Title
Stimulating Antitrust Enforcement to Expand the Regenerative Agriculture Movement

Authors
Tam, Kristen
Bielskis, Olivia

Publication Date
2021-04-01

Undergraduate

ABSTRACT

Competition in the agricultural marketplace has significantly declined as a result of decreasing antitrust enforcement and increasing consolidation. In the current market, the largest firms control disproportionate percentages of market power, threatening consumer prices, principles of equal economic opportunity, and viability of small farms and ranches. Contrary to the notions promulgated by Robert Bork's "consumer welfare standard," which claims that the federal government should regulate mergers sparingly for the supposed benefit of the consumer, consumer prices have increased due to this perspective being applied to jurisprudence and enforcement. Market consolidation also harms principles of fairness and objectivity in policy. Seeing as large firms often contribute such a substantial percentage of a given agricultural product's output, if the firm is significantly compromised financially, they must be "bailed out" because the market inherently relies on their output and constructed dominance. When large firms or farms have such robust security, they are less likely to innovate, improve the quality of their products, and invest in more sustainable agriculture practices.

The Intergovernmental Panel on Climate Change (IPCC) prescribes that the world needs to limit global temperature rise to 1.5 degrees Celsius by 2050, which is contingent upon decreasing greenhouse gas emissions. Agriculture contributes to 10.5 percent of the United States' emissions, and the ability to reduce emissions is hindered by large farms' tendency to employ practices that increase emissions, while small farms, which are being driven out by corporate merges, are more likely to employ sustainable farming practices such no-till, compost as fertilizer, and planting cover crops. Agriculture consolidation has largely increased due to non-precautionary approaches by the Supreme Court and federal regulation agencies, the Federal Trade Commission and Department of Justice. Specifically, the Supreme Court's ruling that the "threat of loss of profits due to possible price competition" does not constitute antitrust harm has hindered the implementation of the Clayton Antitrust Act. Additionally, the federal agencies responsible for regulating mergers have increased the number of mergers they approve, allowing consolidation of the marketplace to continue. The lack of strict antitrust regulation to prevent mergers from holding hostage undue percentages of the marketplace is hindering the growth of regenerative farming, a set of practices that will be integral in meeting the IPCC climate change goals.

Stimulating Antitrust Enforcement to Expand the Regenerative Agriculture Movement

INTRODUCTION

The failures of the federal courts and agencies to adequately enact antitrust enforcement has resulted in extensive consolidation of the agricultural marketplace creating conditions in which few distributors, meatpacking firms, and farms hold disproportionate percentages of the market power. Such instances of consolidation in the market are intended to be regulated through federal policies such as the Clayton Antitrust Act. However, the influence of Robert Bork and the Chicago School, which both argue to prioritize efficiency through consolidation over small businesses and competition in the market, resulted in an era from the 1980s to the present where the federal courts and agencies have adopted a less precautionary philosophy in interpreting antitrust laws, allowing large firms to merge, and leaving the marketplace largely unregulated.

The first gatekeepers that regulate corporation consolidation are the Department of Justice's (DOJ) Antitrust Division and the Federal Trade Commission (FTC), which are responsible for reviewing new and existing mergers. To supplement, the Courts evaluate cases that involve mergers that seek to persist despite the DOJ or FTC preventing the merge. The Courts can also hear cases in which other firms on the market claim they will be substantially threatened by a potential merger. Often, mergers are brought up to the Courts under the Clayton Act, which requires proof of antitrust injury to sue. Suffering "antitrust injury" can include acts that "may substantially lessen competition," as stated in Section 7 of the Act.

The impacts of large mergers are especially staggering when examining the dominance of the agriculture industry's distributors, largest meat packing firms, and largest farms, which can

all be referred to as agriculture firms in this paper. In 2017, four beef packaging firms owned 83 percent of the market.[1] With only four firms holding a substantial percentage of market power, smaller firms and farms were obligated to decrease their selling price in order to compete with larger firms maintaining high economies of scale. This hinders the profitability of small farms, ultimately resulting in market failure because these farms are eventually driven out by their untouchable competitors, allowing the largest agriculture firms to hold monopolistic power. In the 1980s, farmers profited 37 cents per dollar spent in production,[2] while in 2018, farmers made less than 15 cents per dollar.[3] Decreasing profit margins are being perpetuated by the few gargantuan distributors that control the marketplace, allowing them to pay farmers or ranchers the price *they* want to set, often below market rate.

Decreasing competition and profit margins threatens the existence of small farmers and poses a substantial threat to essential climate change mitigation by hindering the growth of regenerative farming. Large industrial agriculture firms mostly utilize destructive farming practices including applying toxic synthetic fertilizers, planting monoculture fields, and tilling their soil. Tilling, the practice of overturning soil for the purpose of reducing soil compaction[4] and mixing nutrients, decreases water retention, destroys vital soil microbes, and results in the release of carbon dioxide, a harmful greenhouse gas contributing to climate change.[5] Every year,

---

[1], *Packers and Stockyards Division Annual Report 2018*, United States Department of Agriculture Agricultural Marketing Service, https://www.ams.usda.gov/sites/default/files/media/PSDAnnualReport2018.pdf (last visited Jan. 1, 2021).
[2] Austin Frerick, *To Revive Rural America, We Must Fix Our Broken Food System*, The American Conservative (Feb. 27, 2019, 12:01 AM), https://www.theamericanconservative.com/articles/to-revive-rural-america-we-must-fix-our-broken-food-system/.
[3]*Food Dollar Application*, United States Department of Agriculture Economic Research Service, https://data.ers.usda.gov/reports.aspx?ID=17885 (last updated Mar. 23, 2020).
[4]Elizabeth A. Warnemuende et al., *Effects of tilling no-till soil on losses of atrazine and glyphosate to runoff water under variable intensity simulated rainfall,* 95 SOIL AND TILLAGE RES. 19, 26 (2007).
[5] Upendra M. Sainju et al., *Soil Carbon Dioxide Emission and Carbon Content as Affected by Irrigation, Tillage, Cropping System, and Nitrogen Fertilization*, 37 J. ENVIRON. QUAL. 98, 106 (2008).

44.02 billion tons of chemical fertilizer are applied onto U.S. soil,[6] while every minute thirty soccer fields worth of soil are lost due to tilling practices.[7] This is threatening food security, ecosystems, and the climate.[8] The Intergovernmental Panel on Climate Change (IPCC) prescribes that the world needs to limit global temperature rise to 1.5 degrees Celsius by 2050. Agriculture contributes to 10.5 percent of the United States' emissions, therefore we have a significant capacity to instead decrease emissions by implementing more sustainable farming practices.[9]

Conversely, a majority of smaller farms avoid these harmful practices and work to combat climate change by implementing regenerative techniques such as practicing no till, applying compost as fertilizer, and planting cover crops. In addition to building soil health, increasing soil water retention, and sequestering carbon dioxide from the atmosphere, small farms are able to implement farming practices that fit the local environment and adapt quickly with flexibility to maintain production during changing environmental conditions.[10] Although small farms are more likely and willing to implement regenerative practices, their ability to switch to regenerative practices is dampened because they have limited money, time, or resources to do so with low profit margins. Failure to regulate the market is hindering a transition that would benefit the industry and planet in the long run. Although there are no laws in place that limit soil degrading practices, antitrust laws were created to prevent monopolies and undue

---

[6] Roberto Mosheim, *Summary of Findings*, United States Department of Agriculture Economic Research Service, www.ers.usda.gov/data-products/fertilizer-use-and-price/summary-of-findings/ (last updated Oct. 30, 2019).
[7] *Join the Worldwide Screening of The Need To GROW*, Food Revolution Network Earth Conscious Films, https://grow.foodrevolution.org/, (last accessed Jan. 10, 2021).
[8] *The Need to GROW*. 2018. [DVD] Directed by R. Dawson. Los Angeles: Earth Conscious Films.
[9] *Climate Change*, United States Department of Agriculture Economic Research Service, https://www.ers.usda.gov/topics/natural-resources-environment/climate-change/ (last updated Aug. 14, 2020).
[10] James M. MacDonald & Robert A. Hoppe, *Examining Consolidation in United States Agriculture*, United States Department of Agriculture Economic Research Service (Mar. 14, 2018), https://www.ers.usda.gov/amber-waves/2018/march/examining-consolidation-in-us-agriculture/.

concentration of market power in the hands of a few corporations, such as the beef packing conglomerates, from forming on the marketplace. If implemented properly, these laws have the potential to protect competition in the agriculture industry, keep small farms alive, and decrease the amount of soil being destructively farmed.

The federal government's lackluster antitrust enforcement is born from a history of jurisprudential doctrines that favor large corporations and efficiency and subsequently discourage federal agencies from striking down harmful mergers. This paper first discusses the impact of lackluster enforcement of antitrust laws on the agriculture industry, focusing specifically on the hindrance of regenerative farming practices. Antitrust laws were created to prevent and correct such consolidation, thus, I enlist a two-pronged approach that identifies the main avenues through which consolidation has increased, and recommend remedies. The first prong addresses how the merge permitted between two meat packing corporations in *Cargill v. Monfort* contradicts the purpose of the Clayton Act and has set substantial precedent for the court's non precautionary interpretation of antitrust laws and what constitutes as "antitrust harm" under the Clayton Act. I argue that the Courts should set a new judicial standard that allows the "threat of loss of profits due to possible price competition" to constitute "antitrust injury," and that they must default to precautionary measures and strike down mergers that have the capacity to acquire an undue percentage of the market share. The second prong addresses how the negligence of the DOJ and FTC has yielded a significant increase in consolidation of agriculture firms in the United States. To do so, I argue that these agencies must increase the number of agriculture and meatpacking merger acquisitions they block by holistically analyzing the scope of the mergers market power. Additionally, the reinvestigation of current corporations in the

market holding unruly market power is essential in remedying the adverse impacts of market consolidation in agriculture.

I. The Current Market: As Farms Consolidate, the Growth of Regenerative Farming is Hindered

A. Increased Consolidation in the Agriculture Industry as Deregulation Heightens on Farms, Meat Packing, and Other Food Corporations

As defined by the United States Department of Agriculture (USDA), a "farm" is any place from which $1,000 or more of agricultural products were produced or sold during the year.[11] This section discusses the historical and current consolidation trends in the agriculture marketplace for farms, meatpacking firms, and many other food corporations. I find that the overall number of farms has decreased while the size of each farm or firm has increased, and the number of farms in higher sales classes have increased along with their subsequent share of farmland.[12]

Farm numbers have decreased since the onset of the 20th century, however, due to Robert Bork and the Chicago School's influence that prioritized economic efficiency and consumer prices over small businesses,[13] the number of farms in the United States started decreasing at faster rates. In 1975, there were 2.5 million farms across the country,[14] which declined by an

---

[11] *Farms and Land in Farms 2018 Summary*, United States Department of Agriculture Economic Research Service (Apr. 2019), https://downloads.usda.library.cornell.edu/usda-esmis/files/5712m6524/j098zk725/9z903749k/fnlo0419.pdf.
[12] *Id*.
[13] Dylan Matthews, *Antitrust Was Defined by Robert Bork. I Cannot Overstate His Influence*, Washington Post (Dec. 20, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/12/20/antitrust-was-defined-by-robert-bork-i-cannot-overstate-his-influence/.
[14] *Farm Numbers Continue Decline*, United States Department of Agriculture Economics, Statistics, and Cooperatives Services (Dec. 27, 1979, 3:00 PM), https://downloads.usda.library.cornell.edu/usda-esmis/files/5712m6524/z316q3990/tx31qm27w/FarmNumb-12-27-1979.pdf.

average of 2.41 percent per year.[1516] Comparatively, from 1980 to 1985, the number of farms decreased by an average of 6.15 percent per year,[17] alluding to increased rates of consolidation.

While farm numbers continue to decrease, output production size and the Gross Cash Farm Income (GCFI) of large farms has increased. From 2012 to 2018, the number of farms decreased from 2.11 to 2.03 million farms, while the average farm size increased from 429 to 443 acres.[18] Specifically, the growth in land holdings has increased the greatest in the largest farms. In 1987, 57 percent of the United States cropland was operated by midsize farms with 100 to 999 acres of cropland while only 15 percent was operated by large farms over 2,000 acres.[19] In 2012, cropland operated by midsize farms drastically decreased to 36 percent while cropland operated by large farms increased to 36 percent, more than doubling the figure from 1987.[20] In addition to holding control of more land and market power, and decreasing competition in the marketplace, these larger farms hold a disproportionate majority of agricultural commodity profits. In 1991, small farms, defined as farms whose income is less than $350,000, took in 46 percent of agricultural profit, while in 2015, small farms took in only 25 percent of agricultural profit.[21] Large farms, who make more than $1,000,000 held 31 percent of the GFCI in 1991, while in 2015, their share increased to 51 percent.[22]

The trend towards consolidation is also prevalent in the livestock, poultry and meat packing industries, seeing as the number of farms and packaging plants decrease while the number of animals raised per farm increases. From 1987 to 2017, there was a 28.50 percent

---

[15] *Id*.
[16] *Id*.
[17] MacDonald & Hoppe, *supra.*
[18] *Farms and Land in Farms 2019 Summary*, United States Department of Agriculture National Agricultural Statistics Service (Feb. 2020), https://www.nass.usda.gov/Publications/Todays_Reports/reports/fnlo0220.pdf.
[19] MacDonald & Hoppe, *supra*.
[20] *Id.*
[21] *Id.*
[22] *Id.*

decrease in the number of cow, pig and chicken farms.[23] While the number of farms decreased, the midpoint numbers for the number of livestock per farm increased; where half of the livestock are above, and half are below it. In 1987, the midpoint number of cows for each livestock feeding industry was 80, while in 2012, this increased to 900, an increase of 1,025 percent.[24] The number of meatpacking plants, where farmers sell their animals to be slaughtered, packaged, and distributed, also decreased which allows meatpackers to run roughshod over farmers by giving them power to pay their desired lower prices, disadvantaging farmers.

Consolidation in other food industries is increasing as well, seeing as in 2012 four firms owned 89 percent of the peanut butter industry, a staggering figure which increased to 92 percent in 2017.[25] In 2015 the two largest corn seed firms owned 78 percent of the market share,[26] in 2017 the four largest jelly firms owned 85 percent of the industry,[27] and in 2018, two firms owned 87 percent of the mayonnaise market share, a $1.6 billion dollar industry.[28] These figures showing monopolization exemplify the formidable proportions to which the agriculture and food industry is consolidated. These trends underscore how the regulation mechanisms in place to promote competition and prevent monopolization are not working.

---

[23] *Id.*
[24] *Id*.
[25] *Peanut Butter*, America's Concentration Crisis: Open Markets, https://concentrationcrisis.openmarketsinstitute.org/industry/peanut-butter/ (last visited Dec. 30, 2020).
[26] *Corn Seed*, America's Concentration Crisis: Open Markets, https://concentrationcrisis.openmarketsinstitute.org/industry/corn-seed/ (last visited Dec. 30, 2020).
[27] *Jelly*, America's Concentration Crisis: Open Markets, https://concentrationcrisis.openmarketsinstitute.org/industry/jelly/ (last visited Dec. 30, 2020).
[28] *Mayonnaise*, America's Concentration Crisis: Open Markets, https://concentrationcrisis.openmarketsinstitute.org/industry/mayonnaise/ (last visited Dec. 30, 2020).

B. *Consolidation Threatens Democratic Systems*

The consolidation and existence of merged corporations harms farmers and consumers and contradicts the democratic spirit of objective policy creation for the good of the people, not the corporation. Limited choices in the marketplace increases reliance on those select businesses, allowing them to have a significant influence on the government to make decisions in their favor. If any of those firms becomes economically endangered, the government is more inclined to to bail them out because they rely on their product or service. For instance, Tyson is one of America's largest meat processing companies.[29] Because they control a sizable majority of the market, when problems hindering production arise, including when multiple plants shut down during the onset of the coronavirus pandemic in 2020, a large decrease in the nation's slaughtering capacity comes about, resulting in food shortages. Because of their essential position in the food supply, these meatpacking businesses can use their large market power to put pressure on the government to provide subsidies and bail them out of lawsuits and business failures. This dynamic harms farmers who have few or no other choices to sell their livestock to for slaughter in order to go to the market. These firms can extract these advantages even when problems such as COVID-19 outbreaks in the plants resulted from deliberate neglect to implement adequate safeguards by company heads.[30] In addition to providing an unwavering safety net regardless of firm malpractice, the government often bends to the firm's demands if they seek subsidies or exemptions from prosecution.[31] In effect, when firms become so large that

---

[29] CHRISTOPHER LEONARD, *THE MEAT RACKET: THE SECRET TAKEOVER OF AMERICA'S FOOD BUSINESS* (2014, Simon and Schuster).

[30] Ana Swanson & David Yaffe-Bellany, *Trump Signs Executive Order to Prevent Meat Shortage*, The New York Times, https://www.nytimes.com/2020/04/28/business/economy/coronavirus-trump-meat-food-supply.html (last updated Apr. 29, 2020).

[31] Jesse W.W. Markham Jr., *Lessons For Competition Law From The Economic Crisis: The Prospect For Antitrust Responses To The 'Too-Big-To- Fail' Phenomenon*, 16, FORDHAM J. CORP. & FIN. L, (2011).

they cannot be allowed to fail, they begin to have disproportionate power over the political process.[32]

C. Consolidation Threatens the Growth of Regenerative Farming

I. Regenerative Farming is Reducing Emissions, Bolstering Biodiversity, and Increasing Food Security, a Critical Practice to create a Climate Resilient Future

The United Nations IPCC report calls for a rapid greenhouse gas reduction to limit temperature rise to 1.5 degrees celsius by 2050.[33] Given that agriculture and forestry accounted for 10.5 percent of greenhouse gas emissions in 2018,[34] farming practices can play a crucial role in meeting these goals. Farming the land in ways that build healthy soil, maintain biodiversity, and sequester carbon dioxide are critical measures that will help America cultivate a sustainable food system, protect the land for generations to come, and meet greenhouse gas emission reduction goals.

Currently, the practices that dominate the American agricultural landscape often till the soil, plant only one to two crops at a time, and input large sums of fertilizer, herbicides, pesticides, and other chemicals to streamline production. Industrialized agriculture values efficiency, maximizing yield, and decreasing labor input. In contrast, regenerative agriculture practices maintain soil health for long term benefit by applying compost as fertilizer, planting cover crops, implementing diverse crop rotation, rotating livestock grazing, limiting fertilizer and

---

[32] *Id.*
[33] Valerie Masson-Delmotte et al., *Global Warming of 1.5 Degrees Celsius*, Intergovernmental Panel on Climate Change (2019), https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_Low_Res.pdf.
[34] *Climate Change*, United States Department of Agriculture Economic Research Service, https://www.ers.usda.gov/topics/natural-resources-environment/climate-change/ (last updated Aug. 14, 2020).

pesticide use, and eliminating tillage practices.[35] Although opponents highlight that regenerative practices yield less products per acre and require more labor input, they neglect the significance of their energy input being 30-60 percent less than traditional methods because they do not use machines, fertilizer, and herbicides.[36] This practice ultimately increases the long term productivity and stability of food production because it doesn't rely on the continuous purchasing and application of chemicals into the soil. Instead, it builds soil health by increasing nutrient and water retention, both of which increases land productivity.[37]

II. Small Farms are More Likely to Implement Regenerative Fertilization Practices

One of the defining regenerative agriculture practices is applying compost and manure as fertilizer. There are three different types of fertilization methods that the USDA measures every few years, manure, organic, and commercial that help replenish soil nutrients. Manure is the application of animal bio excretions,[38] organic fertilizer is the use of organic matter, compost, animal manures or green manures and does not include any chemical fertilizers,[39] and commercial fertilizer is the application of chemically derived fertilizers such as nitrogen, phosphate and potash.[40] For these figures, manure and organic fertilizers are categorized as "regenerative fertilizers" because they represent methods that replenish soils with naturally derived as opposed to chemically manufactured nutrients.

---

[35] Janet Ranganathan et al., *Regenerative Agriculture: Good for Soil Health, but Limited Potential to Mitigate Climate Change*, World Resources Institute (May 12, 2020), https://www.wri.org/blog/2020/05/regenerative-agriculture-climate-change.
[36] Craig J. Pearson, *Regenerative, Semi Closed Systems: A Priority for Twenty-First-Century Agriculture*, 57 BIOSCIENCE 409, 418 (2007).
[37] *Id*.
[38] *Nutrient Use and Management*, United States Department of Agriculture Economic Research Service, https://www.ers.usda.gov/webdocs/publications/41964/30295_nutrientmgt.pdf?v=41143 (last visited Jan. 16, 2021).
[39] Pamela Coleman, *Guide for Organic Crop Producers*, United States Department of Agriculture Agricultural Marketing Service (Nov. 2012), https://www.ams.usda.gov/sites/default/files/media/GuideForOrganicCropProducers.pdf.
[40] *Nutrient Use and Management, supra*.

Small farms, 10.0 to 49.9 acres, are more likely to implement regenerative fertilizer methods than medium sized, 260 to 499 acres, and large sized, 1,000 to 1,999 acre farms. In 2017, 32.74 percent of small farms used regenerative fertilizer, compared to 27.27 percent of medium and 21.63 percent of large farms.[41] Small farms are also transitioning away from commercial fertilizer to regenerative fertilizer methods at a faster rate than medium and large farms. From 2012 to 2017, small farms had the greatest percent decrease in number of farms using commercial fertilizers, 6.50 percent, and the largest percent increase for regenerative practices, 6.47 percent. Medium farms experienced a 2.28 percent decrease in the number of farms implementing commercial fertilizers, while a 2.57 percent increase in regenerative fertilizers. Large farms experienced a 2.31 percent decrease in the number of farming implementing commercial fertilizers, while a 2.32 percent increase in regenerative fertilizers.[42] This demonstrates that smaller farms are more willing and better suited to implement regenerative practices.

Industrial agriculture firms, on the other hand, highly prioritize efficiencies and maximizing profit, thus, are less likely to invest the time and money into learning about and switching to regenerative fertilization practices. While small farms are making the most rapid transition to regenerative fertilization practices that would benefit the market and planet in the long run, the increased market and resource dominance of the largest farms, which have the slowest rates of transition to regenerative fertilization practices, is ultimately hindering the growth of regenerative agriculture in the United States.

---

[41] Sonny Perdue et al., *2017 Census of Agriculture United States Summary and State Data*, United States Department of Agriculture National Agricultural Statistics Service (April 2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.
[42] *Id.*

D. Consolidation Negatively Affects Farmers

This disproportionate market power gained by a few agriculture conglomerates allows them to reduce prices in order to drive out competition.[43] While large farms lack the will to invest in more regenerative farming techniques, small farms that do not employ regenerative practices are primarily hindered by their lack of economic means to do so. As previously stated, individual farmers make less than 15 cents per dollar and, according to a study conducted by the USDA in 2001, 71 percent of poultry growers live below the poverty line.[44] Such subpar circumstances are not conducive to having the freedom to invest time and money into switching practices to plant cover crops, not till, and use animal fertilizer.

E. *Consolidation Negatively Affects Consumers*

In addition to harming farmers, agricultural consolidation has also resulted in increased food prices for consumers, largely disproving the claims of Bork's "consumer welfare standard." In 2014, economist John Kwoka published a book *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy* where he analyzed 200 mergers from 1976 to 2006 and found that post-merger prices on average increased by 4.3 percent.[45] In addition, evidence has shown that market self-correction has not occurred as a result of antitrust underenforcement.[46]

---

[43] SAMUEL C. THOMPSON, *MERGERS, ACQUISITIONS, AND TENDER OFFERS: LAW AND STRATEGIES: CORPORATE, SECURITIES, TAXATION, ANTITRUST, CROSS BORDER*, Corporate and Securities Law Library (New York City: Practising Law Institute, 2010, Practising Law Institute).

[44] *The Business of Broilers: Hidden Costs of Putting a Chicken on Every Grill*, Pew Charitable Trusts (Dec. 20, 2013), http://pew.org/2yHK50g.

[45] JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY,* (2014, The MIT Press).

[46] *Antitrust Enforcement Data*, Yale School of Management (Oct. 23, 2018), https://som.yale.edu/faculty-research-centers/centers-initiatives/thurman-arnold-project-at-yale/antitrust-enforcement-data-0.

II. Prong One: "Antitrust Injury" Should Include the Threat of Loss of Profits due to Possible Price Competition

The negative effects of agriculture consolidation have transpired largely due to the lack of antitrust enforcement from the Courts and the DOJ and FTC. The Supreme Court's ruling on *Cargill v. Monfort*, which allowed two meatpacking corporations to merge even though the plaintiff, a competing firm, claimed the merge would cause a "threat of loss of profits." This showcases how this perspective on antitrust laws has failed to err on the side of precaution and subsequently allows mergers that decrease competition in the marketplace to arise. This section outlines the intended purpose of antitrust laws, provides an overview of the case, then argues why showing the threat of loss of profits due to possible price competition following a merger *does* constitute antitrust injury. Further, this ruling has created an unreasonable threshold for private entities to bring potential mergers to court and has created precedent for later filings to be dismissed on the basis that they did not prove sufficient "antitrust injury."

A. Origins of Antitrust Law

The term "antitrust" came about in the late 1800s because many companies were transferring their stock to a board of "trustees" who controlled the output and prices for entire industries.[47] With this in mind, antitrust laws were designed to ensure that a few corporations do not hold substantial economic power that could "be exerted to oppress individuals and injure the public generally."[48] Not only do they intend to prevent monopolization of markets, but they aim to maintain competitive markets, increase consumer surplus, increase the quantity and quality of

[47] THOMAS V. VAKERICS, *ANTITRUST BASICS* 1,10 (2019).
[48] *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1911).

the product consumed, reduce deadweight loss, and improve efficiency in resource allocation as well.[49]

Congress created three major Federal antitrust laws to maintain competition in the marketplace: The Sherman Antitrust Act, the Clayton Antitrust Act and the Federal Trade Commission Act.[50] The first of the antitrust laws, The Sherman Antitrust Act was enacted in 1890 with the purpose of protecting interstate and foreign trade by outlawing contracts, combinations, conspiracies, and anticompetitive conduct that unreasonably restrained trade.[51] The Act is not violated when one firm's vigorous competition and lower prices take sales from its less efficient competitors; in this case, the Courts state that competition is working properly.[52] While the Sherman Act imposes a more onerous burden of proving actual unreasonable restraints, Congress created the Clayton Act to require proof only of *potential* anticompetitive effect.[53] The Act intends to prevent practices that suppress competition and give large businesses undue advantages over small businesses, as well as to prohibit mergers and acquisitions that are likely to lessen competition.[54]

There are three key elements that help uphold United States antitrust laws and affect the level of enforcement. The first is jurisprudential doctrines that the courts develop.[55] Judicial decisions may limit or expand the reach of antitrust laws by setting precedents that alter the government's ability to challenge certain types of cases. The second is the prosecutorial

---

[49] *Antitrust Enforcement Data*, *supra.*
[50] *Antitrust Laws And You*, United States Department of Justice (Jun. 25, 2015), https://www.justice.gov/atr/antitrust-laws-and-you.
[51] *Id.*
[52] *Id.*
[53] 15 U.S.C. § 18, (LexisNexis 1914).
[54] *Antitrust Status of Farmer Cooperatives: The Story of the Capper-Volstead Act,* United States Department of Agriculture Rural Business-Cooperative Service (Sept. 2002), https://www.rd.usda.gov/files/CIR59.pdf.
[55] *Antitrust Enforcement Data*, *supra.*

discretion that enforcers, the DOJ, the FTC, and the state attorneys general, employ.[56] Because these agencies determine what does and does not violate antitrust laws, a change in the enforcement discretion or philosophy of enforcers may affect the intensity of regulation. The third is the fiscal resources provided to the enforcers.[57] Judicial rules that increase or decrease the cost and barrier to entry to pursue cases can affect the number of antitrust cases brought to trial.

B. Jurisprudential Doctrines are Largely Influenced by Lenient Interpretations by the Courts

Until the late 1970s, the courts strictly ruled against many mergers and in favor of protecting competition. However, this changed when Robert Bork published a book in the 1980s arguing that the government must only focus on changes in consumer prices when assessing anti-competitive harm, a perspective known as the "consumer welfare standard."[58] His framework prioritized economic efficiency over small businesses, arguing that big business should be allowed to consolidate because its efficiency benefited the economy.[59] Concurring with Bork, the Chicago School principles claim that underenforcement of antitrust laws was better than over-enforcement because market self-correction will provide sufficient safeguards to competition.[60]

Because of these new priorities, the Supreme Court, FTC, and DOJ adopted this philosophy in 1979 ushering in what is known as the Chicago Era.[61] They prioritized the efficiencies and lower prices that larger firms created, thus rolling back their antitrust enforcement on larger firms to create more consolidated industries.[62] Although consolidated industries may positively affect consumers by decreasing prices, the Court neglected to take into

---

[56] *Id*.
[57] *Id*.
[58] Frerick, *supra.*
[59] Matthews, *supra.*
[60] *Antitrust Enforcement Data*, *supra*.
[61] Matthews, *supra.*
[62] Frerick, *supra.*

account the negative effect that consolidation in agricultural purchasing and distribution had on suppliers such as farmers. When there are less buyers, distributors, or packers who compete for the supplier's good, the buyers are able to control and drive down the price they pay to the suppliers; they create what is known as monopsony power.

C. Cargill v. Monfort

Cargill v. Montfort exemplifies a decision invoking a diluted enforcement of the Clayton Act that leads to the creation of monopsony power. In this case, the Supreme Court overruled the Circuit and District Court rulings and decided that the plaintiff, Monfort, did not establish sufficient antitrust injury under Section 16 of the Clayton Act by claiming a threat of loss of profits to sue Excel. Monfort, the fifth largest beef packing corporation in the United States, was contesting the merging of Excel and Spencer, the second and third largest beef packing corporations in the United States. Excel is a wholly owned subsidiary of Cargill, Inc., which owns more than 150 subsidiaries in over 35 countries.[63] The merger would still leave Excel as the second largest packer, but its market share would almost equal the largest packer, IBP, Inc.[64]

The case was first brought to the Tenth Circuit Court, where they agreed that the plaintiff proved antitrust standing and was able to seek injunction under Section 16 of the Clayton Act, which allows for a party to sue for injunctive relief due to "threatened loss or damage by a violation of the antitrust laws."[65] This conclusion was reached because Montfort's viability in the market would be injured by (1) a threat of loss of profits from the possibility that Excel would lower its prices to a level at or only slightly above its costs, and (2) a threat of being driven out of business by the possibility that Excel would lower its prices to a level below its costs, which

---

[63] *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 107 (1986).
[64] *Id* at 107.
[65] 15 U.S.C. § 26 (LexisNexis 1914).

would violate Section 7 of the Clayton Act.[66] Section 7 intends to prohibit actions that substantially lessen competition or tend to create monopolies.[67] These injuries would be met on the premise that Excel would injure Monfort by enacting a "price-cost squeeze." A price-cost squeeze would involve Excel increasing the bidding price it would pay for cattle while lowering the price it sells the end product, boxed beef, to a level at or only slightly above its production costs.[68] In effect, this would require Monfort to also lower its prices in order to remain competitive, causing them to suffer profit losses.[69] Excel's large financial resources endowed by its owner, Cargill, would allow it to accept far lower profit margins than firms like Monfort, which would eliminate competitors in the short run and reduce competition in the long run.[7071] This inevitability violates the Clayton Act by creating a "threatened loss or damage"[72] by a price-cost squeeze, which would "substantially… lessen competition"[73] and create a dynamic in which Excel can control the market to maximize their own benefit.[74]

The District Court agreed that Monfort's allegations and proof of anticompetitive effect were sufficient given that Excel, being the second largest producer, could create an acquisition that realistically threatens Monfort's position as a strong competitor in the marketplace.[75] The Court of Appeals also affirmed this ruling and held that the respondent's allegation of a "price-cost squeeze" was not just harm from competition, but constituted a claim of injury as a form of predatory pricing because Excel would drive other companies out of the market.[76]

---

[66] *Cargill*, 479 U.S. at 115.
[67] 15 U.S.C. § 18 (LexisNexis 1914).
[68] *Cargil*l, 479 U.S. at 115.
[69] *Id* at 122.
[70] *Id* at 122.
[71] *Monfort of Colorado, Inc. v. Cargill, Inc.*, 591 F. Supp. 683, 692 (D. Colo. 1983).
[72] § 26.
[73] § 18.
[74] *Cargill*, 479 U.S. at 122.
[75] *Monfort of Colorado, Inc.*, 591 F. Supp. 683 at 698.
[76] *Id.*

D. The Supreme Court's Ruling on *Cargill v. Monfort* Undermines the Clayton Act

In response to the District and Circuit Court rulings, the Supreme Court's first argument was that the showing of loss or damage merely due to increased competition does not constitute antitrust injury to seek relief under Section 16.[77] The Supreme Court looked back to its rulings on *Brunswick orp. V. Pueblo Bowl-O-Mat, Inc.,* where they held that "antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws."[78] Here, the Court found that the competition that Monfort alleged, competition for increased market share, was simply vigorous competition, and not actively forbidden by antitrust laws.[79] The Court suggests that if antitrust laws protected competitors from the loss of profits due to this price competition, any decision by a firm to cut prices in order to increase market share would be rendered illegal.[80]

However, showing loss or damage due to increased competition does constitute antitrust injury. Antitrust injury results from predatory pricing, an anticompetitive practice forbidden by antitrust laws where a corporation intentionally lowers prices below normal competitive prices in order to monopolize part of the market.[81] Monfort demonstrated that this injury is at play because they proved high likelihood that Excel would engage in a price-cost squeeze. A price cost squeeze may be viewed as "simply vigorous competition" in the short run. However, if the practice continues, it will greatly reduce competition in the long run. Furthermore, antitrust laws focus on protecting competition in the long run rather than treating these matters as mere short

---

[77] *Cargill*, 479 U.S. at 106.
[78] *Id* at 117.
[79] *Id* at 117.
[80] *Id* at 117.
[81] § 26.

term price wars. In this case, the Court focused on the postmerger conduct and opted to deny relief unless the plaintiff could prove a violation of the Sherman Act. Instead, the Court should focus its attention on the merger itself and grant relief if there is a significant probability that the merger will adversely affect competition in the market, focusing on the probable threat of harm rather than actual harm.[82] This aligns with the purpose of Section 7 in the Clayton Act to prevent mergers that "may substantially lessen competition, or tend to create a monopoly" without requiring initial proof of ongoing, established harm to the plaintiff.[83] Section 16 of the Clayton Act is not being properly enforced to protect competition if it does not grant plaintiffs antitrust injury on the basis that there is a threat of loss of profits due to possible price competition following a merger.

The Supreme Court's second argument is that the respondent neither raised nor proved any claim of predatory pricing before the District Court. This is because Monfort did not allege that Excel's engaging in a price-cost squeeze was included in predatory activities.[84] Although Monfort may only have four passing references that claim that Excel would be able to and would probably engage in predatory pricing, it should not need to claim this, rather, the evidence of a price-cost squeeze likely occurring is enough to satisfy antitrust injury.

The Court's ruling on *Cargill v. Monfort* did not, however, set a *per se rule*, which would have unequivocally "denied competitors standing to challenge acquisitions on the basis of predatory pricing theories."[85] Therefore, competitors can still *challenge* acquisitions on the basis of predatory pricing. However, because the Court ruled that showing loss of damage merely due to increased competition, or the threat of loss of profits due to possible price competition

---

[82] *Cargill*, 479 U.S. at 126.
[83] *Id* at 111.
[84] *Id* at 104.
[85] *Id* at 105.

following a merger does not constitute antitrust injury to give injunctive relief under Section 16,[86] if following competitors try to bring up this reason for antitrust injury, they will most likely be denied standing as the Court will refer back to this case. This language has been inscribed into this section's jurisprudence doctrines and has not been overturned or amended since, as more recently cited in the definition of antitrust standing in *Glen Holly Entm't, Inc. v. Tektronix Inc* case in 2003.[87] The subsequent adverse impacts of consolidation on the market demonstrate that showing loss of damage due merely to increased competition, or the threat of loss of profits due to possible price competition following a merger *does* constitute antitrust injury and should be struck down.

III. Prong Two: The DOJ and FTC have significantly decreased the number of agriculture and meatpacking merger acquisitions that they block

A. Power in the Hands of the Antitrust Division and Federal Trade Commission to determine Harmful Merges

The second institutional aspect affecting antitrust enforcement is observed in federal agencies. The DOJ and FTC are the federal agencies that evaluate if corporate merges valued at more than $94 million can occur.[8889] Since the 1980s, regulation by the FTC and DOJ has significantly decreased. Every year the FTC and DOJ review over a thousand merger filings, and it was found that between 2000 and 2005, 95 percent of merger filings presented no competitive

[86] § 26.
[87] *Glen Holly Entm't, Inc. v. Tektronix Inc*., 343 F.3d 1000, 1001 (9th Cir. 2003).
[88] *Merger Review*, Federal Trade Commission, https://www.ftc.gov/enforcement/merger-review, accessed Feb. 10, 2021.
[89] *Federal Register Vol. 85, No. 18,* United States Government Publishing Office (Jan. 28, 2020), https://www.govinfo.gov/content/pkg/FR-2020-01-28/pdf/2020-01423.pdf.

issues.[90] For mergers that "may… substantially… lessen competition, or tend to create a monopoly,"[91] the FTC conducts more in-depth investigations using their Merger Best Practices guidelines.[92] Oftentimes, competitive issues with these mergers are solved by consent agreement with the parties. In the few cases where the agency and parties cannot agree on a way to fix the competitive problems, the agency may bring the merger on administrative trial to federal court.[93]

These agencies base their determination on if a merge is likely to create or increase market power.[94] Market power is the ability of a seller or a group of sellers to profitably maintain prices above competitive levels for a significant period of time or the ability of a buyer or coordinating group of buyers to depress prices below competitive levels.[95] When a merger is brought before them, such as the acquisition of Cargill by Continental, the Division conducts extensive research. In this case, they worked with over 20 attorneys, economists and paralegals who reviewed over 400 documents and consulted with officials from the USDA, FTC and state attorneys general offices. They interviewed over 100 farmers, farm organization officials, agricultural economists, grain company executives, and other individuals. In conducting their analysis, the Division determines the size and shape of the product and geographic markets, how recent buying and selling patterns would be affected by the merge, analyzes the size of the firms' market shares, and looks at the pre- and post-merger levels of concentration in the market.[9697] From this, the Division decides if the effect of the merger may substantially lessen competition

---

[90] Deborah Platt Majoras, *Reforms to the Merger Review Process*, Federal Trade Commission (Feb. 16, 2006), https://www.ftc.gov/sites/default/files/attachments/merger-review/mergerreviewprocess.pdf.
[91] *Id*.
[92] *Mergers*, Federal Trade Commission (Jun. 11, 2013), https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers.
[93] *Id*.
[94] Douglas Ross, *Antitrust Enforcement And Agriculture*, Antitrust Division of the U.S. Department of Justice (Aug. 20, 2002), https://www.justice.gov/atr/speech/antitrust-enforcement-and-agriculture-2.
[95] *Id.*
[96] *Id.*
[97] THOMPSON, *supra*.

in the relevant market, which determines whether or not to allow the merger to exist.[98] In *Philadelphia National Bank*, the Supreme Court set forth an additional test that said if mergers control an *undue percentage share* of the relevant market and which results in a *significant increase in the concentration of firms* in the market inherently likely to lessen competition, then they violate Section 7 of the Clayton Act.[99]

After the Division follows these steps, they can prevent the merger from existing or allow the merger to proceed if they follow restructuring recommendations. For Cargill, they concluded that the merger would prevent competition and options for farmers to sell their products to. Thus, the Division suggested multiple divestitures in Cargill and Continental facilities throughout the Midwest, West and Texas Gulf. The Division did this because they wanted to ensure that farmers in the affected markets would have alternative buyers to sell their grain and soybeans to.[100] This case exemplifies that the DOJ and FTC have the capacity to determine how much evidence is needed to prove injury, what constitutes control of an "undue percentage share of the relevant market," and what "a significant increase in the concentration of firms in the market" is.[101] Although the investigation in Cargill and Continental resulted in an adequate enforcement of antitrust guidelines, the majority of cases do not face comparable evaluation.

B. Regulation by the DOJ has Significantly Decreased

Decreased regulation by the DOJ and FTC is not adequately protecting competition. From 2010 to 2019, despite a 79.16 percent increase in the number of pre-merger submissions to the DOJ and FTC, from 1,166 to 2,089, the percentage of mergers that these agencies conducted

---

[98] *Id.*
[99] *Id.*
[100] Ross, *supra*.
[101] THOMPSON, *supra*.

a second request for decreased by 0.5 percent and 0.3 percent respectively for the DOJ and FTC.[102] Despite a clear increase in the number of merger requests, the DOJ and FTC have not proportionally increased the usage of their enforcement mechanisms.

Examining enforcement in 2013, there were 1,326 merger transactions reported, 217 of which raised questions for further inquiry based solely on information reported. From this, 47 second requests were issued from the FTC and DOJ to collect data from the businesses. After receiving this information, the DOJ and FTC brought 38 merger enforcement actions which in the majority included settlement agreements with the parties involving asset divestiture to prevent post merger harm. This resulted in only 6 merger cases filed in court seeking injunction rather than settlement.[103] Seeing as enforcement trends have shifted to such a great extent to allow over 95 percent of merger transactions form every year, the DOJ and FTC have clearly demonstrated a propensity to decrease regulation of mergers, which generally favors furthering the dominance of large corporations.

The *Cargill* case epitomizes the Court's lenient attitude specifically against enforcement of Section 7 of the Clayton Act where the federal agencies also need to increase enforcement to uphold the goals of the statute. Under Section 7 in the Clayton Act, the number of merger cases investigated by the DOJ have decreased in each decade following the Bork era: 125.3 merger cases per year in the pre-Bork era from 1970 to 1979,[104] 95.1 cases per year in the post-Bork era

---

[102] Joseph J. Simons & Makan Delrahim, *Hart-Scott-Rodino Annual Report: Fiscal Year 2019,* Federal Trade Commission and Department of Justice Antitrust Division, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf, (last visited February 10, 2021).
[103] *Merger Review by the Numbers*, Federal Trade Commission (May 21, 2014), https://www.ftc.gov/news-events/blogs/competition-matters/2014/05/merger-review-numbers.
[104] *Antitrust Division Workload Statistics FY 1970-1979*, United States Department of Justice, https://www.justice.gov/atr/antitrust-division-workload-statistics-fy-1970-1979#N_1_, (last updated Jun. 25, 2015).

from 1980 to 1989,[105] and most recently, only 69.8 cases per year from 2010 to 2019.[106] Merger cases have experienced drastic decreases in the number of cases for which the DOJ conducts a second request, finds violation of antitrust laws, and bars a merger from proceeding from the 1970s to our current age. For agriculture enforcement specifically, since 1969 the DOJ has only filed 10 cases against company mergers for fluid milk manufacturing and dairy products, while meat packing firms have only faced 7 cases cumulatively.[107] The DOJ's decreasing regulation of mergers that substantially harms competition has caused the agriculture market to become more consolidated; therefore, it must reinvigorate its deference to its statutory duties to uphold the Clayton Act and strike down on mergers that it foresees will and currently are, threatening competition on the marketplace.

From 2008 to 2011, the FTC challenged nearly all mergers that would result in three or fewer significant competitors, most that would result in four or fewer significant competitors, and none that would leave five or more competitors.[108] This practice closely resembles Robert Bork's philosophy arguing that mergers resulting in four or more competitors should be presumptively lawful.[109] Although the FTC was diligent in challenging mergers that would result in three or fewer significant competitors, having five large competitors on the market still constitutes a substantially consolidated market, further decreasing competition and preventing smaller businesses from surviving and profiting.

---

[105] *Antitrust Division Workload Statistics FY 1980-1989*, United States Department of Justice, https://www.justice.gov/atr/antitrust-division-workload-statistics-fy-1980-1989 (last updated Jun. 25, 2015).
[106] *Antitrust Division Workload Statistics FY 2010-2019*, United States Department of Justice, https://www.justice.gov/atr/file/788426/download (last visited Feb. 21, 2021).
[107] *Antitrust Case Filings*, United States Department of Justice, https://www.justice.gov/atr/antitrust-case-filings (last visited Feb. 21, 2021).
[108] *Antitrust Enforcement Data, supra*.
[109] *Id*.

IV. Recommendations

In order to uphold competition in the marketplace, the Courts and federal regulation agencies must take deliberate action against mergers that will inevitably have profound effects on long-term competition. In order to address prong one, where the Courts have not erred on the side of precaution and have not granted antitrust injury to parties that claim "the threat of loss of profits due to possible price competition," the Courts should interpret American antitrust laws with Congress's intent to protect competition, rather than through the lens of consumer welfare, a strategy that has failed to uphold empirical integrity, seeing as consumer prices have risen.[110] Specifically, they should interpret Section 16 of the Clayton Act to allow for antitrust injury to include the threat of loss of profits due to possible price competition following a merger. Not only will this rightfully decrease the barrier to bringing forth an antitrust injury, but it will bring precedent back into alignment with the purpose and intention of the Clayton Act and prevent further consolidation in the agriculture marketplace.

In order to address prong two, where the DOJ and FTC have largely allowed consolidation in the marketplace to transpire with limited regulation, the DOJ and FTC must increase the number of agriculture and meatpacking merger acquisitions that they block by holistically analyzing the scope of the merger's market power. Additionally, they must reinvestigate current corporations in the market that have unruly market power, such as Tyson, and require divestiture. Tyson is sued on average 2.7 times every month, however, it still holds a substantially large percentage of the meat processing and packing industry.[111] By implementing both of these recommendations, the federal government can truly fulfill their regulatory

---

[110] KWOKA, *supra*.
[111] *Analytics: How the Meat Industry Leads to Dozens of Antitrust Lawsuits*, Law Street Media (Nov. 9, 2020), https://lawstreetmedia.com/agriculture/analytics-how-the-meat-industry-leads-to-dozens-of-antitrust-lawsuits/.

responsibilities by laying the groundwork for increasing competition by maintaining or increasing the number of farms, distributors and meatpacking businesses.

CONCLUSION

The growing consolidation of America's agriculture industry is alarming and poses a continuous threat to the expansion and transition to regenerative farming practices. The DOJ, FTC and the Courts have embraced Robert Bork's "consumer welfare standard" philosophy and employ stricter standards to prove antitrust injury, allowing more consolidation to occur in the agriculture industry. These conglomerates have increased market prices,[112] and in the long run, are implementing farming practices that are destroying the soil and security of America to produce its own food. There are more small and medium sized farms that implement regenerative practices such as applying manure and organic fertilizers. In order to expand the implementation of regenerative practices, large operations need to be broken down and further prevented from forming. Ultimately, allowing merges to occur and limiting regulation on the current marketplace by the Courts and federal agencies is harming consumers, farmers, and the government.

The principles of fairness and equal opportunity in the United States economy are threatened if we allow the few consolidated corporations to exist in the marketplace. The government, consumers, and farmers rely on these few firms as key suppliers and buyers; such dominance by a handful of corporations gives way to their disproportionate influence on regulatory and political processes meant to hold them accountable. The DOJ, FTC and Courts must utilize their statutory responsibilities to break down this corrupt system and create a more

[112] *Cattle: Marketing Year Average Prices Received*, United States Department of Agriculture National Agricultural Statistics Service, https://www.nass.usda.gov/Statistics_by_State/Washington/Publications/Historic_Data/livestock/cattlmya.pdf (last visited Feb. 14, 2021).

competitive marketplace. This will allow more firms to implement regenerative practices and protect our food systems and environment for generations to come. A failure to act constitutes a dereliction of duty to the people, the planet, and the purpose behind antitrust laws intended to uphold fair and ethical business practices.