

# Concentration in Agriculture

## Summary of Activities of the Iowa Attorney General's Office Iowa Attorney General Tom Miller March 12, 2010

### Background

The Iowa Attorney General's Office ("Office") has held a long-term concern about the increasing concentration of market power in agriculture. In 1996, the Office organized a group of 20 states in drafting a letter to then-Secretary of Agriculture Dan Glickman, which asked the USDA to take action with respect to several agricultural competition issues:

Market-Based Livestock Price Reporting. The letter urged the USDA to promote greater disclosure of key livestock market information, either by asking for voluntary compliance or by seeking Federal legislation.

Vertical Integration. The letter asked USDA to launch educational efforts to inform producers about the risks and rewards of production and marketing contracts.

Mergers and Consolidation. The letter asked the USDA to work with the U.S. Department of Justice ("USDOJ") and state attorneys general to closely examine mergers and consolidations in agriculture to determine whether competition would be reduced in violation of law.

Since 1996, these three issues have been the focus of multiple initiatives of the Iowa Attorney General's Office as described below:

### Market-Based Livestock Price Reporting

As the cattle and hog industries became more concentrated, there was a greater prevalence of long-term marketing agreements and packer ownership of livestock. Fewer cash prices were publicly reported, and concerns rose about the disparity of information and bargaining power between packers and producers.

1. Federal Legislation. In 1998, the Iowa Attorney General's Office spearheaded an effort of 20 attorneys general urging Congress to pass meaningful livestock price reporting legislation. In 1999, Congress passed legislation requiring USDA to adopt rules setting up the reporting program. In 2000, the Office submitted formal comments to USDA asking for several improvements in the proposed rules. In response to the comments submitted by the Office and others, some changes were made in the final rules.

2. State Legislation / Bans on Confidentiality Clauses. In 1999, Iowa enacted

mandatory livestock reporting provisions, which were later preempted by the Federal statute discussed above. However, at the request of the Office, the Iowa Legislature enacted a very important provision that enhances transparency in agriculture. It bans the use of confidentiality clauses in (a) livestock marketing agreements and (b) livestock and grain production contracts. This statutory prohibition allows producers to disclose terms in their agricultural contracts.

3. Office Website with Contracts. In 2000, the Office announced that it would post production and marketing contracts submitted by producers on the Iowa Attorney General's web site, [www.IowaAttorneyGeneral.gov](http://www.IowaAttorneyGeneral.gov). Dozens of contracts were posted on the site, which provided producers with valuable information about the terms and conditions of contracts available in the marketplace. In recent years, fewer contracts have been received by the Office.

4. Current Issues. Packer control of livestock production, particularly in the pork industry, has increased dramatically in recent years. The Office has heard concerns about the potential of packers manipulating the purchase price of their captive supplies in order to influence the prices reported to USDA. The Office will continue to monitor the practices of packers and to investigate practices, if facts justify.

## **Vertical Integration**

1. Production Contract Task Force/Checklists/Education. In 1995, the Office formed a Production Contracting Task force to study the issues surrounding the growing use of production contracts. The Task Force produced two educational pieces -- a Livestock Production Contract Checklist and a Grain Production Contract Checklist. Over 20,000 Checklists were distributed to farmers who wanted more information about the risks and rewards of production contracting. Over the years, the Iowa Attorney General's Farm Division has conducted numerous training seminars about production contracting, and it continues to provide information to producers with questions about contracting.

2. Model State Producer Protection Act. In 2000, the Office announced that it had led 17 states in developing a model state statute called the "Producer Protection Act." The act was intended to provide statutory protections to contract producers and was premised on the growing disparity of contract bargaining power between producers and contractor companies. The goal of the Office was to prevent the abuses found in poultry contracting from occurring in hog contracting in Iowa. The Act amounted to a Contract Grower's Bill of Rights.

### **The Producer Protection Act:**

- (a) Required contracts to be written in plain language and contain disclosures of material risks.
- (b) Provided contract producers with a three-day right to review contracts.
- (c) Protected producers from having contracts terminated capriciously or as a form of retribution if farmers had already made a sizeable capital investment in the contract.
- (d) Made it an unfair practice for processors to retaliate or discriminate against producers who exercised rights, including the rights to join producer organizations and to be a whistle-blower.

- (e) Provided producers with a first-priority lien for payments due under the contract.
- (f) Provided that producers would receive attorneys fees if they prevailed in a lawsuit to enforce their rights under the Act.

For several years, the Office advocated for passage of the full Producer Protection Act in the Iowa Legislature. Ultimately, only the first-priority lien idea was enacted in 1999. The Farm Division has issued several Farm Advisories advising farmers to file the lien.

3. Federal Contract Producer Protections. The Office also pushed for enactment of a producer protection act at the federal level. In May 2001, Attorney General Tom Miller testified before the Subcommittee on Agriculture, Rural Development, and Related Agencies of the U.S. Senate Committee on Appropriation, asking for strong, nationwide protections for contract growers. Miller also emphasized that any federal law should not preempt state law protections.

In 2008, Congress did enact several contract producer rights, including a three-day right to cancel production contracts, enhanced disclosure of additional capital investments, choice of law and forum rules, and restrictions on the use of binding arbitration to settle contract disputes.

4. Smithfield Litigation -- Iowa's Ban on Vertical Integration in Livestock. On September 2, 1999, Smithfield Foods announced its acquisition of the Iowa hog production business of Murphy Family Farms. From that date until September 16, 2005, the Office was in litigation with Smithfield Foods to enforce Iowa's restrictions on vertical integration in livestock.

Initially, the litigation was brought by the Office in state court to enforce Iowa's ban on processors engaging in pork production. Later, after the Iowa Legislature amended and strengthened the packer prohibition, Smithfield Foods challenged the constitutionality of Iowa's law in federal district court. The statute was found unconstitutional by the district court because it violated the commerce clause of the U.S. Constitution. Again, the Iowa Legislature amended the statute. On appeal, the 8<sup>th</sup> Circuit Federal Court of Appeals vacated the district court's decision and remanded the case for full consideration of the facts.

Rather than prolong this already-lengthy litigation, the Office began negotiations with Smithfield. The result was a 10-year agreement whereby the Office agreed not to enforce Iowa's packer ban. This allowed Smithfield to legally contract with Iowa farmers to raise hogs owned by Smithfield.

In return, Smithfield agreed to do the following:

- (a) Abide by a contract grower's bill of rights similar to the model state Producer Protection Act described above.
- (b) Refrain from finishing hogs in company-owned facilities for a period of five years.
- (c) Purchase 25% of the swine slaughtered in Smithfield's Iowa and South Dakota packing plants on the open market, for a period of two years.
- (d) Give 90-day advance notice of any plant closure at these facilities.

(e) Pay \$2,000,000 over a 10-year period for environmental and swine production improvement programs.

The agreement was approved by the Governor and legislative leaders and was entered as a consent decree by the federal district court.

5. Cargill, Hormel, and Tyson Agreements. The Office agreed to consent decrees that were almost identical to the Smithfield agreement (although no financial payments were involved) with: Cargill Meat Solutions on January 19, 2006; Hormel Foods on April 6, 2006; and Tyson Fresh Meats on September 11, 2009.

*With these agreements, a vast majority of Iowa pork producers with a production contract have the protections outlined in the model state Producer Protection Act.*

## **Agricultural Antitrust Matters and Unfair Practices**

The Iowa Attorney General's Office has been active in several agricultural antitrust matters, including the following:

1. Farm Chemicals. In 1997, the Office was part of a multi-state investigation involving alleged price-fixing in the resale pricing of farm chemicals. Zeneca, Inc., agreed to end the alleged illegal practices and paid \$3.9 million to the states involved. American Cyanamid Co. also agreed to end the alleged illegal practices and paid the states involved \$7.3 million.

2. Cargill-Continental Merger. In 1999, the Office monitored the Cargill-Continental merger. The Office had periodic discussions with the staff of the USDOJ who were handling the case and expressed specific concerns about the merger. The Office reviewed the proposed Final Judgment in the case, the public comments filed, and the response of USDOJ to the comments. The Office concluded that, with the important merger modifications USDOJ imposed, USDOJ went as far as it could under existing judicial interpretation of federal antitrust law. Further, Iowa antitrust law did not allow the Office to go farther than USDOJ.

3. Smithfield-IBP Merger. On November 13, 2000, Attorney General Miller issued the following statement concerning the planned Smithfield-IBP merger: "I am very concerned about plans to merge Smithfield and IBP, the nation's number-one and number-two pork processing companies. The planned merger raises very important competition and concentration issues in agriculture. We will investigate this situation in cooperation with other states and USDOJ. We already have seen rapid and extraordinary concentration in many sectors of U.S. agriculture, and this focuses the issue even further. The proposed merger poses serious questions for pork producers about the marketing of their hogs, and for consumers who buy pork products in the marketplace."

The merger ultimately did not go forward.

4. JBS-National Beef. In 2008, the Iowa Attorney General's Office joined several other states and USDOJ in filing a lawsuit to block the merger of JBS and National Beef. The acquisition would have combined two of the top four U.S. beef packers and resulted in lower prices paid to cattle suppliers and higher prices for consumers. The merger was abandoned in February 2009 and the litigation was terminated

5. Monsanto. In September 2007, the Office acknowledged that Iowa had issued a Civil Investigative Demand ("CID") to Monsanto as part of an inquiry into possible antitrust violations by the company. The CID sought information about the business practices of the company.

Recently, the Office acknowledged that the investigation of Monsanto is on-going.

6. Unfair Practices of Seed Companies. Through the years, the Office's Farm Division has investigated and advised farmers about potentially unfair practices of seed companies. For example, in 1999, the Farm Division issued a warning about forms that were being used in conjunction with crops grown by farmers using genetically modified seed that had not been approved for export to several important foreign markets ("non-approved GMOs"). The Farm Division and Iowa State University had developed a model form which farmers could use to certify that they had complied with non-approved GMO segregation or "channeling" practices. However, seed companies were asking farmers to sign an alternative form which would have greatly expanded the farmers' liability if a problem developed down the marketing chain concerning non-approved GMO grain. The Farm Division advised farmers to use the model form, not the alternative drafted by the seed companies.

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