to a price that a buyer can manipulate, such as a future regional cash market price and other prices. The futures market may have the same vulnerabilities. This rule would still allow sales by agreement and the benefits that defenders of the practice have offered. It would simply require packers to use a different pricing mechanism that is unlikely to artificially lower prices for cattle.

Two conditions would justify this approach. First, a pricing mechanism tied to the cash price is likely to lower cattle or hog prices and make producers worse off, which establishes that the conduct, on balance, is anticompetitive. Second, the procompetitive benefits do not exist, or else an agreement with a different pricing mechanism would achieve the same benefits.³³⁹

Depending on the evidence, the U.S. Department of Agriculture could develop more refined rules. Let’s say it found that these types of agreements were unlikely to affect prices if the cash market is competitive and substantial cash sales occurred. This version of the rule could ban formula pricing tied to the cash price

unless the cash sales account for a minimum share of cattle sales. This version of the rule could help spur competition among packers. If the agreement with the cash-market pricing mechanism is procompetitive, then packers would have the incentive to compete in cash markets so that they could use that device.

If the evidence on formula-pricing agreements, such as alternative marketing agreements, is mixed, the rule could reflect that complexity. A *prima facie* case would require proof that the buyer has monopsony power and uses the cash-market pricing mechanism in its alternative marketing agreements. Because the packer will likely offer procompetitive justifications, the case would center on whether the pricing mechanism is reasonably necessary to achieve the benefits, the benefits can be achieved by a less restrictive alternative, or the agreement is, on balance, anticompetitive.³⁴⁰

If the U.S. Department of Agriculture determines that the pricing mechanism is unlikely to be anticompetitive, it could require proof, in the specific case, that the packer had monopsony power, that prices were lower because of the pricing mechanism or proof that the benefits were nonexistent, could be achieved by a less restrictive alternative, or were outweighed by the harms, or any combination of those conditions.

Although this section discusses the pricing mechanism, the approach could apply to any type of conduct that is of interest. It relies on the narrow focus of the Packers and Stockyards Act, which applies only to livestock and poultry, and the U.S. Department of Agriculture's own expertise in understanding market dynamics.

Chapter 6: Procedural reforms and strategies to improve enforcement of the Packers and Stockyards Act

Legal cases and rulemaking do not occur in a vacuum. The U.S. Department of Agriculture faces legal hurdles and limited resources that will necessarily shape strategic decisions and possible outcomes. Although it is tempting to think that enforcers can simply brush away bad precedent, particularly when it rests on incorrect or inconsistent reasoning, the agency does not start with a blank slate. Bringing the same type of case as before, using the same strategies and arguments as in the past, is unlikely to change the outcome.

This chapter of the report offers four potential suggestions for maximizing the likelihood that the agency will be successful in developing the law. First, it can attempt to get a case before the U.S. Supreme Court. Although this strategy has its merits, it is better as part of larger strategy to reframe the legal question.

Second, it should adopt a strategic enforcement agenda. Instead of only reacting to complaints that come to its attention, investigating them, and bringing a case, it can affirmatively establish priorities, identify the harms it believes are most critical to address, and identify matters for developing the case law to restore the effectiveness of the Packers and Stockyards Act.

Third, the agency should focus on rules that rely on its substantive expertise, prioritizing rules that delineate definitions or elements of a violation. Rulemaking requires substantial time and resources, but it can produce lasting, definitive guidance to the courts, producers, and packers. It should avoid rulemaking that simply identifies criteria it will consider in favor of rules that define the elements of a violation and the necessary evidence to prove the violation.

Fourth, the U.S. Department of Agriculture faces real limits on its enforcement resources. It can alleviate this limitation by being creative in leveraging its relationship with the U.S. Department of Justice in general and its Antitrust Division in particular.

This chapter will examine each of these recommendations in turn.

Seeking U.S. Supreme Court review

A strong argument can be made that recent case law has misinterpreted the Packers and Stockyards Act, and the U.S. Supreme Court, if presented with the issue, would reject requiring the harm-to-competition standard for every violation of Section 202. If successful, the case would eliminate obstacles to effective enforcement: that harm to competition is required, that the standard is no broader than the general antitrust laws, and that the Packers and Stockyards Act imposes, in application, higher burdens of proof than even the antitrust laws.

This approach has been successful in the past. The Federal Trade Commission successfully pursued it in addressing anticompetitive patent settlements in the pharmaceutical industry.³⁴¹ Although this would be a bold move that would make a statement of policy, it would be time-consuming, providing little help to ranchers, producers, and growers for years, and would be risky.

The Supreme Court could be sympathetic to rejecting the harm-to-competition requirement. A plain reading of the statute does not support it and, arguably, contradicts such a requirement. The lower courts adopting the standard do not interpret it the same way. When the lower-court cases' statutory interpretation is wrong, the Supreme Court is willing to reject even a long line of precedent.³⁴² Success at the Supreme Court, in one fell swoop, would eliminate a rash of cases and principles that are in tension with the act's language and give the U.S. Department of Agriculture the greatest flexibility to interpret the statute.

This strategy involves risks. Substantively, the Supreme Court, particularly in the absence of a definitive USDA interpretation as to the limits of Section 202, could find the language too broad and vague to be meaningful and reject a challenge (or simply refuse to hear the case) that simply seeks to overturn existing precedent.

Further, Supreme Court review could take a decade or more until a case makes its way from investigation to litigation, and through the appeals process to a Supreme Court decision. In addition, the U.S. Department of Agriculture would likely need

to create a circuit-split—having one circuit court reject the harm-to-competition standard—to obtain Supreme Court review.

In principle, the holdings in *Holiday Foods* (9th Circuit) and in *Bruhn’s Meat* (8th Circuit) contradict the holdings in *Wheeler* (5th Circuit), *Terry* (6th Circuit), and *London* (11th Circuit), but the contradiction is implicit. Further, the confusion over harm to competition and anticompetitive harm may make the Supreme Court hesitant to take a case without further clarification in the circuit courts.

The better approach is to combine this strategy as part of a broader approach to reframe the issues. The U.S. Department of Agriculture can bring cases and develop rules that define harm to competition to include both anticompetitive harm and market abuses. Such an approach has textual and caselaw support. If it is successful, the agency could then revive the Packers and Stockyards Act in the short term. When the issue does reach the Supreme Court, the agency’s position will be stronger. It will have framed the legal question—whether Section 202 addresses more than violations of the antitrust laws—in a focused way that stresses the text of the statute and addresses concerns that the act could be transformed into a commercial and contract litigation device.

Adopting a strategic enforcement agenda

Judicial precedents have created significant obstacles to effective enforcement of the Packers and Stockyards Act. No one should underestimate the hurdles the U.S. Department of Agriculture faces. Those precedents are not absolute bars to enforcement. Room exists to either develop the law or, where necessary, challenge existing precedent.

These challenges are not unique to the U.S. Department of Agriculture or to the enforcement of the Packers and Stockyards Act. Antitrust enforcers at the Federal Trade Commission and the U.S. Department of Justice’s Antitrust Division have suffered their share of setbacks and precedents that arguably limit their ability to enforce the law.³⁴³

One response to such obstacles is for enforcers to retrench and accept the state of the law. As noted in the recent Equitable Growth antitrust transition report “Restoring competition in the United States: A vision for antitrust enforcement for the next administration and Congress,” this approach can create a ratchet that continually weakens enforcement:

*Court decisions that limit enforcement tend to circumscribe later enforcement. There are no countervailing forces to convince courts to develop rules based on sound economics that will strengthen enforcement.*³⁴⁴

The other approach is to develop doctrine in ways that reflect sound policy and legal principles, which can set the stage for future legal challenges. When necessary, this may require challenging existing precedent.

The Federal Trade Commission has had success with this approach. By the early 2000s, the federal government had lost a string of enforcement actions challenging proposed hospital mergers, making it appear that merger enforcement cases in this industry were simply unwinnable. The Federal Trade Commission, under the leadership of then-Chairman Timothy Muris, led a successful effort to bring new analysis and legal theories into hospital merger enforcement, which the courts accepted.³⁴⁵ Since 2008, the agency has litigated and won more merger challenges in the hospital industry than any other industry and has lost only once.

Similarly, after a decade of setbacks in trying to address anticompetitive patent settlements in the pharmaceutical industry, the Federal Trade Commission adopted a strategy to create a split among the courts of appeal and obtain Supreme Court review. The plan was largely successful. In 2013, the Supreme Court resolved the split among the courts on pharmaceutical patent settlements and largely agreed with the FTC approach.³⁴⁶ The Supreme Court's ruling and subsequent FTC enforcement has essentially stopped a practice that increased prescription drug prices by more than \$62.3 billion between 2005 and 2013.³⁴⁷

Such results require a strategic enforcement agenda.³⁴⁸ It requires focusing on a few issues while understanding that not all problems can be addressed at once. Limited resources require triage and, most likely, taking a pass on certain issues. The U.S. Department of Agriculture can then develop a plan, leveraging all its tools to address specific problems, including empirical research, investigation, case selection, and rulemaking.

In the case of the Packers and Stockyards Act, the primary barrier to effective enforcement is the implication that the act is no broader or only marginally broader than the antitrust laws—the Sherman Antitrust Act of 1890, the Clayton Antitrust Act of 1914, and the Federal Trade Commission Act of 1914. The previous chapters have identified several options for enforcement of the Packers and Stockyards Act. To provide a more concrete discussion of strategic enforcement, this section will discuss how strategic enforcement could be employed as to one of these goals.

The point here is not to choose any specific goal or even specific steps; it is to illustrate the principle of strategic enforcement.

Pursuing unfair practices against chicken growers

The U.S. Department of Agriculture could decide that chicken growers across the monopsony position of a handful of big chicken-production companies, such as Pilgrim's Pride, Tyson's, and Purdue, harm contract farmers who grow chickens. Because the U.S. Department of Justice must bring enforcement actions against chicken integrators, USDA officials could, in conjunction with the U.S. Department of Justice, identify a practice that is unfair to chicken growers, using a version of the FTC unfairness rule discussed above.

The U.S. Department of Agriculture could use its regulatory and investigatory powers to help define and focus the issue. It could adopt a rule for unfairness under the Packers and Stockyards Act as discussed above: The practice must cause the producers substantial harm; the producer cannot reasonably avoid the harm; and the harm outweighs the benefits. It could also go further and develop a rule regarding the specific practice.

Either the general or specific rule would allow the agency to assess evidence overall, not just as to a single case. It would build a record on the practice generally, including studies that analyze the practice, receive public comments, and engage in other evidence gathering.

The two agencies should agree on criteria for an enforcement action, identifying what facts establish a clear violation, what makes a case strong, and what type of case would have the most impact. They could look for cases involving a packer practice that is common and that frequently results in chicken growers exiting the market. This could be contract terms that shift substantial risk to chicken growers with little benefit. Or the target could be the rules of the tournament system that create arbitrary results. In addition, the chicken growers' harm should be obvious and significant.³⁴⁹ When developing new law or trying to limit existing precedent, having a factually strong case is critical.

There should also be consideration of where to file such a case. The 8th and the 9th Circuits are possible venues since both have cases that have found violations of Section 202 without requiring harm to competition. The 9th Circuit has further rejected the competitive harm standard under Section 312, the sister provision of Section 202 that applies to stockyards and dealers.

Neither the 3rd Circuit nor the 4th Circuit have adopted the competitive harm requirement, and both circuits have significant chicken production industries.³⁵⁰ Although the 4th Circuit has, in an unpublished decision, accepted the harm-to-competition standard, unpublished decisions have no precedential value.

Further, a district court in the 4th Circuit do not treat the decision as binding and have rejected the harm-to-competition standard.³⁵¹ The U.S. Department of Justice would be in a strong position to argue that Section 202 of the Packers and Stockyards Act addresses both anticompetitive harms and market abuses.

The 10th Circuit is also a possible venue. Although the 10th Circuit has adopted the harm-to-competition test, its application is consistent with harm to competition encompassing market abuses.

The combination of rulemaking and enforcement increases the likelihood of success. Even if the courts do not defer to the agency's legal interpretation of the act as it applies to poultry markets, they should still defer to its factual conclusions. In other words, if the court owes the Department of Agriculture no deference on its legal interpretations, the court could reject a USDA holding that the Packers and Stockyards Act does not require proof of harm to competition. The court would still owe the U.S. Department of Agriculture deference on the agency's factual finding, for example, that an integrator has monopsony power.

A general rule on unfairness or a more specific rule based on the evidence and carefully tailored is likely to persuade the court that the agency is interpreting and enforcing the act correctly, regardless of the amount of deference it receives. A definition of unfairness provides limits on the scope of enforcement, making judicially created restrictions less likely. A specific rule should make it easier for a court to focus on whether the violation occurred and to be comfortable that the regulation provides a workable approach.

The U.S. Department of Agriculture should communicate both to Congress and the public its reasons for pursuing the issue. Although such communication will not affect the specific outcome, it will help build broad support for the agency's Packers and Stockyards Act enforcement agenda. Although enforcement and rulemaking are, by necessity, technical, the issues at stake are not. They affect the livelihood of an important and necessary part of the food supply chain. Regardless of the judicial determination of a specific case or a regulation, the public and Congress should understand that without a robust definition of unfair practices, we are condoning a large wealth transfer from producers to chicken integrators.

The agency could develop a similar plan for addressing conduct in the beef or pork industries. In those markets, it could adjudicate the case in the first instance. The resulting decision could set out the USDA interpretation of the statute and how it applies in the specific case. That decision should receive deference both on the law and the facts.³⁵²

Using regulations to strengthen enforcement of the Packers and Stockyards Act

Previous sections of this report have discussed how rules and regulations can help the U.S. Department of Agriculture define and assert its view of the Packers and Stockyards Act. It can use its knowledge of livestock and poultry markets to develop rules that focus on the critical issues in three different ways.

First, developing rules through regulation or adjudication is a case-by-case determination. Second, regulations can help strengthen enforcement, but there are strategic considerations regarding the nature and scope of those regulations. Where possible, substantive regulations should define the elements of a violation instead of simply identifying what factors the agency will consider. Third, it should consider procedural rules, such as a rule defining retaliation to protect cooperating with the government or exercising their rights.

The choice between using regulations and adjudication in developing the law

There is a renewed interest in using regulation to address problems in markets.³⁵³ Regulations can help revitalize enforcement of the Packers and Stockyards Act, but the choice between regulation and adjudication is strategic, not substantive. Each has relative merits and can be more effective in different situations. Used effectively, the two tools can reinforce each other.

In theory, a regulation is broader than an adjudicative decision because the latter binds only the party to the litigation. In practice, the difference can be minimal. The Federal Trade Commission announced its definition of unfairness in an adjudication, not a rulemaking. Further, an agency's legal interpretations, whether the result of an adjudicative decision or a regulation, receive the same deference from reviewing courts.³⁵⁴

A full discussion of the differences between adjudication and rulemaking is beyond the scope of this report,³⁵⁵ but a few key differences stand out for reviving enforcement of the Packers and Stockyards Act. Rulemaking is a public procedure. In informal rulemaking—also known as notice-and-comment rulemaking—the agency initiates the process with a notice of proposed rulemaking that includes the legal basis for proposing the rule and the terms or substance of the rule or a description of the issues involved. A public comment period follows that allows for the submission of data, views, and arguments. The agency may hold hearings on the rule as well. The agency issues a final rule with a “concise general statement of their basis and purpose.”³⁵⁶ Rules issued by regulation are subject to judicial review.³⁵⁷

In comparison to adjudication—which requires the U.S. secretary of agriculture to issue a complaint alleging specific violations of the Packers and Stockyards Act, a hearing, a decision, and appeals³⁵⁸—rulemaking allows input from all potentially affected parties, not just the litigants. The record is likely to be both broader and deeper than in a single adjudication. It is not adversarial, increasing the ability to identify and develop consensus.³⁵⁹

Rulemaking is likely to be subject to more political pressure. Because rulemaking has general applicability, it is more likely to trigger industry opposition. As the U.S. Department of Agriculture experienced firsthand in 2011, Congress can easily stop or prevent enforcement of rule by placing a rider on an appropriations bill.³⁶⁰ Because adjudication involves a limited number of respondents and allegation of illegal conduct, Congress will face less pressure and will be disinclined to interfere. Stopping an ongoing adjudication through a rider undermines law enforcement. Adjudication is more focused and can highlight an egregious violation. In contrast, a rulemaking can devolve into theoretical questions about whether the rule is too broad or not broad enough.

There are no fixed rules. Where the determination depends on substantial evidence from a broad array of sources, such as empirical studies or general academic literature, that evidence fits more naturally in a rulemaking proceeding. Similarly, where the U.S. Department of Agriculture is concerned with the impact on multiple parties, rulemaking has an advantage over adjudication. In contrast, adjudication is the only forum to address past or existing violations and to penalize those violation. It also has an advantage where the specific facts matter or where there is a need to focus on the harm caused by a practice.

Adjudication and regulation will work best when used together to reinforce one another. A string of adjudications with similar outcomes provides the strongest basis for a rule. Conversely, as the next two sections discuss, regulations can improve and streamline adjudication.

Structure of substantive regulations

Federal agencies enjoy broad discretion in drafting substantive regulations if there is sufficient support in the evidentiary record. Existing regulations implementing the Packers and Stockyards Act reflect this flexibility. The rule on “furnishing information to competitor buyers” prohibits giving competitors “buying information.”³⁶¹ The rule has specific and general provisions. It specifically prohibits providing competitors information “concerning his proposed buying operations, such as the species, classes, volume of livestock to be purchased, or prices to be paid.” It also includes a general prohibition on sharing “any other buying information to competitor buyers.”³⁶²

Reflecting a different approach, the recent rule regarding “undue or unreasonable preferences and advantages” lists criteria the U.S. secretary of agriculture will consider in determining whether “a packer, swine contractor, or live poultry dealer has made or given any undue or unreasonable advantage.” The secretary will assess whether the differential treatment:

- Cannot be justified on the basis of a cost savings related to dealing with different producers, sellers, or growers
- Cannot be justified on the basis of meeting a competitor’s prices
- Cannot be justified on the basis of meeting other terms offered by a competitor
- Cannot be justified as a reasonable business decision³⁶³

Although the criteria approach is more likely to survive a legal challenge, criteria rules are unlikely to have much impact on enforcement. Criteria are a list of relevant information, not a definition of a violation. They provide no guidance on how to balance different criteria. The preference rule, for example, does not make litigating a violation under Section 202 of the Packers and Stockyards Act more efficient or more focused. It does not provide a roadmap for how the decision-maker should decide a case; it does not tell either packers or producers what conduct does or does not violate the statute.

Defining a test or defining a violation requires a stronger evidentiary record but offers greater benefits. A test-based rule, such as the unfairness proposal discussed above, establishes general elements that the U.S. Department of Agriculture can apply in adjudications or future rulemakings. It can apply to any conduct. A specific rule applies to discrete conduct: Requiring contract chicken growers to make substantial capital investments is unfair unless the chicken integrator provides guaran-

tees against arbitrary termination. It defines conditions when terminating a chicken producer is unfair but gives the packer the ability to justify its actions.

Regardless of the specific formulation—defining elements, establishing a ban but allowing a defense, or a prohibition—test or conduct-specific rules provide concrete rules that the U.S. Department of Agriculture can then enforce. In turn, that clarity deters problematic conduct and will focus and narrow enforcement actions.

Procedural rules that would enhance the enforcement of the Packers and Stockyards Act

The U.S. Department of Agriculture should not overlook procedural rules that would enhance the administration and enforcement of the Packers and Stockyards Act. The agency has flexibility in how it organizes its adjudicatory process. In adjudicative matters:

*there shall be afforded the packer or swine contractor a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe.*³⁶⁴

The U.S. secretary of agriculture can issue rules of evidence and develop presumptions. The secretary could also issue rules on admissibility of evidence. It could issue a rule that, in cases involving alleged violations against packers, evidence of the benefits to the packer is irrelevant and inadmissible.

The secretary's general authority to "make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act could also address certain types of retaliation and protect whistleblowers."³⁶⁵ Livestock and poultry producers have raised concerns that packers will retaliate against them if they file complaints to the U.S. Department of Agriculture or cooperate with a USDA investigation.

Retaliation can be a substantive violation of the Packers and Stockyards Act. In addition, retaliation or fear of retaliation prevents the agency from effectively enforcing the statute. Without notice of violations or the information from livestock or poultry producers, it cannot effectively enforce the statute.

In other contexts, whistleblower and anti-retaliation provisions can bolster enforcement initiatives, and such protections may be an untapped reservoir of concepts

that the U.S. Department of Agriculture should consider adopting. According to a 2007 PricewaterhouseCoopers study, whistleblowers are more effective than professional auditors at detecting fraud: Whistleblowers detected and exposed 43 percent of fraud at private corporations, while professional auditors detected 19 percent.³⁶⁶

Similarly, whistleblowers have helped the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission recover more than \$2.8 billion from violations of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.³⁶⁷ Current protections, even where they exist, may need strengthening. According to a recent Government Accountability Office report, the federal government terminated probationary and permanent employees who had filed whistleblower complaints at a consistently higher rate than those who had not filed whistleblower complaints.³⁶⁸

Nonetheless, protection from retaliation, although by no means perfect, is a tool the U.S. Department of Agriculture should consider implementing. In drafting a rule, it should look to developing presumptions. The agency could identify conditions that would establish a *prima facie* case of retaliation, which the companies could then rebut. Rules against retaliation would be less effective than a legislative approach because it has no authority to provide a bounty for those who come forward and reveal violations.

The U.S. Department of Agriculture also could consider rules on attorney discipline. Other agencies such as the Federal Trade Commission,³⁶⁹ the Securities and Exchange Commission,³⁷⁰ the Federal Energy Regulatory Commission,³⁷¹ and the Executive Office for Immigration Review³⁷² all have adopted discipline rules to address unethical and unprofessional conduct.

Leveraging cooperation with the Department of Justice to maximize enforcement activity

The staff at the U.S. Department of Agriculture working on enforcement of the Packers and Stockyards Act is small, relative to the scope of their responsibilities. Roughly 117 people, as of 2019, are responsible for policing a nationwide industry of \$88 billion. Due to budget limitations, staffing for enforcement of the Packers and Stockyards Act has fallen 40 percent since 2010.³⁷³ An increase in resources is necessary for the U.S. Department of Agriculture to be fully effective, and Congress should dramatically increase the budget for enforcement of the Packers and Stockyards Act. Until that occurs, the agency must be creative in leveraging its

resources to maximize its impact. In part, this challenge should affect both case selection and rulemaking.

In the meantime, the U.S. Department of Agriculture and the U.S. Department of Justice can increase their effectiveness by coordinating enforcement efforts. The two agencies share enforcement responsibilities for the Packers and Stockyards Act. Increased coordination reflects the whole-of-government competition policy that President Joe Biden announced last summer.³⁷⁴ As Equitable Growth’s anti-trust transition report explains, coordination between the Department of Justice and other executive branch agencies is necessary to “tackle endemic competition problems in specific industries.”³⁷⁵

The Obama administration tried this approach and created an intergovernmental task force. As discussed in the introduction, its results were underwhelming—no major cases. Part of that result may have arisen from the decision to commit to rulemaking, which then faced major political opposition. Regardless, this section offers some suggestions for cooperation to improve enforcement of the Packers and Stockyards Act.

Ideally, the two agencies would develop a unified strategic agenda, as discussed above, that identifies case selection principles and enforcement goals. The approach should bring together the resources of the U.S. Department of Agriculture and the Antitrust and Civil Divisions of the U.S. Department of Justice.

The two agencies should also consider whether detailing personnel from one agency to another could improve enforcement. Although the Packers and Stockyards Act is broader in scope than the Sherman Act, antitrust issues are often relevant to whether there is a violation. Having an attorney with antitrust experience would help with case development and investigation. The Department of Justice’s antitrust investigations would likely benefit from having a designated USDA expert on livestock and poultry markets. Similarly, the Commodity Futures Trading Commission and Securities and Exchange Commission staff could help in developing market manipulation rules or cases.

Another potential tool is case referrals. Under Section 404 of the Packers and Stockyards Act, “The Secretary [of Agriculture] may report any violation of this Act to the Attorney General of the United States,” and the attorney general “shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States.” The language signals broad authority to refer violations to the U.S. Department of Justice.

This authority appears underutilized. It may be because one court has limited that section to the collection of fees and enforcement orders after the secretary of

agriculture has found a violation.³⁷⁶ Despite the uncertainty, the two agencies have a legitimate basis to pursue case referrals.

The two agencies can develop strategic enforcement strategies. The U.S. Department of Agriculture could take the lead on developing and implementing enforcement of market abuse, such as cases addressing deception, unfairness, unjust discrimination, and manipulation of prices. The Department of Justice could take the lead on enforcing antitrust harms. Such a division would need to be absolute. It would allow the Department of Justice to bring its antitrust expertise to bear in cases where antitrust issues are central and allow the U.S. Department of Agriculture to focus on conduct prohibited by the statute involving market abuses, undermining market integrity, or frustrating congressionally mandated goals.

Conclusion

In response to concerns that livestock and chicken markets are not working for producers and growers, this report examines Section 202 of the Packers and Stockyards Act. Recent case law suggests that a Section 202 violation occurs only if there is proof of harm to competition. The report then critiques that approach, pointing out its weaknesses, its ambiguities, and the mistakes that courts have made when applying this requirement under the Packers and Stockyards Act.

The report then unpacks the text of Section 202, showing how it clearly addresses market abuses in addition to antitrust violations. Market abuses do not necessarily require proof that the conduct is anticompetitive and would violate the antitrust laws. Contrary to some claims, there is no consensus on requiring harm to competition, and different courts have very different definitions of the term. Even if a harm-to-competition requirement exists, harm to competition itself must encompass the full scope of Section 202 and, therefore, market abuses.

The report then discusses how specific provisions of Section 202 can address market abuses and explores using Section 202 to address different issues. It then explores how the U.S. Department of Agriculture can adopt rules that target problematic conduct while addressing concerns that the operative terms are vague. Because the department implements congressionally mandated programs and goals, the department, in determining whether a violation of Section 202 has occurred, should consider the impact of the conduct on those goals.

The report then turns to the antitrust side of Section 202. It explains how the Packers and Stockyards Act provides tools to address oligopsony behavior. Further, because Section 202 applies to only a single industry, the U.S. Department of Agriculture can develop rules to focus analysis on the critical issues within the industry. The agency, for example, could issue rules on what constitutes monopsony power in cattle markets, or it could provide guidance for how it will assess whether specific conduct is anticompetitive.

The report concludes by offering suggestions on how the U.S. Department of Agriculture can maximize the possibility of a successful enforcement agenda. This would begin with a targeted, strategic enforcement agenda, using procedural rules to optimize enforcement, and coordinating with the Justice Department.

Together, the report's research, analysis, findings, and recommendations provide multiple paths for the U.S. Department of Agriculture, sometimes in league with other market enforcement agencies of the federal government, to address market power and market abuses in the U.S. markets for livestock and chickens.

About the Author

Michael Kades is currently the director for markets and competition policy at the Washington Center for Equitable Growth. His research focuses on competition and antitrust enforcement, with an emphasis on consumers, wages, equality, and innovation. Prior to joining Equitable Growth, Kades worked as antitrust counsel for Sen. Amy Klobuchar (D-MN), the ranking member on the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, where he led efforts to reform antitrust laws. Previously, he spent 20 years investigating and litigating some of the most significant antitrust actions as an attorney at the Federal Trade Commission. During his time at the commission, he was an attorney advisor to Chairman Jon Leibowitz. He has testified before Congress and the Federal Trade Commission, and has been cited by *The New York Times*, *The Washington Post*, and other media outlets on antitrust enforcement and competition policy matters. Kades is a graduate of Yale University and the University of Wisconsin Law School.

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Glossary of industry terms

Alternative marketing agreement: a type of vertical agreement in which the beef packer agrees to buy a certain number of cattle in the future while the price is determined on a future date

Boxed beef: cuts of beef put into boxes for shipping from a packing plant to retailers

Broiler: chickens that are raised for meat as opposed to eggs

Cash market (for cattle): cattle transactions where the price is determined through buyer and seller interaction on the day of sale

Chicken integrator: the owner of the processing plant, hatchery, and the feed mill; integrators provide chicken growers with chicks, feed, medicine, and technical support

Chicken dealers (as used in the Packers and Stockyards Act): any person engaged in the business of obtaining live chickens by purchase or under a poultry-growing arrangement for the purpose of slaughtering and selling it

Cow-calf operations: a management unit that maintains a herd of beef cows for raising calves

Feedlot: an animal-feeding operation used to intensively feed and grow scattle for finishing

Formula pricing: a transaction between a cattle rancher and a beef packer that includes an advance commitment of cattle for slaughter. These transactions happen outside of negotiated trades or negotiated grids. Alternative marketing agreements are one type of formula pricing.

Meatpacker: any person or firm engaged in the business of buying livestock in commerce for the purposes of slaughter, manufacturing, or preparing meats or meat food products for sale or shipment in commerce, or marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce

Stockyard: a place where livestock, such as cattle or hogs, are temporarily kept until slaughtered and sold

Swine contractor: any person engaged in the business of obtaining swine under a swine-production contract for the purposes of slaughtering the swine or selling swine for slaughter

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- 98 Schroeder, Coffey, and Tonsor, “Enhancing Supply Chain Coordination through Marketing Agreements: Incentives, Impacts, and Implications,” p. 95. The U.S. Department of Agriculture may not report data if it would reveal the identity of the reporting entities or disclose the confidentiality of proprietary transactions. When the agency does not report a price, it like means that so few cash transactions occurred or the number of actual buyers so small, that reporting prices would reveal individual transaction prices. See Agricultural Marketing Service, “2018 LMR Negotiated Cattle Market: Confidentiality in the negotiated cattle market 0-14 day delivered negotiated cattle market, and reporting regions” (U.S. Department of Agriculture, n.d.), p. 2, available at <https://www.ams.usda.gov/sites/default/files/media/2018LivestockMandatoryReportingNegotiatedCattleMarketReviewPresentation.pdf>.
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- Tyson Fresh Meats, Inc.,” *The Antitrust Bulletin* 53 (2) (2008):455–474, available at <https://www.proquest.com/openview/5ac663762ad2a971dca2c6cedbdo7f54/1?pq-origsite=gscholar&cbl=35923>.
- 107 Justin Tupper, written testimony on behalf of the United States Cattlemen’s Association for the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, “Examining Markets, Transparency, and Prices from Cattle Producer to Consumer,” June 23, 2021, p. 3, available at https://www.agriculture.senate.gov/imo/media/doc/Testimony_Tupper%2006.23.21.pdf.
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- 115 Carstensen, “Dr. Pangloss as an Agricultural Economist: The Analytical Failures of The U.S. Beef Supply Chain Issues and Challenges,” p. 4.
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- 123 See, *infra* nn. 15–17 and 213–233.
- 124 Christopher R. Kelley, “An overview of the Packers and Stockyards Act,” (Fayetteville: University of Arkansas Law Note, 2003), p. 36, available at <http://media.law.uark.edu/arklawnotes/2003/10/15/an-overview-of-the-packers-and-stockyards-act/>.
- 125 Ibid.
- 126 See the Introduction of this report: “Packers means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce. 7 USC § 191. The term “swine contractor” means any person engaged in the business of obtaining swine under a swine production contract for the purpose of slaughtering the swine or selling the swine for slaughter, products in an unmanufactured form.”; Kelley, “An Overview of the Packers and Stockyards Act,” p. 35, 41.
- 127 The secretary may also seek a temporary injunction to stop the conduct pending the outcome of the administrative hearing. 7 USC §202 (c).
- 128 7 USC §193 (b).; 7 CFR § 3.91
- 129 7 USC §203 (c).
- 130 Compare 7 USC §193, which states that the secretary of agriculture can adjudicate violations

- by packer or swine contractor, with 7 USC §224, stating that the attorney general can prosecute any violation of the act.
- 131 7 USC §404.
- 132 Pub. L. 74-272, 19 Sta. 648, 648.
- 133 See *United States v. Perdue Farms Inc.*, 680 F.2d 277, 282 (2nd Cir. 1982) (discussing 1958 amendments).
- 134 7 USC §209(a).
- 135 *Wheeler v. Pilgrim's Pride Corp.*, 536 F.3d 455, 456 (5th Cir. 2008), rev'd 591 F.3d 355 (2009) (en banc).
- 136 *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355, 363 (5th Cir. 2009) (en banc).
- 137 *Been v. O.K. Industries*, 495 F.3d 1230 (10th Cir. 2007).
- 138 *Ibid.*, p. 1232.
- 139 See section of this report titled "A new attempt at enforcement."
- 140 *Terry v. Tyson Farm Inc.*, 604 F.3d 272, 275 (6th Cir. 2009).
- 141 *Ibid.*, p. 279.
- 142 *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1305 (11th Cir. 2005).
- 143 *Picket v. Tyson Fresh Meats Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005).
- 144 *Terry*, 604 F.3d p. 277.
- 145 *De Jong Packing Co. v. U.S. Department of Agriculture*, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980). See also, *London*, 495 F.3d, p. 1304 ("Eliminating the competitive impact requirement would ignore the long-time antitrust policies which formed the backbone of the Packers and Stockyards Act's creation").
- 146 *Been v. O.K. Industries*, 495 F.3d, p. 1229 ("Not to require a showing of competitive injury or the likelihood thereof would make a federal case out of every breach of contract. Nothing in the Packers and Stockyards Act suggests that Congress intended this result"); *London*, 410 F.3d, p. 1304 ("Failure to require a competitive impact showing would subject dealers to liability under the Packers and Stockyards Act for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised").
- 147 *Chevron U.S.A Inc. v. NRDC*, 467 U.S. 837, 843 (1984).
- 148 *London v. Fieldale Farms Corps*, p. 1304; *Wheeler v. Pilgrim's Pride Corp.*, p. 363-371 (Jones, C.J., concurring).
- 149 *Ibid.* at 1304 ("The PSA does not delegate authority to the Secretary to adjudicate alleged violations of Section 202 by live poultry dealers. (a). Congress left that task exclusively to the federal courts.")
- 150 *Been v. O.K. Industries*, 495 F.3d, p. 1240 (Hartz J., dissenting).
- 151 See *Wheeler* at 361 n.25 and 363 (citing *London*, 410 F.3d, p. 1304 and *Been*, 495 F.3d, p. 1227).
- 152 *Wheeler v. Pilgrim's Pride Corp.*, pp. 36-263; *Been v. O.K. Industries*, 495 F.3d, p. 1227 ("noting in the plain language of § 202 (a) indicates that a practice is unfair only if it adversely affects competition or is likely to do so. But neither does the statute otherwise define an unfair practice.").
- 153 *Been v. O.K. Industries*, 495 F.3d, p. 1239 (Hartz, J., concurring and dissenting).
- 154 See discussion of USDA decision, note 28.
- 155 *Philson v. Goldsboro*, 1998 U.S. App. Lexis 35564 (4th Cir. 1998).
- 156 *M&M Poultry v. Pilgrim's Pride Corp.*, 2015 U.S. Dist. LEXIS 195184 (ND WV 2015). West Virginia is in the 4th Circuit, so a holding by that court would be binding on the trial court. In other words, had the 4th Circuit adopted the anticompetitive harm rule, the *M&M* court would have had to follow it. The *M&M* court was also unimpressed with *Terry's* tidal wave imagery: "The Court provided little analysis of the statute and mistakenly lumped all cases together in one broad sweep, which the Court referred to as a 'tidal wave.'" The courts of appeals have, in fact, not reached unanimity on this issue. Fortunately, although typically causing much destruction and chaos before receding, tidal waves inevitably return to the sea, allowing rebirth, and eventually the tides will turn.
- 157 *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d at 381 (Garza J., dissenting)
- 158 *Farrow v. United States Department of Agriculture*, 780 F.2d 211, 213 (8th Cir. 1985).
- 159 *Armour & Co. v. United States*, 402 F.2d 712, 723 (7th Cir. 1968).
- 160 *De Jong Packing Co. v. United States Department of Agriculture*, 618 F.2d 1329 (9th Cir. 1980).
- 161 *Central Coast Meats, Inc. v. United States Dep't of Agriculture*, 541 F.2d 1325, 1327-28 (9th Cir. 1976).
- 162 *Holiday Food Service Inc. v. Department of Agriculture*, 820 F.2d 1103 (9th Cir. 1987).
- 163 *Bruhn's Freezer Meats, Inc. v. Department of Agriculture*, 438 F.2d 1332, at 1341.
- 164 See *Milton Abeles Inc. v. Creekstone Farms premium Beef LLC.*, 2009 U.S. Dist LEXIS 27647 (ED NY 2009); *Gerace v. Utica Veal Col.*, 580 F. Supp. 1465 (NDNY 1984); *Schumacher v. Tyson Fresh Meats Inc.*, 434 F. Supp. 2d 748 (DSD 2006).

- 165 *M&M Poultry v. Pilgrim's Pride Corp.*, 2015 U.S. Dist. LEXIS 195184 (ND WV 2015). West Virginia is in the 4th Circuit, so a holding by that court would be binding on the trial court. In other words, had the 4th Circuit adopted the anticompetitive harm rule, the *M&M* court would have had to follow it. The *M&M* court was also unimpressed with *Terry's* tidal wave imagery: "The Court provided little analysis of the statute and mistakenly lumped all cases together in one broad sweep, which the Court referred to as a 'tidal wave'."), *Ibid.* p. 277. As discussed above, the courts of appeals have, in fact, not reached unanimity on this issue. Fortunately, although typically causing much destruction and chaos before receding, tidal waves inevitably return to the sea, allowing rebirth, and eventually the tides will turn. *Ibid.* p. 31.
- 166 *Been v. O.K. Industries*, 495 F.3d, p. 1230.
- 167 *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d, p. 375.
- 168 *United States v. Bowman*, 363 F.2d 81 (5th Cir. 1966), discussed in *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d, p. 376 (Garcia J., dissenting).
- 169 *Capitol Packing Co. v. United States*, 350 F.2d, p. 67, 74 (refusal to sell high quality cattle separately), pp. 74–75 (loan to packer) (10th Cir. 1965).
- 170 *Van Wyk v. Bergland*, 570 F.2d 701, 704–05 (8th Cir. 1978) (failure to pay for livestock violates Section 312) and *United States v. Donahue* (comingling fund violates Section 312), both cited in *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d, p. 376.
- 171 *Ibid.*
- 172 *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d p. 380.
- 173 *Syverson v. USDA*, 601 F.3d 793, 802 (9th Cir. 1988).
- 174 *Spencer v. Department of Agriculture*, 841 F.2d 1451 at 1455 (9th Cir. 1988).
- 175 *Ibid.*, at 1455.
- 176 *Ibid.*
- 177 *Ibid.*
- 178 *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d, p. 59 (Garcia J., dissenting).
- 179 *Bowman*, as a 5th Circuit case, is binding precedent on both the *Wheeler* court and the *London* court.
- 180 *Been v. O.K. Industries*, 495 F.3d, p. 1230 (quoting *Capitol Packing Co. v. United States*, 350 F.2d 67 (10th Cir. 1965) (emphasis added in *Been*)).
- 181 *Been v. O.K. Industries*, 495 F.3d, p. 1229.
- 182 *Capitol Packing Co. v. United States*, 350 F.2d 67, 74.
- 183 *Mandeville Island Farms Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) ("The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150; [*American Tobacco Co. v. United States*, 328 U.S. 781.] The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.; *United States v. South-Eastern Underwriters Assn.*, *supra*, at 553.")
- 184 *Telecor Comms Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2002).
- 185 C. Scott Hemphill and Nancy L. Rose, "Mergers that Harm Sellers," *Yale Law Journal* 127 (7) (2018): 2076, 2079, available at <https://www.yalelawjournal.org/feature/mergers-that-harm-sellers>; Phillip E. Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law* (New York: Wolters Kluwer, 2005).
- 186 *Ibid.*
- 187 *Impax Labs., Inc. v. Fed Trade Comm'n*, 994 F.3d 484, 497–500 (5th Cir. 2021).
- 188 *Pickett v. Tyson Fresh Meats Inc.*, 420 F.30, p. 1280.
- 189 *Ibid.*, p.1281.
- 190 It may be that the court did not discuss ancillarity because it offered no evidence on pretext, but the defendant should have had the burden to come forward with an explanation on ancillarity. Moreover, as discussed in the following, the court's own discussion of the evidence established that the plaintiffs had proven that the anticompetitive effects outweighed the procompetitive benefits.
- 191 In *The U.S. Beef Supply Chain: Issues and Challenges*, one essay argues that alternative marketing agreements also lower costs for the feedlots. The defendants in *Pickett* did not raise that justification. If they had, the court should have required evidence that, on balance, the feedlots that signed the contracts were better off. Then, it would have had to consider whether those benefits could be achieved through a different pricing mechanism—one that did not reduce cash prices for those who did not sign contracts.
- 192 This argument assumes that the alternative marketing agreements did not lead to increased demand for cattle. In theory, if these agreements caused packers to increase their cattle purchases, the feedlot and the ranchers might be better off selling more cattle at a lower price to boost demand in the future. This justification has two problems. First, there is no guarantee that the feedlots receiving the lower price today will be around to benefit from increased demand. Second, it still does not explain why the price needs to be pegged to an undetermined cash price.

- 193 *Agerton v. Pilgrim's Pride Corp.*, 728 F.3d 457, p. 461.
- 194 *Ibid.*, p. 462.
- 195 *Pickett v. Tyson Fresh Meats Inc.*, 420 F.3d, p. 1279.
- 196 *Terry v. Tyson Farm Inc.*, 604 F.3d, p. 279.
- 197 *Morris v. Tyson Chicken*, 2022 U.S. Dist. LEXIS 2729, *16 (WD Ky January 6, 2022).
- 198 *Been v. O.K. Indus.*, 495 F.3d at 1231
- 199 *Stafford v. Wallace*, 258 U.S. 495, 213 (1922). The Supreme Court placed controlling price in the same category as antitrust violations. Because market manipulation affects prices without market power, this report treats the phrase “manipulating or controlling prices” as a market abuse.
- 200 *Spencer Livestock Com. Co. v. Department of Agriculture*, 841 F.2d 1451 at 1455 (9th Cir. 1988); *United States v. Perdue*, 680 F.2d 277, 280–81 (2nd Cir. 1982).
- 201 61 Cong. Rec. at H1805.
- 202 Public Law 74-272, 49 Stat. 648, 648 (1935); 71 FR 92566, 92568 (2016); 61 Cong. Rec. at H1805.
- 203 Peter C. Carstensen, “The Packers and Stockyards Act: A History of Failure to Date,” *The CPI Antitrust Journal* (2) (2010), available at <https://www.competitionpolicyinternational.com/assets/Uploads/CarstensenAPR-2.pdf>.
- 204 Herbert Hovenkamp, “Does the Packers and Stockyards Act Require Antitrust Harm?” (Philadelphia: Faculty Scholarship at Penn Law, 2011), available at https://scholarship.law.upenn.edu/faculty_scholarship/1862.
- 205 Stumo and O'Brien, “Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships,” p. 92.
- 206 Section 2 of the Sherman Act prohibits attempts to monopolize and conspiracy to monopolize.
- 207 Hovenkamp, “Does the Packers and Stockyards Act Require Antitrust Harm?” p. 3. (This argument builds on Professor Hovenkamp's analysis.)
- 208 *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d, p. 375 (Garza J., dissenting).
- 209 *Ibid.*, p. 355, 282. (For a longer discussion of the relevance of Gratz to the Packers and Stockyards Act, see section of this report, titled “Recent Court decisions have required proof of harm to competition.”)
- 210 *Ibid.*, p. 371–85 (Garza J., dissenting); *Been v. O.K. Industries*, 495 F.3d, p.1238–43 (Hartz J., dissenting).
- 211 Cross reference section.
- 212 *Been v. O.K. Industries*, 495 F.3d, p. 1228; *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d, p. 370–71.
- 213 *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d, p. 371 (Jones, concurring).
- 214 The actual text bans “contracts, combination in the form of trust or otherwise, or conspiracy.” Agreement is used as a shorthand for the statutory language.
- 215 *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d, p. 367 (Owens J., concurring).
- 216 *Ibid.*, p. 3. The concurrence is arguing that an incorrect and rejected interpretation of one act (the FTC Act) should control the interpretation of a related statute.
- 217 *Been v. O.K. Industries*, 495 F.3d, p. 1239 (Harz H., concurring and dissenting).
- 218 61 Cong. Rec. at H1805
- 219 *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), p. 430.
- 220 In certain cases, courts do not require proof of harm or market power. In those cases, the “pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse.” *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958).
- 221 Federal Trade Commission, “FTC Policy Statement on Unfairness” (1980), available at <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.
- 222 H.R. Rep. No. 85-1048, p. 1 (1957). In 1958, U.S.C.A.N. 5213, 5213 quoted in *Been v. O.K. Industries*, 495 F.3d, p. 1228. For a comprehensive discussion of the legislation history, see Rosales, “Comment: Dethroning Economic Kings: The Packers and Stockyards Act of 1921 and its Modern Awakening.”
- 223 *Been v. O.K. Industries*, 495 F.3d, p. 1230 (discussing *Excel Corp. v. USDA*, 397 F.3d 1285 (10th Cir. 2005)).
- 224 *Ibid.* (discussing *Hays Livestock Commission Co. v. Maly Livestock Commission Co.*, 498 F.2d 925 (10th Cir. 1974)).
- 225 *Ibid.*
- 226 *National Beef Packing Co. v. Secretary of Agriculture*, 606 F.2d 1167, 1169 (10th Cir. 1979).
- 227 *Been v. O.K. Industries*, 495 F.3d, p. 1230.
- 228 *Capitol Packing Co. v. United States*, 350 F.2d, pp. 80.
- 229 *Machlin Meat Packing* 15 AD 97, 110 (1956).
- 230 *Ibid.*, p. 110–111 (collecting cases).
- 231 *Ibid.*, p. 110.
- 232 *Ibid.*
- 233 *Ozark County Cattle Co. Inc.* 49 AD 335, 358–59, collecting cases (1990).
- 234 *Ibid.*, p. 358.

- 235 Ibid.
- 236 Ibid.
- 237 Carstensen, “Dr. Pangloss as an Agricultural Economist: The Analytical Failures of The U.S. Beef Supply Chain Issues and Challenges,” p. 5.
- 238 Steven Y. Wu and James MacDonald, “Economics of Agricultural Contract Grower Protection Legislation,” *Choices Magazine* 30 (3) (2015): 3, available at <https://www.choicesmagazine.org/choices-magazine/theme-articles/current-issues-in-agricultural-contracts/economics-of-agricultural-contract-grower-protection-legislation>.
- 239 Carstensen, “Dr. Pangloss as an Agricultural Economist: The Analytical Failures of The U.S. Beef Supply Chain Issues and Challenges,” p. 4.
- 240 Daniel D. Barnhizer, “Inequality of Bargaining Power,” *Colorado Law Review* 76 (1) (2005):139, 186, 196, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=570705. (providing examples, including unfair and deceptive acts or practices, labor relations, right to rescind certain contracts).
- 241 See, for example, *Agerton v. Pilgrim's Pride Corp.* (In re *Pilgrim's Pride Corp.*), 726 F.3d 457 (5th Cir. 2013); In re *Pilgrim's Pride Corp.*, 448 BR 896 (Bank. N.D. Tex 2021); *Sanders v. Koch Foods, Inc.*, 2002 U.S. Dist. 116406 (Bank. S.D. Miss 2020).
- 242 See section of this report, titled “Courts have rejected USDA’s interpretation that the Packers and Stockyards Act does not always require proof of competitive harm.” Even if courts do not give USDA interpretations of Section 202 the highest level of deference, courts will give the agency’s interpretation some, and potentially significant, weight: “But at the least I would think that we owe respect to the experience and expertise of the USDA regarding the PSA.”
- 243 *Armour & Co. v. United States*, 402 F.2d 712, 721 (7th Cir. 1968).
- 244 *Schumacher v. Tyson Fresh Meats Inc.*, 434 F. Supp. 2d 748 (DSD 2006), p. 454.
- 245 Federal Trade Commission, “FTC Policy Statement on Deception,” appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf
- 246 Federal Trade Commission, “FTC Policy Statement on Deception” (1983), available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.
- 247 See, e.g., *London*, 410 F.3d, p. 1300 (plaintiffs alleging defendant “with substandard chick in retaliation for Harold’s testimony in the race discrimination case.”).
- 248 *Been v. O.K. Industries*, 495 F.3d, p. 1230 (discussing *Excel Corp. v. USDA*, 397 F.3d 1285 (10th Cir. 2005)).
- 249 Ibid.
- 250 *Been v. O.K. Industries*, 495 F.3d, p. 1230 (discussing *Excel Corp. v. USDA*, 397 F.3d 1285 (10th Cir. 2005)).
- 251 Stumo and O’Brien, “Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships,” p. 104.
- 252 See, e.g., 15 USC §45n (defining unfair as an act that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”)
- 253 Federal Trade Commission, “FTC Policy Statement on Unfairness.”
- 254 J. Howard Beales, “The FTC’s Use of Unfairness Authority: Its Rise, Fall, and Resurrection” (Washington: Federal Trade Commission, 2003), available at <https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection>. (“Substantial injury can consist of small harm to a large number of consumers, or significant harm to each affected individual. Even in the aggregate, total injury may not be large, as in cases when the company is small, or the practice is one that creates unnecessary transaction costs. But relative to the benefits, the injury may still be substantial.”). <https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection>
- 255 Federal Trade Commission, “FTC Policy Statement on Unfairness.”
- 256 Ibid.
- 257 Ibid. p. 50.
- 258 *International Harvester*, 104 FTC 949 (1984).
- 259 *Orkin Exterminating Co. Inc. v. Federal Trade Commission*, 849 F.2d 1354 (11th Cir. 1984).
- 260 Federal Trade Commission, “Trade Regulation Rule; Credit Practice,” 49 FR 7740 (1984), available at https://archives.federalregister.gov/issue_slice/1984/3/1/7708-7793.pdf#page=33 (inclusion of confession of judgement and waiver of defense clauses in consumer credit contracts is unfair); Federal Trade Commission v. Roca labs, CV 8;15-v-02231-MSS-TBM (2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3255-x150061/roca-labs-inc> (inclusions of gag order that prohibited customers from posting truthful and nondefamatory negative comments). <https://www.ftc.gov/enforcement/cases-proceedings/142-3255-x150061/roca-labs-inc>
- 261 *FTC v. CompUSA Inc.*, 139 F.T.C. 357 (2005).
- 262 *Federal Trade Commission v. Countrywide Homes*, CV 10 4197 (2010), available at

- <https://www.ftc.gov/enforcement/cases-proceedings/082-3205/countrywide-home-loans-inc-bac-home-loans-servicing-lp> (collecting fees not included in mortgage contract is unfair).
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- 270 *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d, p. 366. (Owens J., concurring).
- 271 *Ibid.*, p. 366.
- 272 *Ibid.*, p. 366–69.
- 273 *Interstate Commerce Commission v. Baltimore and Ohio Railroad*, 145 U.S. 283–284. (1892).
- 274 *Ibid.*
- 275 *Interstate Commerce Commission v. Alabama M. R. Co.*, 168 U.S. 144, 170 (1897).
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- 277 *Terry v. Tyson Farm Inc.*, 604 F.3d., p. 279 (quotations omitted).
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- 279 Anuva Ganapathi, “Re-thinking Batson in Light of Flowers: An Effort to Cure a 25-year Problem of Prosecutorial Misconduct,” *Georgetown Journal of Legal Ethics* 33 (3) (2020): 503, 506–509, available at <https://www.law.georgetown.edu/legal-ethics-journal/in-print/volume-33-issue-3-summer-2020/>. Justice Marshall raised this concern in his Batson concurrence: “when a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutors’ motives. *King v. County of Nassau*, 581 F. Supp. 493, 501–502 (EDNY 1984). Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons.”
- 280 *Agerton v. Pilgrim’s Pride Corp.*, 28 F.3d 457, 461 (5th Cir. 2013).
- 281 *Ibid.*
- 282 *Ibid.* (explaining that “Because the protection of natural price levels is the object of prohibitions against anticompetitive conduct § 192(e) is clearly direct at conduct that is anti-competitive.”)
- 283 *Ibid.*, p. 463.
- 284 *Ibid.*, p. 461.
- 285 *Cargill Inc. v. Harden*, 452 F.2d 1154, 1163 (8th Cir. 1971) (quoting *General Foods Corporation v. Brannan*, 170 F.2d 220, 231 (7th Cir. 1948)).
- 286 *Ibid.*, p. 1162 (explaining how a squeeze is a form of manipulation that does not require monopoly power).
- 287 U.S. Securities and Exchange Commission, “Concept Release on Equity Market Structure” (2010).
- 288 Jerry W. Markham, “Manipulation of Commodity Future Prices—The Unprosecutable Crime,” *Yale Journal on Regulation* 8 (2) (1991): 281, 313, available at <https://openyls.law.yale.edu/handle/20.500.13051/8429>.
- 289 *Pickett v. Tyson Fresh Meats Inc.*, 420 F.30, p. 1280.
- 290 See section of this report, titled “Recent court decisions have required proof of harm to competition.”
- 291 The next chapter discusses how this conduct could also violate the Packers and Stockyards Act as an antitrust violation.
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- 296 Written Statement by Andy Green for the U.S. Senate Committee on Agriculture, Nutrition & Forestry, “Legislative hearing to review S. 4030, The Cattle Price Discovery and Transparency Act of 2022 and S. 3870, The Meat and Poultry Special Investigator Act of 2022,” available at <https://www.agriculture.senate.gov/hearings/legislative-hearing-to-review-s-4030-the-cattle-price-discovery-and-transparency-act-of-2022-and-s-3870-the-meat-and-poultry-special-investigator-act-of-2022>; Jon Lauck, “Toward an Agrarian Antitrust: A New Direction for Agricultural Law,” *North Dakota Law Review* 75 (3) (1999): 449, 480, available at <https://commons.und.edu/ndlr/vol75/iss3/2/>.
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- 301 *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Holiday Wholesale, et al v. Philip Morris, et al.*, 231 F. Supp. 2d 1253 (ND Ga 2002).
- 302 See, generally, Christopher R. Leslie, “The Decline and Fall of Circumstantial Evidence in Antitrust Law,” *American University Law Review*, 69 (6) (2020).
- 303 *United States v. Foley*, 598 F.3d 1323 (4th Cir. 1979).
- 304 *Jacob Binder & Sons v. Gerber Prods. Co.*, 166 F.3d 112 (3rd Cir. 1999).
- 305 *Been v. O.K. Industries*, 495 F.3d, p. 1231 (“The antitrust requirement that monopoly power be acquired willfully and include the power to exclude competitors does not apply in the context of the PSA”; Hovenkamp, “Does the Packers and Stockyards Act Require Antitrust Harm?” p. 3–4.
- 306 *Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968).
- 307 *Ibid.*, p. 253.
- 308 *Ibid.*, p. 254–55. Although the more recent case law has not discussed Swift, Stumo and O’Brien discussed Swift and how it exemplifies the broader reach of the Packers and Stockyards Act compared to the antitrust laws in the context of what is unfair.
- 309 Richard Posner, “Oligopoly and the Antitrust Laws: Suggested Approach,” *Stanford Law Review* 21 (6) (1968): 1562, 1564–65, 1588–93, available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2862&context=journal_articles.
- 310 Compare *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772 (ND Ill 2017) (ruling complaint sufficiently alleged agreement) with *In re Cattle Antitrust Litig.*, 2020 U.S. Dist. LEXIS 177526 (D. Min. 2020) (dismissing complaint for failure to allege agreement).
- 311 See section of this report titled “Rules related to traditional antitrust violations.”
- 312 In other words, if the U.S. Department of Agriculture issued a rule saying proof of market power is never necessary for a Packers and Stockyards Act claim alleging an antitrust violation, the courts would give the agency no deference because the agency is interpreting (and in this hypothetical, incorrectly interpreting) the antitrust rule-of-reason test, which the agency is not charged with enforcing or administering. In contrast, if the agency presumed chicken aggregators have monopsony power based on substantial evidence, that would be a factual determination that should receive substantial deference.
- 313 *Mandeville Island Farms Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948).
- 314 *Ibid.*
- 315 *Been v. O.K. Industries*, 495 F.3d, p. 1231.
- 316 *Realcomp II Ltd. v. FTC*, 635, 815 (6th Cir. 2011).
- 317 *Nat. Collegiate Assoc. of Athletics v. Alston*, 141 S.Ct. 2141, 2159 (2021).
- 318 See, e.g., U.S. Department of Justice and the Federal Trade Commission, “Horizontal Merger Guidelines: Section 10” (2010).
- 319 *Polk Bros. v. Forest City Enterprises Inc.*, 776 F.2d 185 (7th Cir. 1985). There is some disagreement whether this analysis belongs in the procompetitive benefit step or the balancing stage.
- 320 Hovenkamp, “Does the Packers and Stockyards Act Require Antitrust Harm?”
- 321 Scott Morton, “Modern U.S. antitrust theory and evidence amid rising concerns of market power and its effects.”

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- 325 *Compare, United States v. Visa U.S. Inc.*, 344 F.3d 229 (2nd Cir. 2003) (finding firm with 26 percent market share had market power); *Wilk v. American Medical Ass’n*, 895 F.2d 352, 360 (7th Cir. 1990).
- 326 U.S. Department of Justice, “Horizontal Merger Guidelines” §5.3 (2010), available at <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>. In a merger case, the next step is to determine how the merger would increase the market HHI. A merger that increases the HHI by 200 points in a highly concentrated market is presumed anticompetitive.
- 327 Kelloway and Miller, “Food and Power: Addressing Monopolization in America’s Food System.”
- 328 See section of this report titled “Overview of the meatpacking industry” for a discussion on how markets for livestock and poultry are being concentrated.
- 329 Peter C. Carstensen, “Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy,” *William and Mary Business Law Review* 1 (1) (2010): 1–46, available at <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1001&context=wmbmlr>.
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- 332 Stephen R. Koontz, “Another Look at Alternative Marketing Arrangement Use by the Cattle and Beef Industry.” In Bart L. Fischer, Joe L. Outlaw, and David P. Anderson, eds., *The U.S. Beef Supply Chain: Issues and Challenges* (Kansas City: Agriculture and Food Policy Center, 2021), p. 102–131, 108, available at <https://www.afpc.tamu.edu/research/publications/710/cattle.pdf>.
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- 337 *Pickett v. Tyson Fresh Meats Inc.*, 420 F.3d, p. 1280.
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- 353 Executive Order no. 14036, *Executive Order on Promoting Competition in the American Economy*; Rohit Chopra and Lina M. Khan, “The Case for ‘Unfair Methods of Competition Rulemaking,” *University of Chicago Law Review* 87 (2) (2020): 357–379, available at <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6181&context=ucirev>.
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- 356 5 U.S.C. § 553 (c).
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- 369 16 CFR §4.1 (e).
- 370 Securities and Exchange Commission, “Rules of Practice and Rules of Fair Fund and Disgorgement Plans” (2017), p. 102.
- 371 18 CFR § 385.2102.
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