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VOLATILE MILK INDUSTRY AFFECTED
BY ILLEGAL COMPETITION

*Kyle Gaffaney**

There are always two sides to every story and sometimes there are three. The rollercoaster ride of milk pricing is one such story. The story starts with the farmer producing milk, continues with the middleman, and ends with the consumer. The farmer wants to get the highest price he can for his milk while the consumer wants to pay as little as possible. The middleman is caught exactly where his name implies, and being in the middle draws a lot of attention.

One of these middlemen is currently the focus of a multistate antitrust lawsuit. On January 22, 2010, the U.S. Department of Justice's Antitrust Division, joined by the Attorneys General of Illinois, Michigan, and Wisconsin, filed a lawsuit against Deans Foods in federal court in Milwaukee, Wisconsin.¹ The lawsuit claims that the acquisition of a Wisconsin milk processing plant by Dean Foods essentially eliminates competition in milk sales to schools, grocery stores, and convenience stores in Illinois, Michigan and Wisconsin.²

I. Roller Coaster of Milk Pricing – Price Increase of 2007

Anyone who has taken a basic economics course knows that the supply and demand of a product determines its price. However, the natural pricing of a product can be upset by outside forces. When those prices are purposely manipulated, it can result in governmental intervention.

Unfortunately, not all forces that improperly affect the price of a product can be traced to one particular offender who can be reprimanded. Rather, a competing industry can be to

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¹ Brent Kendall, *U.S. Sues to Rescind Deal by Dean Foods*, WALL ST. J., Jan. 23, 2010, at B4.

² *Id.*

blame. This type of price-changing force has been affecting the milk industry over the past few years and its effects are being compounded by participants in the market.

A. Effect on Dairy Farmers

In 2007, dairy farmers raced to increase the size of their herds, attempting to take advantage of the historic run-up in milk prices.³ Between early 2007 and December 2008, dairy farmers increased herd size by 190,000.⁴ The price consumers paid for milk increased due to factors working against the milk industry. Milk prices increased, therefore affecting consumer demand, due to the increase in transportation expenses.⁵ The rise in transportation costs increased the demand for ethanol, which increased the demand and price for corn, an important part of most livestock feed.⁶ This in turn increased the cost of production.

Another economic factor sprung up to play havoc on the price of milk. The recent global recession has driven the demand for U.S. produced milk down, causing an excess of supply.⁷ The excess supply due to the increased herd sizes and the decline in global demand resulted in a decrease of milk prices. Because of the drop in milk prices, the increased herd sizes then became unnecessary. As a result, since December 2008, dairy farmers have been shrinking their herd sizes.⁸

The decrease in herd size is an organized effort. A group of dairy farmers known as Cooperatives Working Together (“CWT”) believe they can strengthen and stabilize milk prices by balancing supply with demand. CWT is working to decrease herd size nationally.⁹ Since 2008, the group has removed 252,000 dairy

³ Scott Kilman & Lauren Etter, *Farmers Want Industry Probe*, WALL ST. J., Sept. 17, 2009, at A3, available at <http://online.wsj.com/article/SB125314377665317635.html>.

⁴ *Id.*

⁵ *Forget Worries About \$4 Gas ... Now It's \$4 Milk*, MSNBC, May 30, 2007, <http://www.msnbc.msn.com/id/18946296>.

⁶ *Id.*

⁷ Kilman, *supra* note 3.

⁸ Whitney McFerron, *U.S. Cattle Herd Falls to 1958 Low as Losses Climb, Survey Says*, BUS. WK., Jan. 27, 2010, available at <http://www.businessweek.com/news/2010-01-27/u-s-cattle-herd-falls-to-1958-low-as-losses-climb-survey-says.html>.

⁹ Cooperatives Working Together, What is CWT?, http://www.cwt.coop/about/about_whatis.html (last visited Feb. 2, 2010).

cows from production.¹⁰

B. Effect on Consumers

Not everyone across the country is upset by the decrease in milk prices. Consumers have been hit hard by the recession. At least the price of one item in their grocery cart has gone down. The average price consumers paid for milk at the grocery store decreased 20% between August 2008 and September 2009.¹¹

The 20% decrease in price is great for consumers but the impact to the farmers has been more drastic. Some farmers are getting half as much for their raw milk as they used to get. This price is the lowest farmers have received in 40 years.¹² Unfortunately, the low price consumers are paying and the even lower price the farmers are getting is making it difficult for dairy farmers to survive. The 67,000 dairy farmers across the United States are expected to see a twelve billion dollar decrease in sales for 2009.¹³

II. Attempts to Fix the Industry

As a result of decreased sales revenue, dairy farmers are taking on debt, putting off the purchase of new equipment or going out of business.¹⁴ In 2009, at least 71 New England dairy farmers closed their barn doors for the final time.¹⁵

But dairy farmers have not been sitting idly by and letting their industry implode. Dairy farmers are organizing into groups such as CWT and examining what they can do to stabilize the market. In addition, government involvement in the pricing of milk is increasing.

The U.S. Government has been assisting dairy farmers since the Great Depression.¹⁶ In 2009, Congress approved \$350

¹⁰ McFerron, *supra* note 8.

¹¹ Alice Gomstyn, *Are Milk Prices too Low?*, ABC News, Sept. 18, 2009, <http://abcnews.go.com/Business/milk-prices-low/story?id=8605563&page=1>.

¹² John Burnett, *Independent Farmers Feel Squeezed by Milk Cartel*, NPR, Aug. 20, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=112002639>.

¹³ Gomstyn, *supra* note 11.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Editorial, *Got Money?*, WASH. POST, Oct. 9, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/08/AR2009100803578.html>.

million in aid for struggling dairy farmers.¹⁷ Under the plan, \$290 million would go to programs that directly support farmers.¹⁸ The remaining \$60 million would be used to purchase surplus cheese and other dairy products.¹⁹ The purchase of the \$60 million in surplus is designed to raise prices.²⁰ The purchased products would go to food banks and other nutrition programs.²¹ This \$350 million in aid is in addition to the \$1 billion in regular price-support and direct-payments the U.S. government already provides.²²

However, all of the measures taken by organizations of dairy farmers and the government are useless if the market is being monopolized by middlemen. And this monopolization is exactly what many people across the country are claiming.

III. Antitrust Suit Filed

There are only two main players in the dairy market, Dean Foods, based out of Dallas, Texas, and Dairy Farmers of America (“DFA”) of Kansas City, Missouri.²³ DFA is a cooperative that buys milk from farmers and then sells some of the milk purchased to Dean Foods.²⁴ Dean Foods is a milk processing company that purchases raw milk from dairy farms and then pasteurizes and packages the milk.²⁵ After packaging, the processing company distributes and sells the milk to school districts, supermarkets, grocery stores, and other commercial customers, essentially acting as the ‘middleman.’²⁶

People across the country are concerned about the large market share size held by Dean Foods. In August of 2009, Senators Schumer of New York, Feingold of Wisconsin, and Sanders of Vermont complained to the Justice Department’s

¹⁷ *Lawmakers Agree On \$350 Million Dairy Farmer Aid*, MSNBC, Sept. 30, 2009, http://www.msnbc.msn.com/id/33093605/ns/business-food_inc/.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Editorial, *supra* note 16.

²³ Kilman, *supra* note 3.

²⁴ *Id.*

²⁵ See Press Release, Department of Justice, Justice Department Files Antitrust Lawsuit Against Dean Foods Company (Jan. 22, 2010)[hereinafter Department of Justice] available at http://www.justice.gov/atr/public/press_releases/2010/254435.pdf.

²⁶ *Id.*

antitrust division that Dean Foods controls at least 80% of the fluid-milk market in Michigan, Massachusetts, and Tennessee and has 70% of the market in New England.²⁷ Dean Foods responded by stating these estimates were grossly inaccurate and only 15% of the nation's raw milk is purchased by Dean Foods.²⁸

Earlier in 2009, Dean Foods showed a 35% increase in profits²⁹ while simultaneously, dairy farmers were losing money. One particular farmer was spending 45 cents more per gallon to produce the milk than he was getting on its sale.³⁰

In April of 2009, Dean Foods purchased Foremost Farms USA's consumer products division.³¹ Foremost Foods' consumer products division had net sales of \$237.7 million in 2008 and consisted of two dairy processing plants.³² With this purchase Dean Foods now controlled 57% of the market for processed milk in northeastern Illinois, the Upper Peninsula of Michigan, and Wisconsin.³³

Under the Hart-Scott-Rodino Antitrust Improvements Act, in some situations, companies are required to report a purchase of a competitor to the Department of Justice and the Federal Trade Commission.³⁴ However, the purchase of Foremost Foods dairy processing plants by Dean Foods did not meet the \$65.2 million threshold for required reporting,³⁵ so Dean Foods did not report the purchase. The merger was flagged for review by Peter Carstensen,³⁶ a law professor and antitrust expert at the University of Wisconsin Law School who watches the dairy industry closely.³⁷

On January 22, 2010, the Department of Justice filed a civil antitrust lawsuit against Dean Foods challenging the April 2009 purchase of Foremost Foods dairy processing plants in De

²⁷ *Id.*

²⁸ *Id.*

²⁹ Burnett, *supra* note 12.

³⁰ *Id.*

³¹ Kendall, *supra* note 1.

³² Department of Justice, *supra* note 25.

³³ *Id.*

³⁴ Karen Robinson-Jacobs & Dave Michaels, *Federal Antitrust Suit Targets Dean Foods' Acquisition of Dairy Plant*, DALLAS MORNING NEWS, Jan. 25, 2010, available at http://www.dallasnews.com/shared/content/dws/bus/stories/DN-dean_23bus.ART.State.Edition1.3cf361f.html.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Burnett, *supra* note 12.

Pere and Waukesha, Wisconsin.³⁸ The lawsuit, joined by the Attorneys General of Illinois, Michigan, and Wisconsin, was filed in U.S. District Court in Milwaukee.³⁹

Antitrust regulators claim that the purchase of Foremost Farm's dairy processing plant substantially weakened competition in certain dairy markets.⁴⁰

The purpose of the department's lawsuit is to restore competition so that schools, grocery stores and other retailers in Illinois, Michigan and Wisconsin, will pay lower prices for their milk.⁴¹

Officials in Illinois are concerned the acquisition of a major competitor by Dean Foods could affect the price of milk for retailers and consumers in the northeastern region of the state.⁴² Lisa Madigan, the Attorney General of Illinois stated:

'Dean Foods' acquisition would eliminate a significant milk supplier for northern Illinois that, until now, helped keep milk prices in check. Vigorous competition is essential to protecting consumers from skyrocketing prices especially in this tough economy.⁴³

Dean Foods is the largest and Foremost Foods was the fourth largest dairy processors in northeastern Illinois, the Upper Peninsula of Michigan, and Wisconsin.⁴⁴ Now, a number of school districts in the area are left with little to no choice in their milk supplier.⁴⁵ Some school districts have even been left with only one option, essentially creating a monopoly.⁴⁶

³⁸ Department of Justice, *supra* note 25.

³⁹ *Id.*

⁴⁰ Kendall, *supra* note 1.

⁴¹ Department of Justice, *supra* note 25 (statement of Christine Varnet, Assistant Attorney General, Department of Justice Antitrust Division).

⁴² Press Release, Illinois Attorney General, Attorney General Madigan, U.S. Dept. of Justice, Wisconsin and Michigan File Antitrust Case Against Dean Foods (Jan. 22, 2010) available at http://www.illinoisattorneygeneral.gov/pressroom/2010_01/20100122.html.

⁴³ *Id.*

⁴⁴ Department of Justice, *supra* note 25.

⁴⁵ *Id.*

⁴⁶ *Id.*

IV. History of Legal Trouble in the Dairy Industry

This is the second time in recent years that the price of dairy products in Illinois has been investigated. In 2008, two former executives of DFA were fined \$12 million by the Commodity Futures Trading Commission for trying to inflate cheddar cheese prices on the Chicago Mercantile Exchange.⁴⁷

For two years, the Department of Justice Antitrust Division investigated anti-competitive conduct in the dairy industry by DFA and Dean Foods.⁴⁸ In 2006, investigators recommended charges be filed against the two companies for possible violations of the Sherman Antitrust Act.⁴⁹ However, charges were never filed and the Department of Justice shelved the case.⁵⁰

Illegal pricing practices in the dairy industry go back even further. For example, in the 1980's bid rigging on school milk contracts resulted in hundreds of convictions or guilty pleas by milk processors in two dozen states.⁵¹

V. Conclusion

It is clear that pricing in the dairy industry is volatile and there are multiple factors creating this volatility. It is also clear that these dramatic price changes are affecting the lives of dairy farmers across the country. An average of 4,600 dairy farms closed each of the last three decades, and some farmers have been driven to take their own lives.⁵²

Fortunately, the local dairy farmer is not sitting idly by; he is organizing and investigating why his industry is so volatile. Since the American milk industry is so large, the stability of the industry is crucial to the lives of farmers and consumers alike.⁵³

⁴⁷ Burnett, *supra* note 12.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*