COMPETITION UNDER THE PACKERS AND STOCKYARDS ACT: WHAT NOW?

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I. INTRODUCTION

There has been much recent furor over the question of whether injury to competition must be shown to establish a violation of section 202(a) and (b) [codified as amended at 7 U.S.C. § 192(a)-(b) (2006); hereinafter § 202(a) and (b)] of the Packers and Stockyards Act of 1921 (PSA). Judicial decisions in the past year confirm that proof of adverse impact on competition is necessary for a violation. The issue was confronted starkly and discussed in depth in the recent Fifth Circuit *en banc* decision, *Wheeler v. Pilgrim's Pride Corp.*, where a district court ruling and a 2-1 panel decision by the Court of Appeals was overturned and adverse impact on competition was required by a narrow majority.[1] The split could not have been closer. A nine-judge majority and a seven-judge group of dissenters engaged in spirited disagreement on virtually every possible approach to statutory construction.[2] In May of 2010, the Sixth Circuit, in *Terry v. Tyson Farms, Inc*., followed the *Pilgrim's Pride* majority and "the prevailing tide of other circuit court decisions" and held that evidence of an anti-competitive effect is required to sustain a violation of § 202(a) and (b).[3]

The U.S. Department of Agriculture (USDA), which has long argued that evidence of an anti-competitive effect is not necessary to sustain a violation, counterattacked on June 22, 2010. On that date, the Grain Inspection Packers and Stockyards Administration (GIPSA), the USDA agency that regulates the marketing of livestock and poultry, issued a new set of proposed rules.[4] These regulations attempt, quite overtly, to overturn the holdings in *Terry* and *Pilgrim's Pride*.[5] The proposed regulations include new section 201.210, which establishes that an "unfair" practice under PSA "can be proven without proof of predatory intent, competitive injury, or likelihood of injury."[6] The regulations provide PSA-specific definitions to "competitive injury" and "likelihood of competitive

1. Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 357 (5th Cir. 2009) (en banc) (reversing former rulings with a 9-7 decision).

2. *Id*. at 361-63; *id.* at 364-71 (Jones, C.J., concurring); *id.* at 374-79, 382-85 (Garza, J., dissenting).

3. Terry v. Tyson Farms, Inc., 604 F.3d 272, 277 (6th Cir. 2010), *cert. denied*, No. 10-542, 2011 WL 197656, at *1 (Jan. 24, 2011).

4. Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338 (proposed June 22, 2010) (to be codified at 9 C.F.R. pt. 201).

5. *Id*. at 35341 (arguing recent courts of appeals decisions requiring harm to competition "are inconsistent with the plain language of the statute" and "incorrectly assume that harm to competition was the only evil Congress sought to prevent by enacting the [PSA]").

6. *Id*. at 35340, 35351.

injury"—definitions that are significantly less rigorous than those developed in traditional antitrust jurisprudence.[7] The proposed regulations also define some specific practices that would be prohibited regardless of anti-competitive effects.[8] In addition, they effectively shift the burden of proof onto the packer to establish lack of anti-competitive effect and require packers to create and keep advance documentation to justify any price or contract differences given to producers.[9] As a result of GIPSA's proposed regulations, the controversy is now focused on whether the PSA gives GIPSA the statutory authority to overturn judicial rulings by regulation and create violations of § 202(a) and (b) which do not have an adverse impact on competition.

This Article explores several antitrust and competition issues raised by the *Pilgrim's Pride* decision and GIPSA's proposed regulations.[10] Why does an 89-year-old statute with a deep jurisprudence provoke such consternation and dissention in 2010? What is the state of the law regarding violations of the PSA? Going forward, what arguments will the opposing sides assert in attempt to further their positions? What must GIPSA or a private plaintiff prove regarding adverse impact to competition in order to establish a violation of the PSA?

This Article argues that the body of case law interpreting the PSA is not as black-and-white as the descriptions provided by either the majority or the dissent in *Pilgrim's Pride*. It attempts to define and compare what plaintiffs must prove given the majority ruling and what plaintiffs would need to prove if the dissent's view were to prevail. This Article explains the basic contours of the case law and the courts' attempts to compare and contrast the scope of liability under the PSA to the scope of Sherman, Clayton, and FTC Act liability. It

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7. *Id.* at 35351 ("A *competitive injury* occurs when conduct distorts competition in the market channel or marketplace."). Also, the

> *[l]ikelihood of competitive injury* means there is a reasonable basis to believe that a competitive injury is likely to occur in the market channel or marketplace. It includes but is not limited to situations in which a packer, swine contractor, or live poultry dealer raises rivals' costs; improperly forecloses competition in a large share of the market through exclusive dealing; restrains competition among packers, swine contractors, or live poultry dealers; or represents a misuse of market power to distort competition among other packers, swine contractors, or live poultry dealers.

Id. The proposed regulations additionally include situations where a packer "impair[s] a producer's or grower's ability to receive the reasonable expected full economic value from a transaction." *Id*.

8. *Id*. at 35341-42, 35351-52.

9. *Id*. at 35351.

10. The Constitutional and Administrative Procedure Act issues surrounding the scope of GIPSA's authority to issue regulations under the Farm Bill of 2008 and the PSA, and GIPSA's ability to overrule judicial precedent through regulation are beyond the scope of this Article and will not be addressed.

demonstrates that the real gap between the positions stated by the *Pilgrim's Pride* majority and dissent is relatively narrow, so even if the dissent were to prevail, the scope of PSA liability would not be free ranging. Finally, this Article suggests some alternative sets of principles to bridge the gap. The authors hope that this analysis will serve as the basis for further discussion and dialogue as 2010 has created a new focus on competition in agriculture markets.[11]

II. A BRIEF HISTORY OF § 202(A) AND (B)

Congress enacted the PSA in 1921 on the basis of a six-volume report issued by the Federal Trade Commission in 1919 explaining how the "Big Five" packing houses of that day dominated meat-packing markets through anti-competitive, monopolistic behavior.[12] This report and a voluminous record of legislative hearings and statements provide fodder for constructing a variety of selective legislative histories.[13] A discussion of statutory purpose in *Stafford v. Wallace*, holding that the PSA was constitutional, has also become a frequently-quoted part of the PSA canon.[14] Very generally, all agree Congress enacted the

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11. The USDA and DOJ Antitrust Division's series of public workshops throughout the country in 2010 explored a number of competition issues in agricultural industries. These meetings have facilitated dialogue among stakeholders and other interested parties, including farmers, ranchers, industry representatives, regulators, attorneys and scholars, about the appropriate role for antitrust and regulatory enforcement in the agricultural industry. In particular, the meetings addressed concerns giving rise to the issues discussed in this article.

12. *See* FED. TRADE COMM'N, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT-PACKING INDUSTRY (1919).

13. *See, e.g.*, Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 360-62 (5th Cir. 2009) (arguing that statements of members of Congress and then-Secretary of Agriculture Henry C. Wallace contained in *Meat Packer: Hearing on H.R. 14, H.R. 232, H.R. 5034, H.R. 5692 Before the H. Comm. on Agric.*, 67th Cong. 246 (1921) demonstrate "[t]he legislative debate surrounding the PSA supports the conclusion that it was designed to combat restraints on trade"); *id.* at 378-79 (Garza, J., dissenting) (requiring the plaintiff to show adverse impact on competition is not supported by PSA's legislative history because a close reading of the entire history reveals that the PSA also aimed to protect individual producers from "'unfair'" or "'unjustly discriminatory practice[s]'" (quoting H.R. REP. NO. 85-1048, at 1-2 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213); London v. Fieldale Farms Corp., 410 F.3d 1295, 1302-03 (11th Cir. 2005) (relying on statements contained in House Report 1048, H.R. REP. NO. 85-1048, at 1-2 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213, and *Stafford v. Wallace*, 258 U.S. 495, 514-15 (1922), as well as the PSA's "antitrust ancestry" to conclude that only those practices "adversely affecting competition are prohibited by the PSA"); Armour & Co. v. United States, 402 F.2d 712, 720-21 (7th Cir. 1968) (citing selected passages of legislative history in support of the argument that adverse impact on competition is required to sustain a PSA violation).

14. *See Pilgrim's Pride*, 591 F.3d at 357-58 (relying on statements in *Stafford v. Wallace*, 258 U.S. 495 (1922), to support a conclusion that PSA violations require injury to competition); *London*, 410 F.3d at 1301 (relying on *Stafford* to require injury to competition); Christopher

PSA because it did not believe the existing Sherman Act and Federal Trade Commission Act were sufficient to control the actions of the Big Five. However, quotations woven into the legislative history can be found to support *both* prevention of unreasonably high meat prices to the public (today called "protection of competition" and "consumer welfare") *and* prevention of unreasonably low prices to livestock producers (today called "protection of competitors") as goals of the statute.[15]

Among the provisions of the PSA enacted in 1921 were § 202(a) and (b), which made it unlawful for packers to:

> 1. Engage in or use any *unfair, unjustly discriminatory,* or *deceptive practice* or device . . . or
> 2. 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 . . . .[16]

M. Bass, *More Than a Mirror: The Packers and Stockyards Act, Antitrust Laws, and the Injury to Competition Requirement*, 12 DRAKE J. AGRIC. L. 423, 431-33 (2007) (arguing that legislative history and statements in *Stafford* establish that the PSA sought to protect individual farmers and ranchers from unfair business practices "regardless of their effect on competition").

15. *Pilgrim's Pride*, 591 F.3d at 378-89 (Garza, J., dissenting); Bass, *supra* note 15, at 431-33 (arguing that the PSA legislative history demonstrates it was intended to foster both competition in agriculture markets and to combat unfair practices that impacted individual competitors); *see also* Swift & Co. v. United States, 308 F.2d 849, 853 (7th Cir. 1962) (recognizing the PSA's legislative history shows Congress intended that it would be "broader in scope than antecedent legislation"); Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, *in* AGRICULTURAL LAW 182, 186 (John H. Davidson ed., 1981) ("The legislative history of the [A]ct shows that it was intended to be broader in scope and to go further in the prohibition of undesirable trade practices than the foregoing statutes.").

16. Packers & Stockyards Act, 1921, ch. 64, § 202(a)-(b), 42 Stat. 159, 161 (1921) (codified as amended at 7 U.S.C. § 192(a)-(b) (2006) (emphasis added) (often compared and contrasted with 7 U.S.C. § 192(c)-(e)). Subsections (c)-(e) state that packers may not:

> (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, *if* such apportionment *has the tendency or effect of restraining commerce or of creating a monopoly*; or
> (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article *for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly* in the acquisition of, buying, selling, or dealing in, any article, *or of restraining commerce*; or
> (e) Engage in any course of business or do any act *for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly* in the acquisition of, buying, selling, or dealing in, any article, *or of restraining commerce* . . . .

Although Congress has revised a number of provisions of the PSA in separate amendments since 1921, § 202(a) and (b) remain relatively unchanged. The PSA gives enforcement authority over violations of these provisions to the USDA,[17] and, as amended, creates a private right of action for violations of the PSA or USDA's regulations under the PSA (without treble damages).[18]

After the PSA was amended to permit a private right of action, the Seventh, Eighth, and Ninth Circuits addressed several fact situations and found, or refused to find, violations of § 202(a) and (b) depending upon the establishment of adverse impact on competition.[19] On the basis of this authority, the Fourth, Tenth, and Eleventh Circuits subsequently pushed this proposition further. These circuits held that a plaintiff could not sustain a claim under § 202(a) and (b), in any circumstances, unless an adverse impact, or the likelihood of adverse impact, on competition could be demonstrated.[20] Since the *Pilgrim's Pride* decision, the Sixth Circuit joined its sister circuits in requiring adverse impact on competition with its *Terry v. Tyson Farms, Inc.* decision.[21]

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7 U.S.C. § 192(c)-(e) (2006) (emphasis added).

17. 7 U.S.C. § 210.

18. 7 U.S.C. § 209 (private right of action created by Pub. L. No. 94-410, § 6, 90 Stat. 1249, 1250 (1976)).

19. *E.g.*, IBP, Inc. v. Glickman, 187 F.3d 974, 977 (8th Cir. 1999) (holding that the packer's marketing agreement with feedlots, which established terms of sale and gave the packer a right-of-first-refusal for cattle sold by feedlots, did not violate the PSA because the agreement did not "potentially suppress or reduce competition sufficient[ly] to be proscribed by the Act"); Farrow v. USDA, 760 F.2d 211, 214 (8th Cir. 1985) (holding that livestock dealers violated the PSA by agreeing not to compete against each other for the purchase of cows from a particular auction location because their conduct was "likely to reduce competition and prices paid to farmers for cattle"); De Jong Packing Co. v. USDA, 618 F.2d 1329, 1336-37 (9th Cir. 1980) (holding that packing companies violated the PSA because their joint efforts to force auction stockyards to change terms of sale imposed on sellers threatened to have an adverse impact on competition); Armour & Co. v. United States, 402 F.2d 712, 722 (7th Cir. 1968) (finding that a violation of § 202 of the PSA requires adverse impact on competition).

20. Been v. O.K. Indus., Inc., 495 F.3d 1217, 1230 (10th Cir. 2007) (joining other circuits in finding that proof that "[a] practice injures or is likely to injure competition" is a required element of PSA violation); London v. Fieldale Farms Corp., 410 F.3d 1295, 1303 (11th Cir. 2005) (relying on courts holding "only those . . . practices adversely affecting competition are prohibited by the PSA"); Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1280 (11th Cir. 2005) (stating "that by 'unfair' practice, PSA § 202(a) means a practice that does or is likely to adversely affect competition"); Philson v. Goldsboro Milling Co., No. 96-2542, 1998 U.S. App. LEXIS 24630, at *11 (4th Cir. Oct. 5, 1998) (affirming jury instruction which stated that to establish a PSA violation the plaintiff was required to prove "defendants' conduct was likely to affect competition adversely").

21. Terry v. Tyson Farms, Inc., 604 F.3d 272, 277-79 (6th Cir. 2010). *Terry* added little to the analysis of the issues, as it simply adopted the *Pilgrim's Pride* majority opinion without conducting its own detailed evaluation of the language or history of the PSA. *Id.*

Throughout this development, the USDA, many farm and ranch organizations, and their supporters in academia—a group we will call the "Populists"—have maintained that the PSA is more than just an antitrust statute, violations of the PSA should not require proof of impact on competition, and these decisions have perverted the PSA.[22] By contrast, packer groups, many producers, and their academic supporters in the Chicago School have argued that the PSA is clearly an antitrust statute, there can be no antitrust violation of any sort without adverse impact on competition, and the recent decisions are correct.[23]

III. THE *PILGRIM'S PRIDE* OPINIONS

In *Pilgrim's Pride*, contract growers of broiler chickens for Pilgrim's Pride Corporation claimed that the processor had purchased broilers at higher prices, and on more advantageous terms, from another grower with inside connections—Pilgrim's Pride founder and chairman, "Bo" Pilgrim, who grew broilers on his own farm.[24] The growers alleged that this constituted an "'unfair and unjustly discriminatory [practice]'" and an "'undue or unreasonable preference or advantage' in violation of [§ 202(a) and (b)]."[25] No adverse impact on competition was established during discovery.[26]

Pilgrim's Pride moved for summary judgment on the ground that adverse impact on competition was a necessary element for a § 202 violation.[27] The district court denied summary judgment and held that § 202(a) and (b) could be violated without proof of adverse impact on competition.[28] The district court then allowed an interlocutory appeal,[29] and a panel of the Fifth Circuit affirmed in a 2-to-1 decision.[30] The en banc Fifth Circuit then granted rehearing.[31]

Pilgrim's Pride differed from previous cases because it involved an allegation of preferential pricing unblemished by any allegations regarding a particular market, how the market worked, or how the packer may have affected competition in the market.[32] Thus, the issue of the necessity to prove anti-competitive

22. *See, e.g.*, Bass, *supra* note 15, at 431-34.
23. *See, e.g.*, *id.* at 426-27.
24. Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 372-73 (5th Cir. 2009) (en banc) (Garza, J., dissenting).
25. *Id.* at 373.
26. *See id.* ("[Processor] moved for summary judgment arguing that the Growers did not allege an adverse effect on competition . . . .").
27. *Id.* at 357 (majority opinion).
28. *Id.*
29. *Id.*
30. Wheeler v. Pilgrim's Pride Corp., 536 F.3d 455, 456 (5th Cir. 2008).
31. Wheeler v. Pilgrim's Pride Corp., 576 F.3d 532, 533 (5th Cir. 2008).
32. *See Pilgrim's Pride*, 591 F.3d at 357.

impact came to the en banc Fifth Circuit as a purely abstract question, completely divorced from any real-world evidence about what market impacts (either pro- or anti-competitive) or efficiencies may have resulted from the alleged conduct.[33]

The *Pilgrim's Pride* majority reversed the district court and the majority decision of the court's earlier panel and held that plaintiffs must prove adverse impact on competition to establish a PSA violation.[34] The majority found the following determinative: (1) the PSA was historically an antitrust statute that shared common ancestry with the Sherman Act and the FTC Act; (2) the 40-year history of authorities from six circuits uniformly held that adverse impact on competition was an essential element of a PSA violation; (3) Congress acquiesced in this interpretation by not amending § 202(a) and (b), despite passing seven amendments to the PSA; (4) the proposition that "predictability must be the lodestar;" and (5) conduct prohibited by § 202(a) and (b) would be entirely ambiguous without a requirement for anti-competitive impact.[35]

The *Pilgrim's Pride* dissent rejected each of the majority's arguments with its own counter-reading of statutory history, the cases, Congress' intent in not amending § 202(a) and (b), and the counter-assertion that "[p]redictability may be important, but it does not trump the correct result."[36] The dissenters expressed confidence that adequate standards of what constitutes "unfair" conduct could, and would, be developed through "agency adjudication, regulation, and judicial proceedings" if adverse impact on competition was not found to be a necessary element.[37]

The dissent undertook a "plain text" analysis, pointing out that the words of § 202(a) and (b) do not expressly require that competition be impacted or restrained, or that monopoly be created by the prohibited conduct, while § 202(c)-(e) expressly do require the tendency or effect and/or the purpose or effect of "'restraining commerce'" or "'creating a monopoly.'"[38] The dissenters argued that Congress clearly could have, and would have, used the same words in subsections (a) and (b) if adverse impact on competition were required for a violation.[39] This analysis lead the dissent to accuse the majority of being a group of judicial activists which "overstep[ed] its proper role" by "judicially engrafting . . . [a] requirement . . . when Congress intentionally omitted one"—fighting words

33. *See id*. at 372-74 (Garza, J., dissenting).
34. *Id*. at 363 (majority opinion).
35. *Id*. at 358-63.
36. *Id*. at 374-85 (Garza, J., dissenting).
37. *Id*. at 384.
38. *Id*. at 374.
39. *Id*.

in a court where 12 of the 16 judges are Ronald Reagan, George H.W. Bush, or George W. Bush appointees.[40]

A concurring opinion by four of the nine majority judges refuted the dissenters' accusation with an additional textual analysis.[41] The concurrence asserted that proper "plain meaning" analysis is not based purely on today's dictionary definitions.[42] Rather, since the words in § 202(a) and (b), e.g., "unfair" and "unjust," were "terms of art" that were "clearly defined in jurisprudence" when Congress passed the PSA in 1921,[43] the concurrence analyzed law from that period which defined the statutory terms and argued those same definitions must be what Congress intended.[44] Following this methodology, the concurrence dug into pre-1921 FTC and ICC cases and asserted that the then-existing use of the words in the PSA supports the majority's position.[45]

The *Pilgrim's Pride* litigation was settled in late February 2010, so plaintiffs will not seek certiorari, and the Supreme Court will not have an opportunity to rule on whether the majority or dissenting opinion is correct. Thus, the Fifth Circuit's majority opinion—bolstered by identical rulings by seven other circuits—is the law of the land and the best, most recent declaration on the meaning of § 202(a) and (b).

IV. WHERE ARE WE NOW? THE CURRENT STATE OF THE LAW AND THE PROPOSED GIPSA RULES

Current law can only be characterized as requiring proof of an adverse impact, or the likelihood of an adverse impact, on competition in order to establish a violation of § 202(a) and (b). The most recent decisions from five circuits (the Fourth, Fifth, Sixth, Tenth, and Eleventh) expressly impose this requirement.[46] Earlier decisions from three other circuits (Seventh, Eighth, and Ninth)

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40. *Id*. at 375. The *Pilgrim's Pride* majority included six Republican and three Democratic appointees; the dissent included six Republican appointees and one Democratic appointees. Federal Judicial Center, History of the Federal Judiciary, http://www.fjc.gov/history/home.nsf/page/research_categories.html (last visited Dec. 30, 2010) (search by court, nominating president and party of nominating president).

41. *Pilgrim's Pride*, 591 F.3d at 364-71 (Jones, C.J., concurring).

42. *Id.* at 365-66.

43. *Id.* at 369.

44. *Id*. at 367-69.

45. *Id*. at 366-70 (noting that the term "'[u]nfair' was not an inkblot in 1921," and by using this term Congress did not intend to countenance "a free-ranging inquiry into the equities of business practices").

46. Terry v. Tyson Farms, Inc., 604 F.3d 272, 277-79 (6th Cir. 2010); Been v. O.K. Indus., Inc., 495 F.3d 1217, 1230 (10th Cir. 2007); Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1280 (11th Cir. 2005); London v. Fieldale Farms Corp., 410 F.3d 1295, 1303 (11th Cir.

are consistent with these decisions in that they required proof of anti-competitive impact in the fact situations they addressed.[47] However, these opinions do contain significant dicta suggesting that proof of actual anti-competitive impact *identical to that required under the Sherman Act* may not be necessary in all circumstances.[48]

The *Pilgrim's Pride* and *Terry* decisions left GIPSA and other proponents of expanding § 202(a) and (b) with a range of options. At one end of the spectrum, they could launch a frontal attack and push for judicial rejection of the *Pilgrim's Pride* majority and adoption of the rationale expressed in Judge Garza's dissenting opinion. On the other end of the spectrum, they could accept the general rule of the *Pilgrim's Pride* majority but attempt to undermine its significance by fleshing out what it means in ways that might differentiate and increase the scope of conduct prohibited by the PSA beyond that reached by the Sherman and Clayton Acts.

The frontal attack attempting to directly overrule the requirement that adverse impact on competition must be proven to sustain a PSA violation has two prongs. The first is GIPSA's proposed regulations expressly overrule the requirement.[49] Congressional reaction to the proposed rules has been harsh, with both Republicans and Democrats criticizing GIPSA's attempt to implement policies (including elimination of the injury to competition requirement) which members of Congress felt had been expressly rejected by Congress during the 2008 Farm Bill debate.[50]

In response, GIPSA issued a press release that extended the comment period on the proposed rules an additional ninety days and argued the proposed

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2005); Philson v. Goldsboro Milling Co., No. 96-2542, 1998 U.S. App. LEXIS 24630, at *11 (4th Cir. Oct. 5, 1998).

47. Farrow v. USDA, 760 F.2d 211, 214 (8th Cir. 1985); De Jong Packing Co. v. USDA, 618 F.2d 1329, 1336-37 (9th Cir. 1980); Armour & Co. v. United States, 402 F.2d 712, 720 (7th Cir. 1968).

48. *See, e.g.*, *Been*, 495 F.3d at 1232; *Farrow*, 760 F.2d at 214-15; *De Jong Packing Co*., 618 F.2d at 1336-37; *Armour & Co.*, 402 F.2d at 722.

49. Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338, 35351 (proposed June 22, 2010) (to be codified at 9 C.F.R. pt. 201) ("A finding that the challenged act or practice adversely affects or is likely to adversely affect competition is not necessary in all cases. Conduct can be found to violate . . . the Act without a finding of harm or likely harm to competition.").

50. *Hearing to Review Livestock and Related Programs at USDA in Advance of the 2012 Farm Bill: Hearing Before the Subcomm. on Livestock, Dairy, and Poultry of the H. Comm. On Agriculture*, 111th Cong. 2 (2010) (statement of Hon. David Scott, Chairman, H. Subcomm. on Livestock, Dairy, and Poultry).

rules had been misconstrued.[51] GIPSA explained the proposed rule would only eliminate the injury to competition requirement for violations "that do not involve competitive harm, such as retaliatory conduct, using inaccurate scales, or providing a grower sick birds," while for "matters dealing with practices that could cause competitive harm, such as manipulation of prices, the producer would need to show harm or the likelihood of harm to competition."[52] Since this explanation is contradicted by the plain text of the proposed rule, which does not limit the elimination of the injury to competition requirement to any category of violations, GIPSA's current position is unclear.[53] It remains to be seen, therefore, if GIPSA's attack on the injury to competition requirement is directed at all § 202(a) and (b) violations or if it will be scaled back to a more limited category of violations.

Even if GIPSA is unsuccessful in eliminating the adverse impact on competition requirement for any category of violations, the proposed rules weaken the requirement by defining "competitive injury" to include injury to an individual grower,[54] as opposed to injury to the process of competition as the term is now defined in antitrust and current PSA law. This Orwellian definition of competitive injury is GIPSA's second, alternative line of attack on the current law interpreting the PSA. If this definition is adopted, it would undermine the injury to competition requirement as understood in the current antitrust and PSA law.

The second prong was plaintiffs' appeal of *Terry* to the U.S. Supreme Court. Although *Pilgrim's Pride* was settled and therefore not appealable, the poultry grower plaintiffs in *Terry* petitioned for a writ of certiorari from the Sixth Circuit on October 21, 2010.[55] This appeal was supported by 55 farming, ranching, and consumer organizations, including the National Farmers Union and the American Antitrust Institute.[56] The U.S. Supreme Court denied certiorari on January 24, 2011, so the views of the *Pilgrim's Pride* majority will remain the law.[57]

There is an alternative, more nuanced approach to broadening PSA liability, which neither GIPSA nor the *Terry* plaintiffs have taken. This approach

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51. Press Release, Edward Avalos, Under Sec'y of Mktg. and Regulatory Programs, USDA (July 26, 2010), *available at* http://archive.gipsa.usda.gov/psp/avalosstatements.pdf.

52. Edward Avalos, USDA, Farm Bill Regulation—Misconceptions and Explanations 1-2 (July 26, 2010), *available at* http://archive.gipsa.usda.gov/psp/rulefacts.pdf (accompanying Press Release, *supra* note 52).

53. *See* Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. at 35351.

54. *See id*.

55. Petition for Writ of Certioriari, Terry v. Tyson Farms, Inc., 2010 WL 4220530 (Oct. 21, 2010) (No. 10-542).

56. Brief of 55 Farming, Ranching, and Consumer Organizations as Amici Curiae in Support of the Petitioner, *Terry*, 2010 WL 5323957 (Dec. 22, 2010) (No. 10-542).

57. *Terry*, No. 10-542, 2011 WL 197656, at *1 (Jan. 24, 2011).

would accept the need for proof of an adverse impact on the competitive process (in its true antitrust sense of injury to competition, not competitors), while also attempting to push the limits of PSA liability beyond the current parameters of analogous antitrust violations. This approach—the road not taken by GIPSA and the poultry grower plaintiffs—does find some support in current case law. There may, in fact, be more support for this tactic than for the more frontal challenge GIPSA has chosen to pursue. A rich and nuanced jurisprudence lurks under the calm surface of the general rule enumerated by the *Pilgrim's Pride* majority. This existing authority deals with complex factual situations and legal/economic reasoning that is familiar to students of antitrust.

The case law imposing an adverse impact on competition requirement for PSA liability has never been as black-and-white as the *Pilgrim's Pride* majority represents. The jurisprudence surrounding § 202(a) and (b) identifies, or at least suggests, at least two types of claims which could be exceptions to the requirement that an anti-competitive impact must be shown. These two exceptions are: claims that conduct is "likely" to have an adverse impact on competition and claims that conduct is "deceptive" under § 202(a).[58]

In addition, the analysis applied by some PSA cases to determine whether or not adverse impact on competition has been adequately proven suggests that differences between the PSA and Sherman/Clayton Act violations may exist with respect to plaintiffs' standards of proof. These analyses are framed in rhetoric familiar to antitrust practitioners.

Sections V and VI, *infra*, dive into this in detail and attempt to sort out what parameters may define § 202(a) and (b) liability under the standards enunciated by the *Pilgrim's Pride* majority. Section VII discusses the potential parameters of liability if the *Pilgrim's Pride* dissent were to prevail. While the authors do not advocate any specific rules or sets of solutions, Section VIII attempts to predict the path that future development could potentially take, on the basis of issues ignored by both the *Pilgrim's Pride* majority and dissent.

V. SCOPE OF LIABILITY UNDER THE PSA VS. THE SHERMAN AND CLAYTON ACTS

A. *Background: What Did Congress Intend the PSA to Accomplish?*

Any discussion of broader liability under the PSA than under other antitrust statutes confronts the question of what Congress intended in passing the

58. *See, e.g.*, Schumacher v. Tyson Fresh Meats, Inc., 434 F. Supp. 2d 748, 752 (D.S.D. 2006) (suggesting the adverse impact requirement may not apply in the context of "likely" to have adverse impact and "deceptive" conduct under § 202(a)).

PSA in 1921. These questions permeate the debate. Did Congress intend the PSA to be (1) an industry-specific antitrust statute enforced by the agency most knowledgeable about the industry; or (2) a market regulatory statute supplementing previous antitrust statutes which were deemed inadequate for the industry?

The current case law holds the PSA to be an antitrust statute, equates it with the Sherman and FTC Acts, and applies the full panoply of jurisprudence that has built up around those statutes to it.[59] The current GIPSA proposed regulations view § 202(a) and (b) of the PSA as market regulation statutes, which authorize broad regulatory action above and beyond that permitted by antitrust statutes.[60] From this perspective, GIPSA views its role as more analogous to the Securities Exchange Commission than to the FTC.

If the mainstream view expressed in current case law is correct, the PSA is one of several antitrust statutes intended to protect competition in order to protect consumers from high prices, and it should not be allowed to impose any restrictions without some adverse impact on competition.[61] However, if GIPSA is correct, the PSA is a market regulatory statute intended to protect producers from low prices, and it might well be more restrictive than antitrust statutes, which "protect[] . . . competition, not competitors."[62]

Since isolated quotations from the legislative history can be found to support both sides, both sides have developed a narrative supporting their position. The Chicago School takes a holistic view of the legislative history.[63] It points out that the Sherman Act, the FTC Act, and the PSA all have a common heritage and share intellectual, political, and legal histories.[64] This family of antitrust statutes had similar mixed historical motivations, but during the past several

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59. *See, e.g.*, De Jong Packing Co. v. USDA, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980).

60. Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. at 35341; *see* Swift & Co. v. United States, 308 F.2d 849, 853 (7th Cir. 1962) (recognizing that the PSA's legislative history shows Congress intended it would be "broader in scope than antecedent legislation such as the Sherman Antitrust Act").

61. *See* Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 370 (5th Cir. 2009) (en banc) (Jones, C.J. concurring) (arguing the PSA legislative history demonstrates it was intended to prevent restraint on competition in agriculture markets and abuse of monopolies, which "would ultimately aid farmers and growers and reduce the price of food for consumers").

62. *Compare* Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. at 35351 (protecting growers, or "competitors", as well as competition), *with* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (indicating antitrust laws are concerned "with the protection of competition, not competitors").

63. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 61-63 (The Free Press 1993) (1978); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 933 (1979).

64. BORK, *supra* note 61, at 63.

decades, all have evolved to conform with fundamental principles of modern economic theory.[65] As a result, modern antitrust jurisprudence focuses exclusively on promoting market efficiency and consumer welfare.[66]

By contrast, Populists point to ever-increasing horizontal concentration and vertical integration of beef and pork packers and poultry processors, which they assert increases the market power and injustices the PSA was intended to prevent.[67] They focus on fairness to, and the welfare of, small farmers, as opposed to consumer welfare, and minimize the impact that increases in prices to producers would have on consumer prices.

These historical, economic, and philosophical arguments collectively motivate and often substitute for legal analysis. Nevertheless, we attempt to explore the existing case law in search of guideposts for future developments.

B. *Incipient, "Likely To Impact Competition" Violations*

The most obvious potential exception to the requirement that an actual adverse impact on competition is required for a violation of § 202(a) and (b) is for incipient violations, where the conduct at issue will likely have an adverse impact on competition. This oft-stated exception is explicitly recognized in the earliest cases.[68] *De Jong* stated the rationale for concluding a PSA violation may be sustained in such circumstances:

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65. *Id.*

66. *See* Posner, *supra* note 61, at 933-34.

67. Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449, 450 (1999) (lamenting the Chicago School's role in reducing use of the Sherman Act and the PSA to combat concentration of agribusiness and other conduct that threatens to harm individual farmers); Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91, 92 (2003) (rejecting the use of antitrust standards to limit packers' liability to conduct that injures competition and arguing that "unfair" practices under PSA should include conduct that causes unjustified harm to individual livestock producers regardless of impact on competition); *see generally* Doug O'Brien, *Policy Approaches to Address Problems Associated with Consolidation and Vertical Integration in Agriculture*, 9 DRAKE J. AGRIC. L. 33 (2004) (recommending policy initiatives to combat problems caused by excessive concentration in agricultural industries).

68. Philson v. Goldsboro Milling Co., No. 96-2542, 1998 U.S. App. LEXIS 24630, at *11 (4th Cir. Oct. 5, 1998) (affirming a jury instruction that plaintiff had to prove only that the defendant's conduct was likely to affect competition); De Jong Packing Co. v. USDA, 618 F.2d 1329, 1336-37 (9th Cir. 1980) (affirming a USDA judicial officer's finding of violation because there was sufficient evidence that conduct was likely to harm competition); Armour & Co. v. United States, 402 F.2d 712, 722 (7th Cir. 1968) (overruling a USDA judicial officer's finding of violation because there was not sufficient evidence that conduct was likely to harm competition).

> The government contends that the purpose of the [PSA] is to halt unfair trade practices in their incipiency, before harm has been suffered; that unfair practices under [§] 202 are not confined to those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint of competition. We agree. . . . It would make little sense and might prove disruptive of the market to hold that petitioners may continue to repeat their concerted efforts to coerce a change in market practices and may be halted only when they have finally acquired sufficient market power to succeed.[69]

The view that the PSA prohibits a wider scope of "likely-to" incipient offenses than other antitrust statutes finds support in the case law.[70] Home of the original Big Five packers, the Seventh Circuit made clear from the start that § 202(a) and (b) prohibit conduct that would not be condemned by earlier antitrust statutes:

> [T]he sections of the Packers and Stockyards Act under consideration were broader in scope than the antecedent legislation (61 Cong.Rec. 1805 (1921)). To illustrate, Representative (later Speaker) Rayburn, emphasized that although Congress gave the Federal Trade Commission wide powers to prohibit unfair methods of competition, such authority is not as wide-ranging as that given to the Secretary of Agriculture under the language in section 202(a) and (b) of the Packers and Stockyards Act. (61 Cong.Rec. 1806(1921)).
>
> From the legislative history it is a fair inference that, in the opinion of Congress, section 2 of the Clayton Act, section 5 of the Federal Trade Commission Act and the prohibitions in the Sherman Anti-Trust Act were not broad enough to meet the public needs as to business practices of packers. Section 202(a) and (b) was enacted for the purpose of going further than prior legislation in the prohibiting of certain trade practices which Congress considered were not consonant with the public interest.[71]

While these principles have never been rejected, no authority appears to expressly permit actions for incipient violations or attempts to articulate the outside limits of *how likely* an incipient adverse impact to competition must be to

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69. *De Jong Packing Co*., 618 F.2d at 1336-37 (citations omitted).

70. Although *Pilgrim's Pride* did not address a "likely-to" case, all the cases that the majority cites as support for its decision describe the plaintiff's burden to prove *either* actual adverse impact on competition *or* likelihood of adverse impact on competition, in the disjunctive. *See, e.g.*, Been v. O.K. Indus., Inc., 495 F.3d 1217, 1230 (10th Cir. 2007) (joining the other circuits in "requiring a plaintiff . . . to show that the practice injures *or is likely to* injure competition" (emphasis added)); London v. Fieldale Farms Corp., 410 F.3d 1295, 1303 (11th Cir. 2005) (joining the other circuits which hold that "a plaintiff much show that the defendant's unfair, discriminatory or deceptive practice adversely affects [competition] *or is likely to* adversely affects competition" (emphasis added)); IBP, Inc. v. Glickman, 187 F.3d 974, 977 (8th Cir. 1999) (noting that the PSA "'does not require the [USDA to] prove actual injury before a practice may be found unfair' . . . . A potential violation can suffice.'" (quoting Farrow v. USDA, 760 F.2d 211, 215 (8th Cir. 1985))).

71. Wilson & Co. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961).

find a violation. Thus, there is no recognized independent and free-standing standard for defining the contours of what constitutes an incipient violation. For example, there is no PSA analog to the case law that has built up around the "dangerous probability of success" element required for an attempted monopolization claim under section 2 of the Sherman Act.[72]

Instead, the PSA cases nearly all conflate the concepts of likely future and actual or current impact of competition and discuss them together.[73] This analysis insinuates the likelihood-of-impact concept into the overall analysis of competition under the PSA in a manner that may be read to create standard-of-proof tests for whether or not adverse impact on competition has been adequately demonstrated, which may diverge from, and be easier to prove than, those in Sherman/Clayton Act antitrust claims. These differences are discussed in Section VI, *infra*.

C. *Deceptive Conduct*

The language of § 202(a) expressly prohibits "deceptive" practices.[74] This prohibition is separate, and in addition to, the "unfair," "unjust," "undue," and "unreasonable" practices that are also proscribed in § 202(a) and (b).[75] This statutory language raises the question of whether liability for some clearly defined subset of deceptive practices can be established under the PSA without proof of adverse impact on competition.

Proponents of PSA liability being broader than the mainstream antitrust statutes can argue that "deceptive" practices are barred on a different theory than other anti-competitive practices prohibited by the PSA—the theory that properly functioning markets require transparency and free access to accurate information by market participants.[76] The legislative history of the PSA and the FTC-like

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72. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993) (holding that to prove a claim for attempted monopolization under section 2 of the Sherman Act, plaintiff must demonstrate defendant had such significant market power in the relevant market that there is "a dangerous probability" the attempt to monopolize the market would succeed).

73. *But see De Jong Packing Co.*, 618 F.2d at 1336-37. The *De Jong* court found that the packers had violated the PSA through incipient conduct that had the potential to adversely impact competition even though they had not yet actually done so. "[E]ven assuming that petitioners lacked market power, and even were we to conclude that petitioners' lack of market power would preclude our finding that they had violated the Sherman Act, the cease and desist order under [§] 202 was proper." *Id.* at 1336. In effect, the Ninth Circuit determined that a horizontal agreement among packers to restrain competition constituted a *per se* violation of the PSA for which proof of actual harm to competition was unnecessary. *Id.* at 1337.

74. 7 U.S.C. § 192(a) (2006).

75. 7 U.S.C. § 192(a)-(b).

76. *See* Bass, *supra* note 15, at 432-33.

enforcement powers it gives to GIPSA might be raised in support of this argument. Thus, PSA violations for deceptive practices can be viewed to embody a purpose akin to the FTC's consumer protection mission—a logic outside the realm of the Sherman Act—which would not require proof of adverse impact on competition.[77]

Proponents of the current law can object to this analogy on the ground that all antitrust statutes, including the PSA, currently are (and properly should be) construed to protect consumer welfare. The FTC's competition mission protects consumers from higher prices.[78] The FTC's consumer protection mission does not conflict with it, because it bars deception *of consumers* from distorting markets. On the other hand, use of the PSA to prevent deception *of competitors* (without adverse impact on competition) may well conflict with protecting consumers from higher prices, violating the axiom that antitrust laws "protect competition, not competitors."

While the conclusion is not entirely clear, existing case law could be read not to require proof of adverse impact on competition to establish a deceptive action. In first holding that a violation of § 202(a) and (b) requires proof of anticompetitive impact, *Armour* dealt with facts and articulated reasons that addressed only the "unfair," "unreasonable," "undue," and "unjust" practices prohibited by those subsections, not "deceptive" practices.[79] This reading of *Armour* has been interpreted differently by at least two circuits. In *London*, the Eleventh Circuit expressly refused to read *Armour* in the disjunctive and stated that proof of deceptive practices under § 202(a) requires proof of adverse impact on competition.[80] However, the conclusion is not necessary to the court's holding because *London* involved no facts alleged to be deceptive and may be considered merely as dicta.[81]

Cases from the Tenth Circuit and one district court in the Eighth Circuit suggest a different result. In 1985, without any discussion of impact on competition, the Tenth Circuit upheld a USDA finding that the defendant had committed a deceptive act in violation of § 202(a)—by "false and improper advertising, misrepresentations to customers, and 'bait and switch' sales tactics"—without requiring a showing of adverse impact on competition.[82] Over twenty years later, plaintiffs in a case alleging "unfair" discount pricing (not a deceptive practice)

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77. *Id*. at 434-35.

78. *See* Fed. Trade Comm'n, Competition Mission, http://www.ftc.gov/os/ar97/competition.shtm (last visited Dec. 30, 2010).

79. *See* Armour & Co. v. United States, 402 F.2d 712, 717-22 (7th Cir. 1968).

80. London v. Fieldale Farms Corp., 410 F.3d 1295, 1304, 1305 n.8 (11th Cir. 2005).

81. *Id*. at 1305 n.8.

82. Peterman v. USDA, 770 F.2d 888, 888-89 (10th Cir. 1985).

cited *Peterman* for the proposition that no showing of adverse impact on competition was necessary to prove a violation of § 202(a) and (b).[83] The court distinguished *Peterman* as a "deceptive," rather than an "unfair," act violation of the PSA, read *Armour* in the disjunctive, held that adverse impact on competition was required to prove an "unfair" act violation, and made no decision as to whether an adverse impact on competition was required to sustain an alleged PSA violation based on a "deceptive" practice.[84]

A recent district court decision in the Eighth Circuit addressed the issue head-on when cattle producers alleged that packers had engaged in a "deceptive" practice by knowingly using inaccurate market prices to negotiate sales prices with producers.[85] The plaintiffs made no attempt to prove adverse impact on competition.[86] The court: (1) determined that the Eleventh Circuit had read *Farrow* incorrectly in its *London* decision;[87] (2) refused to follow *London*;[88] (3) held that a "deceptive" practice violation of § 202(a) did not require proof of adverse impact on competition;[89] and (4) denied Tyson's motion for summary judgment on that ground.[90] In support, the court cited the legislative history and the description of the "evils" addressed by the PSA set forth in *Stafford* and *De Jong*.[91] Thus, it concluded that proof of an adverse impact on competition is not necessary to sustain a deceptive act violation of the PSA, because "the PSA is broader than its antecedent antitrust legislation and in some cases proscribes practices which the antitrust Acts would permit."[92]

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83. Been v. O.K. Indus., Inc., 495 F.3d 1217, 1230 (10th Cir. 2007).

84. *Id*. *Been* also discussed another recent Tenth Circuit case, *Excel Corp. v. USDA*, 397 F.3d 1285 (10th Cir. 2005), in which a practice that might well be described as "deceptive"—a packer's failure to disclose to producers a change in its formula for computing the weight of carcasses—was held to violate § 202(a) without a showing of an adverse impact on competition. *Been*, 495 F.3d at 1230. In *Excel*, the packer's conduct was not expressly characterized as either "unfair" or "deceptive." The court found, however, that the alleged conduct satisfied the impact on completion requirement because *if* the producers had been given full information, *then* they could have sold to Excel's competitors and competition *would have* been adversely impacted. Excel Corp. v. USDA, 397 F.3d 1285, 1294 (10th Cir. 2005). By this logic, a deceptive act was articulated as an incipient, might-have, "likely-to" violation.

85. Schumacher v. Tyson Fresh Meats, Inc., 434 F. Supp. 2d 748, 750 (D.S.D. 2006).

86. *Id.*

87. *Id.* at 752-53.

88. *Id.* at 753.

89. *Id.* at 754.

90. *Id.* at 755.

91. *Id.* at 751, 753.

92. *Id.* at 753.

VI. PROOF OF ADVERSE IMPACT ON COMPETITION UNDER THE RULE IN *PILGRIM'S PRIDE*

The *Pilgrim's Pride* majority decision states unequivocally that adverse impact on competition is a necessary element of § 202(a) and (b) violations.[93] However, it does not provide any sort of guidance about what a claimant must prove to satisfy this element. A review of other PSA cases regarding this issue indicates that the terrain is similar to, yet may be slightly different than, the main-line antitrust landscape. Three topics are worthy of note: *per se* shortcuts; use of intent to prove adverse impact on competition; and attempts to balance anti-competitive and pro-competitive impacts of the challenged conduct.

A. Per Se *Shortcuts*

Proof of adverse impact on competition has been assumed—and the requirement of proof dispensed with—in cases of clear horizontal agreements between competitors to raise prices. Such a conspiracy has been held to violate § 202(a) and (b) absent any showing of adverse impact on competition or market power on the part of the conspirators because it is "likely to" have an anti-competitive impact.[94] The rationale for this result is "[t]he essential nature and the necessary result [of such an agreement] . . . was to eliminate competition."[95]

This same rule applies under section 1 of the Sherman Act, where similar conspiracies among competitors are deemed *per se* illegal without a showing of actual anticompetitive impact, because "surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct" or the specific market conditions in which the agreement occurred.[96] A more general rule applying *per se* analysis to PSA violations, whenever the *per se* rule would apply in analogous situations under the Sherman Act, might thereby satisfy the standard enunciated by the *Pilgrims' Pride* majority and establish that the challenged conduct had injured, or was likely to injure, competition.[97]

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93. Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 363 (5th Cir. 2009) (en banc).

94. *See, e.g.*, Farrow v. USDA, 760 F.2d 211, 214 (8th Cir. 1985); De Jong Packing Co. v. USDA, 618 F.2d 1329, 1336-37 (9th Cir. 1980); Swift & Co. v. United States, 308 F.2d 849, 853 (7th Cir. 1962).

95. *Swift & Co.*, 308 F.2d at 853.

96. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103-04 (1984).

97. *Pilgrim's Pride*, 591 F.3d at 363.

B. *The Role of Intent and Likelihood*

The Seventh Circuit's seminal decision in *Armour* might be read to hold that proof of the defendant's "predatory intent" or "intent to eliminate competition" is sufficient to prove a violation of § 202(a) and (b) without proof of actual adverse impact on competition.[98] *Armour* sets up general parameters for interpretation of the PSA, using Sherman/FTC/Clayton Act violations as a benchmark:

- the PSA prohibits conduct deemed "unfair" by the FTC under Section 5 of the FTC Act;
- the PSA is broader than the other general antitrust statutes, but is not a "mandate to ignore the general outline of long-time antitrust policy;" and
- the PSA does not give the USDA "complete and unbridled discretion" to regulate market practices.[99]

Applying these axioms to the language of § 202(a) and (b), the *Armour* opinion holds that a practice is not condemned unless it is (1) deceptive, (2) injurious to competition, or (3) *intended* to be injurious to competition.[100]

At another point, *Armour* states—again in the disjunctive—that a practice cannot violate the PSA absent *either* predatory intent *or* likelihood of competitive injury.[101] It then goes on to conflate the two concepts by saying that the terms "unfair," "unjust," "undue," and "unreasonable" compel an examination of the defendant's intent to determine likelihood of anti-competitive impact.[102] Whether intent to injure competition alone is sufficient to support a PSA violation, or intent is merely probative evidence tending to prove some larger concept of likelihood of injury (which should be considered the real requirement), the court in *Armour* was attempting to articulate *something* less rigorous than the

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98. Armour & Co. v. United States, 402 F.2d 712, 717, 720 (7th Cir. 1968).

99. *Id.* at 722. *Armour* is *more restrictive* than the Seventh Circuit's earlier pronouncements in *Wilson*, which stated simply that the USDA had "wide-ranging" powers to define violations than the FTC had under the FTC Act. Wilson & Co. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961).

100. *Armour & Co.*, 402 F.2d at 722.

101. *Id.* at 721.

102. *Id*. at 717; *cf.* Excel Corp. v. USDA, 397 F.3d 1285, 1294 (10th Cir. 2005) ("Nothing in the language of [the PSA] . . . requires a showing of wrongful intent. To the contrary, the focus is solely on the acts committed or omitted.").

showing of actual, real-time harm to competition required to support violations of the Sherman Act.[103]

Thus, the jurisprudence surrounding violations of § 202(a) and (b) supports some inchoate, yet-to-be-defined concept combining predatory intent and/or incipiency of injury, which might prohibit some acts that are permitted under the Sherman Act. Further development of this concept might proceed through (1) definition of what constitutes "likelihood" of injury and how near-to-actuality the injury must be, (2) definition of the intent necessary to support a violation of the PSA, or (3) use of the current, undefined concept that the PSA is somewhat broader to construct standards of proof for adverse impact on competition that are easier to prove than the standards a plaintiff must prove to establish a violation under the Sherman Act.

C. *Rule of Reason Balancing*

The bulk of cases requiring proof of adverse impact on competition to establish § 202(a) and (b) violations involve situations in which injury to competition was never alleged; little, if any, evidence of injury to competition was presented; or injury would be obvious for established categories of conduct that are *per se* illegal. Two recent cases have, however, conducted fact-based inquires into particular markets to determine if adverse impact on competition had been proven.

1. Pickett v. Tyson Fresh Meats, Inc.

In *Pickett*, cattle raisers who sold to Tyson on the cash market challenged its use of marketing agreements for 20-50% of purchases and alleged manipulation of those contracts to decrease the price on the cash market.[104] A jury was asked, *inter alia*, if plaintiffs had proven that (1) Tyson's practices had an anti-competitive impact and (2) that Tyson lacked a legitimate business reason or

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103. While some Sherman Act case law allows evidence of intent to be introduced, the trend clearly favors analysis of industry structure. Examination of a defendant's subjective intent is strongly disfavored in modern Sherman Act analysis because it reveals virtually nothing about the actual economic impact of a defendant's conduct. *See* 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 113, at 140 (3d ed. 2006). As the authors explain, the goal of contemporary antitrust law is to promote competition. *Id.* The market circumstances that facilitate or undermine competition "are objectively measurable with imperfect but tolerable accuracy." *Id.* Therefore, the best way to determine if particular conduct threatens competition "is by ignoring intent and focusing on conduct, market structure, or other objective considerations." *Id.* ¶ 113, at 141.

104. Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1274-76 (11th Cir. 2005).

competitive justification for its practices.[105] The jury answered both questions in the affirmative.[106]

The Eleventh Circuit overturned the jury verdict. Although it determined that there was sufficient evidence to support the jury's finding that the challenged conduct adversely impacted competition by lowering prices in both the cash and the overall market, this did not end its inquiry.[107] The court also found there was insufficient evidence to support the jury's second conclusion that Tyson lacked a business reason or competitive justification for its conduct, because the record indicated: (1) there was intense competition among packers, and (2) Tyson presented a number of business justifications (which plaintiffs did not dispute) with evidence that the agreements facilitated the availability of consistent supply to its factories, reduced transaction costs, and enhanced the ability to match purchase prices to yield and quality.[108] In other words, even though the challenged conduct impacted competition by reducing the price sellers received for their cattle, the efficiencies the buyers obtained from the marketing agreements were held to justify the sellers' losses, and the conduct was determined not to be "unfair" under the PSA.

2. Been v. O.K. Industries, Inc.

The Tenth Circuit and U.S. District Court for the Eastern District of Oklahoma addressed similar issues in *Been*, where chicken growers sued a vertically-integrated processer over its supply contracts.[109] Plaintiffs showed that O.K. Industries required them to make significant investments in chicken houses; the prices they received remained constant during periods of both high and low production; the volumes of flocks provided to them were reduced according to O.K. Industries' needs; and O.K. Industries shared market information with other processors, which it withheld from the plaintiffs.[110] Plaintiffs presented expert testimony that O.K. Industries had a monopsony over chicken purchases in the plaintiffs' geographic area and that O.K. Industries' supply contracts resulted in its paying lower prices to plaintiffs and receiving higher prices on its own sales.[111] The District Court initially granted the processor summary judgment, holding that plaintiffs had not presented sufficient evidence of adverse impact on compe-

105. *Id.* at 1277.
106. *Id.*
107. *Id*. at 1279.
108. *Id.* at 1280-87.
109. Been v. O.K. Indus., Inc., 495 F.3d 1217, 1222 (10th Cir. 2007).
110. *Id.* at 1222, 1233; Been v. O.K. Indus., Inc., No. 08-7078, slip op. at 5 (10th Cir. Oct. 13, 2010).
111. *Been*, 495 F.3d at 1233; *Been*, No. 08-7078, slip op. at 4-5.

tition. The Tenth Circuit overturned the District Court and determined that plaintiffs had provided sufficient evidence of adverse impact on competition to preclude summary judgment and to warrant presenting the issue to a jury.[112] The Tenth Circuit distinguished *Pickett* on two grounds. First, *Pickett* involved a situation where a number of buyers were competing, not a single-buyer monopsony.[113] Second, *Pickett* focused on analysis of efficiencies, not on the market as a whole.[114]

After the resulting trial, a jury found that O.K. Industries had violated § 202(a) by engaging in "unfair" conduct and awarded a $21.2 million verdict.[115] Given the instructions to the jury, this conclusion necessarily required findings that O.K. Industries was a monopsonist, that it had "arbitrarily" lowered prices to growers (defined as setting prices by other than "normal market forces"), and that this pricing also raised, or was likely to raise, the processor's resale price and consumer prices.[116] The jury was specifically told that the growers did *not* have to prove the processors lacked business justification, and they were instructed that O.K. Industries' intent and the nature of competition in the markets in which it purchased and sold were only relevant to the arbitrariness of the prices paid to growers and the likelihood that its conduct would raise resale and consumer prices.[117] The jury's verdict was then upheld by the Tenth Circuit.[118]

3. *Rule of Reason Balance in* Pickett *and* Been

In focusing on the defendant's market position and intent, the state of competition in the market, and identifying specific adverse impacts on competition, both *Pickett* and *Been* considered, albeit in quite undeveloped form, the countervailing concepts of pro- and anti-competitive impacts. However, neither *Pickett* nor *Been* engaged in a real step-by-step, shifting-burden, rule of reason analysis. In fact, neither did any balancing at all.

In *Pickett*, the jury was asked to find whether or not there were anti-competitive impacts and pro-competitive efficiencies, but it was never asked to *balance* the two (and did not need to since the jury found no pro-competitive impact).[119] The Court of Appeals upheld the jury's finding of anti-competitive

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112. *Been*, 495 F.3d. at 1234.
113. *Id.*
114. *Id.* at 1233.
115. *Been*, No. 08-7078, slip op. at 6.
116. Instructions to the Jury at 22, Been v. O.K. Indus., Inc., No. 02-CIV-285-RAW, 2008 WL 2149014 (E.D. Okla. Mar. 10, 2008).
117. *Id.* at 26.
118. *Been*, No. 08-7078, slip op. at 35.
119. Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1277 (11th Cir. 2005).

impact and found that the defendant had presented sufficient evidence of pro-competitive efficiencies, but did not engage in any balancing of the two or remand for such a balancing.[120] Rather, it appears to have simply assumed that the proffered pro-competitive justification for the conduct (1) was real (because plaintiffs did not contest it), and (2) outweighed the anticompetitive harm caused by the conduct.

Neither did *Pickett* involve shifting burdens of proof. Unlike a Sherman Act plaintiff, the plaintiffs in *Pickett* were required to establish both anti-competitive impact and the lack of any pro-competitive efficiency or justification.[121] A different burden of proof, or a special interrogatory asking the jury to balance pro- and anti-competitive impacts, or a different interpretation of the record by the Court of Appeals, may well have dictated a different result in *Pickett*.

If *Pickett* was excessively pro-defendant, the Court in *Been* went to the other extreme. It focused only on the anti-competitive impact of the defendants' conduct and failed to recognize, or even identify, any efficiencies or pro-competitive impacts of the conduct.[122] The processor's intent and the competitiveness of markets were permitted as part of the analysis in only the most indirect and convoluted way.[123] No pro-competitive impacts were identified or balanced against anticompetitive impacts to determine whether O.K. Industries' conduct had, or was likely to have had, a net adverse impact on competition.

It is safe to say a rule of reason balancing test for violations of § 202(a) and (b) of the PSA is undeveloped. Despite the fact that the rule of reason balancing test is a well-developed antitrust standard for determining unreasonable restraints of trade and impact on competition, it has never been applied in a PSA case. Assuming that the *Pilgrim's Pride* majority decision continues to be the law, application of this test might be a natural and logical development.

Definition of the proper standard for determining whether alleged unfair conduct adversely impacts competition will be a major battleground between the Chicago School and Populist forces. This battle will engage over the issues of (1) whether or not a rule of reason balancing test is the proper test, and (2) which form of that test—which steps and burdens of proof for each step—is most appropriate for the PSA.

The threshold question of whether a rule of reason balancing is the appropriate standard raises the issue of whether the even more rigorous below-cost test, used in Sherman Act section 2 monopsony cases, should be applied. Sec-

120. *Id*. at 1286-87.
121. *Id.* at 1279.
122. Been v. O.K. Indus., Inc., 495 F.3d 1217, 1231 (10th Cir. 2007).
123. *Id*. at 1228 n.8, 1233-34.

tion 202(a) "was aimed at sales below cost where the packer intended to eliminate competitors or injure competition through geographic price discrimination."[124] One of the most contentious current issues under the PSA focuses on the concern that increasingly powerful, vertically-integrated packers with monopsony power can purchase livestock from individual growers at reduced prices. Both *Been* and *Pickett* arose out of such situations.[125] Virtually all PSA decisions defining liability in these cases, however, have pre-dated the Supreme Court's monopsony purchasing decision in *Weyerhauser Co. v. Ross Simmons Hardwood Lumber Co*.[126] In that case, the Supreme Court rejected a rule of reason-like balancing approach in favor of a more pro-defendant, purchase-below-cost test, based on *Brooke Group*.[127] Thus, the Court determined that a strict *Brooke Group*-type rule should apply in precisely the circumstance that is the major focus of many PSA claims—when a powerful, concentrated, vertically-integrated firm functions in a relevant market as both the primary buyer of inputs and as a producer and seller of those same inputs in competition with other independent producers.[128]

If the *Pilgrim's Pride* majority decision requiring proof of adverse impact on competition dictates absolute equality between the standards of proof for violations of the PSA and the Sherman Act, a similar below-cost, *Brooke Group*-type test should be required to prove a violation of § 202(a) in many of these cases.[129] On the other hand, if the legislative histories, statutory language, and specialized industry economics behind the PSA are held to differentiate it from the Sherman Act, some other test for adverse impact on competition, such as the rule of reason balancing, might be held appropriate.[130] Persuading courts to adopt

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124. Armour & Co. v. United States, 402 F.2d 712, 721 (7th Cir. 1968).

125. *See* Been v. O.K. Indus., Inc., 495 F.3d 1217, 1223 (10th Cir. 2007); Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1275-76 (11th Cir. 2005).

126. The Tenth Circuit's decision in *Been* was issued after *Weyerhaeuser* but did not apply or discuss it.

127. *See* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 317-18 (2007) (rejecting the district court's jury instruction which stated that the plaintiff only needed to prove the defendant "'purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent [the plaintiff] from obtaining the logs they needed at a fair price.'" (citation omitted)).

128. *See id*. (concluding the *Brooke Group* test applies to both "'buy-side predatory bidding'" and "'sell-side predatory pricing'").

129. *Contra* Bass, *supra* note 15, at 427-28 (explaining that the PSA and the Sherman Act do not share the same standard of proof).

130. *See generally id.* (arguing that the PSA offers protections beyond an adverse impact created by the defendant's conduct). In a Sherman Act section 2 analysis, current cases generally apply below-cost tests to conduct involving *pricing*. *See, e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 209-10 (1993); *Weyerhaeuser Co.*, 549 U.S. at 317-18. Further, current cases apply a rule of reason balancing test to conduct involving *exclusionary prac-*

the latter approach may be the focus of future claimants who seek to promote a broader scope for the PSA.

If the rule of reason is applied, pro-producer forces might advocate the "inherently suspect analysis" approach to the rule of reason articulated by the FTC in *In re Polygram Holding, Inc.*[131] Pro-packer forces may advocate for a more full-blown analysis like that outlined by the D.C. Circuit for monopoly claims in *United States v. Microsoft*.[132]

One part of GIPSA's proposed regulations appears to call for a form of balancing. Sections 201.94(b) and 201.210(a)(5) of the proposed rules require a packer or poultry processor to keep advance documentation justifying any price differences, premiums, or discounts.[133] Although the factors which may or may not justify differences in prices paid to producers are not defined, this formulation implies some balance of harm to the producer against a justifying gain to the packer. While a Sherman Act rule of reason balancing is clearly more pro-producer (and anti-packer) than the below-cost test for monopsony cases under the Sherman Act, the balancing test GIPSA seeks to impose would be even more pro-producer. The GIPSA proposed rules would clearly shift the burden of proof on all issues to packer defendants, and the burdensome recordkeeping and documentation required to establish justification, as a practical matter, would make proof of justification very difficult.[134] The result is that, even if GIPSA's attempt to overturn the requirement of adverse impact on competition is rejected by the courts, the regulations constitute a substantive change that is significantly more anti-packer than either the below-cost or rule-of-reason standards applied under the Sherman Act.

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tices. *See, e.g.*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600-05 (1985); United States v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001). If this pricing-versus-exclusion distinction were applied to proof of adverse impact on competition under § 202(a) and (b) of the PSA, the proper test would depend on the type of conduct alleged, just as with section 2 of the Sherman Act.

131. *In re* Polygram Holding, Inc., No. 9298, 2003 WL 21770765 (Fed. Trade Comm'n July 24, 2003) (final order), *aff'd*, Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

132. United States v. Microsoft Corp., 253 F.3d 34, 58-59 (D.C. Cir. 2001).

133. Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338, 35351 (proposed June 22, 2010) (to be codified at 9 C.F.R. pt. 201).

134. *See id.*

VII. LIMITS ON PSA LIABILITY UNDER THE RULE OF THE *PILGRIM'S PRIDE* DISSENT

If one changes perspectives and assumes that the *Pilgrim's Pride* dissenting opinion was to prevail, no proof of adverse impact on competition would be required for a violation of § 202(a) and (b). However, such a rule cannot be viewed as giving the USDA an unlimited opportunity to define, and private plaintiffs to collect for, any practice they can convince a court or jury is "unfair." Plaintiffs would not be painting on a blank canvas. Further definition of what must be proven to establish liability under § 202(a) and (b) and what the outer limits of that liability might be would take place in the context of the same eighty-year-old body of case law discussed above.

Armour's statement of the general parameters of § 202(a) and (b) is still good law. On one hand, the PSA "should be read liberally enough to take care of the types of anti-competitive practices properly deemed 'unfair' by the Federal Trade Commission," and in addition, should also be read to cover "any of the special mischiefs and injuries inherent in livestock and poultry traffic."[135] On the other hand, the PSA does not give the USDA "complete and unbridled discretion to regulate," or a "mandate to ignore the general outline of long-time antitrust policy."[136]

In *Armour* and subsequent decisions, courts have measured the proper scope of § 202(a) and (b) by looking to the most analogous statute—the prohibition of "unfair methods of competition" and "unfair or deceptive acts or practices" contained in section 5 of the FTC Act.[137] Although this benchmark may currently be somewhat of a moving target, it sets fairly tight parameters.[138] At its

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135. Armour & Co. v. United States, 402 F.2d 712, 722 (7th Cir. 1968).

136. *Id. Armour* also explains that Congress did *not* intend to expand "the deficient reach of" the Sherman, Clayton, ICC, and FTC Acts. *Id.* at 721. Rather, it merely saw the need for a specialized regulation and enforcement of the same rules in a specific industry by the agency with the most experience and expertise with that industry. *Id*.

137. *Id*. at 718 n.7. *See* Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 382 (5th Cir. 2009) (en banc) (Garza, J., dissenting) ("Comparison of the PSA to the FTC Act is warranted because the PSA is an offspring of the FTC Act.").

138. For decades, the FTC has struggled to articulate systematic criteria for determining whether an act or practice is "unfair" in violation of section 5 of the FTC Act. In 1994, Congress enacted 15 U.S.C. § 45(n) which sought to provide the FTC guidance in defining unfairness under the Act. *See* 15 U.S.C. § 45(n) (2006). Like the FTC's statements before it, 15 U.S.C. § 45(n) has been criticized for failing to give businesses charged with compliance adequate notice about what practices are unfair and violate the Act. *See generally* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980) (discussing the vagueness of the FTC's unfairness standards); Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935 (2000) (reviewing the history and limitations of attempts by Congress and the FTC to define what constitutes unfairness under section 5).

most expansive, the case law can be read to allow section 5 violations broader than Sherman Act violations,[139] when: (1) anti-competitive effects involve reduction in consumer choice, rather than an increase in prices; (2) section 5 will "fill gaps in coverage" by the Sherman Act; (3) deceptive practices or anti-competitive oligopolistic behavior occurs without overt collusion; (4) a series of otherwise legal acts combine to have an adverse impact on competition; and (5) section 5 is used to avoid collateral consequences, such as precedent for private treble damages cases.[140]

On the other hand, even the proponents of a relatively expansive section 5 admit that the same cases allowing these expansions also set limits on the scope of section 5, in holding that "Section 5 cannot reach conduct that Section 1 and [Section] 2 [of the Sherman Act] reach simply because there is a failure to prove an established essential element of [the Sherman Act] offense," and that section 5 can only reach conduct that can be considered oppressive or injurious to *consumer* welfare "at least in the long run."[141] GIPSA's current proposed rules and those who favor a PSA that provides more protection to individual producers against what they perceive as the "unfair" practices of contemporary agribusiness (and who invoke the populist history and purpose of the PSA to condemn the *Pilgrim's Pride* majority position) ignore this existing legal authority.[142]

In addition, one significant difference between the Sherman/FTC Act regime and the PSA can be raised against an expansive reading of § 202(a) and (b). This factor relates to the FTC's fifth limiting principle for expansion of FTC liability, described above. In the general antitrust world, private plaintiffs can sue

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139. *See* E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 135 (2d Cir. 1984); Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 925 (2d Cir. 1980); Boise Cascade Corp. v. FTC, 637 F.2d 573, 581-82 (9th Cir. 1980).

140. *See* Fed. Trade Comm'n, Statement of Chairman Leibowitz and Commissioner Rosch, *In the Matter of Intel Corp.*, Docket No. 9341 (Dec. 16, 2009), *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelchairstatement.pdf; *see also* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 935-38 (2010).

141. J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, Remarks Before the LECG Newport Summit on Antitrust Law and Economics, Wading into Pandora's Box: Thoughts on Unanswered Questions Concerning the Scope and Application of Section 2 & Some Further Observations on Section 5, at 20 (Oct. 3, 2009), http://www.ftc.gov/speeches/rosch/091003roschlecgspeech.pdf.

142. *Contra* Stumo & O'Brien, *supra* note 65, at 103-04 (recognizing section 5 jurisprudence requires demonstrating that challenged conduct runs afoul of antitrust standards, but arguing that it also prohibits "'unfair methods of competition'" based on more general equitable considerations if the challenged conduct causes "'unjustified consumer injury'"). These equitable principles would seemingly not apply to the prototypical PSA case, however, where the claimant is a competitor or market participant, not a consumer. *See, e.g.*, Pickett v. Tyson Fresh Meats, Inc., 420 F.3d 1272, 1274 (11th Cir. 2005).

for damages caused by Sherman and Clayton Act violations,[143] but only the FTC can sue for (theoretically) broader section 5 violations.[144] Under the PSA, both the USDA and private plaintiffs may sue for violations of § 202(a) and (b) and USDA regulations under the PSA.[145]

Advocates pressing for expansion of section 5 argue that expansion will cause no harm and few false positive decisions precisely because the FTC alone can proceed under section 5, and plaintiffs and federal district courts cannot rely on favorable section 5 case law in Sherman Act cases.[146] Thus, FTC actions creating new forms of liability will not result in defendants becoming subject to unforeseen liability or unpredictable jury verdicts in private lawsuits.

Advocates of a broad-ranging PSA cannot avail themselves of this "no over-deterrence" argument. They bear the further burden of demonstrating why "the special mischiefs and injuries" of the livestock and poultry industries, in the context of the particular economies of those industries, are sufficiently onerous to make yet-undefined violations of § 202(a) and (b) the subject of liability to private plaintiffs, when similar violations would not stand under the Sherman Act or section 5 of the FTC Act.

If the *Pilgrim's Pride* minority decision were law, it would be incumbent upon proponents of a broad § 202(a) and (b) to articulate some rationale—within the "'general outline of long-time antitrust policy'"[147]—to support prohibiting conduct under § 202(a) and (b) that does not violate other antitrust statutes. Perhaps advocates for this position may be able to demonstrate that the unique economics and market structures of the livestock and poultry industries subject PSA claimants to "special mischiefs and injuries" that warrant such increased protection.[148]

Still, the scope of § 202(a) and (b) would be circumscribed by the same, or similar, principles as those being asserted by the FTC in *Intel*, and not the free-wheeling vehicle for disciplining big-firm agribusiness that proponents of expansion envision. This limitation would apply whether or not adverse impact on competition is a necessary element for a PSA violation.

In the end, authority defining the outer limits of § 202(a) and (b) under the rule of the *Pilgrim's Pride* dissent might not be too much different than the rules for proof of adverse impact on competition developed under the *Pilgrim's*

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143. 15 U.S.C. § 15(a) (2006).
144. FTC v. Klesner, 280 U.S. 19, 25-26 (1929).
145. 7 U.S.C. § 209 (2006).
146. *See generally* Rosch, *supra* note 138.
147. Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 362 (5th Cir. 2009) (en banc) (quoting Armour & Co. v. United States, 402 F.2d 712, 722 (7th Cir. 1968)).
148. *See id.* at 382 (Garza, J., dissenting).

Pride majority and concurring opinions. The *Pilgrims' Pride* dissent suggested as much, in response to the majority's arguments that not requiring a PSA claimant to demonstrate injury to competition would expose packers to liability under "a 'standardless' definition of 'unfair.'"[149] The dissent argued that "to the degree that 'unfair' is standardless, it is unlikely to remain so for long. Like most statutory terms, those within the PSA will receive definition and refinement through the language of the statute itself, agency adjudication, regulation, and judicial proceedings."[150] It stated that whether Pilgrim's Pride's conduct was "unfair" or otherwise violated the PSA should have been determined "in the context of industry standards, the economic justifications for the actions, and the motives and actions of those concerned."[151]

Even if adverse impact on competition were not required to prove a PSA violation, violations of § 202(a) and (b) would be subject to limitations. The case law and "general outline of longtime antitrust policy" suggests that those limitations would parallel the limitations on section 5 of the FTC Act. The GIPSA proposed rules should be measured against this set of limitations, regardless of whether they are successful in overturning the requirement for adverse impact on competition.

VIII. FUTURE DEVELOPMENT OF PSA STANDARDS

The terrain ahead for the development of liability standards under § 202(a) and (b) of the PSA is likely to resemble the ground already trod by the Sherman Act. The legislative history of the Sherman Act demonstrates that its original framers were concerned not only with combating anticompetitive conduct and the higher prices such conduct imposed on consumers, but also with the welfare of individual competitors, especially small businesses.[152] Indeed, anti-

149. *Id*. at 384.

150. *Id*.

151. *Id*. at 385.

152. There is a vast body of scholarship analyzing the original purposes of the Sherman Act. Debate closely resembling that which surrounds the history of the PSA has raged for decades, with Chicago School scholars arguing the Sherman Act's exclusive purpose was to promote efficiency and lower prices, while Populists have argued that the Sherman Act was intended to advance a broader set of noneconomic and economic values, including distributive justice, "fairness," and the ability of small firms to compete against larger, more concentrated rivals. *See, e.g.*, BORK, *supra* note 61, at 56-66 (arguing that the framers of the Sherman Act were concerned almost exclusively with allocative efficiency as measured by modern neoclassical economics); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 68 (1982) (arguing that Congress' chief concern was to stop the transfer of wealth to monopolists and away from consumers); Louis B. Schwartz, "*Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1076 (1979) (arguing that Con-

trust scholar and historian, Herbert Hovenkamp, concludes that "[t]he case that the framers of the Sherman Act wanted to develop an antitrust law based on essentially neoclassical concepts of allocative and productive efficiency . . . is quite weak."[153] Instead, the evidence indicates that Congress was "significantly more concerned about various kinds of injury to competitors."[154] Thus, the "most important and perhaps most troublesome conclusion is that while the framers of the Sherman Act were intent on condemning 'monopoly,' they saw the principal injury of monopoly as reaching competitors rather than consumers."[155]

Over the last several decades, however, interpretation of the Sherman Act has been strongly influenced by developments in economic theory associated with the Chicago School that have eliminated concern for the fate of small, individual (and inefficient) producers from antitrust analysis. Mainstream jurisprudence today views the Sherman Act as a "Magna Carta of free enterprise," written in the broadest terms,[156] which Congress intended the Courts to interpret in the context of an ever-evolving economy. Regardless of the various original (and conflicting) intentions of its framers, the circumstances in which the Sherman Act may now be successfully applied have been narrowed, and plaintiffs must satisfy increasingly rigorous standards of proof that have evolved to promote free markets, economic efficiency, consumer welfare, innovation, and the competitive process.[157] Individual competitors who are subject to these market forces and whose individual interests often conflict with these policies, receive little protection from the Sherman Act, unless they can demonstrate the defendant's conduct has also harmed competition itself.[158]

This conflict between protecting the competitive process for the benefit of consumers and protecting individual competitors is at the heart of disputes

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gress was concerned with justice or fairness, not efficiency); George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1, 7 (1985) (arguing the Sherman Act was passed at the behest of particular non-consumer interest groups, including small businesses and farmers, who found it difficult to compete with larger, lower-cost rivals).

153. 1 AREEDA & HOVENKAMP, *supra* note 101, ¶ 101, at 9.

154. *Id.* ¶ 101, at 10.

155. *Id.* ¶ 103, at 41-42.

156. United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

157. For a general understanding of the Chicago School in Antitrust, see generally Posner, *supra* note 61.

158. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (rejecting competitor's antitrust claim because "[i]t is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*'"). In fact, as explained above, this was not always so. In one early Sherman Act decision, for instance, the Supreme Court suggested that business practices might be illegal if they resulted in lower prices, thereby "driving out of business the small dealers and worthy men . . . who might be unable to readjust themselves to their altered surroundings." United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

over the meaning of the PSA. The central question for PSA jurisprudence going forward is whether, and to what extent, the PSA will continue to emulate and adopt the same answers that have been reached by modern Sherman Act jurisprudence.

Mainstream antitrust thinking asserts that the standards under the PSA ought to be the same as those under the Sherman Act.[159] It will take the *Pilgrim's Pride* majority decision requiring adverse impact on competition to prove a § 202(a) or (b) violation and push it to its logical conclusion. The PSA is one of a "family" of antitrust statutes that regulate competition in the United States. The ultimate goal of all antitrust statutes should be to promote economic efficiency, innovation, and lower prices and more choices for consumers by protecting the unfettered operation of the competitive process. To ensure that the country's various antitrust statutes promote these policy goals, all antitrust statutes, including the PSA, should be interpreted to require a plaintiff to satisfy the same rigorous, economically rational standards applied to the Sherman Act. To do otherwise risks promoting the very evil the antitrust laws seek to prevent—unnecessarily high consumer prices—since consumers will ultimately pay if market participants may use the antitrust laws as swords against more efficient, competitive, and successful market participants.[160]

A countervailing group will focus on the differences between the PSA and the Sherman Act—in statutory history, statutory language, and focus on a single industry rather than the economy in general. They will continue the debate between the majority and dissent in *Pilgrim's Pride*, in hopes of fighting the antitrust tide and reversing the *Pilgrim's Pride* majority rule.

In the context of the PSA, the positions of both the Chicago School and the Populists have strengths and weaknesses. The strengths of the mainstream position are that it is economically rational, promotes consumer welfare (i.e., public over special, private interests), and can supply ready-made legal standards for a variety of competitive situations which have been developed under the Sherman Act.[161] The weakness of the Chicago School position is that it arguably does not give sufficient credence to the PSA's statutory history, statutory language, and focus on a specific industry that may subject individual producers to special mischiefs and injuries.[162]

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159. *See* Lauck, *supra* note 65, at 453 (stating the policy of applying antitrust scrutiny while promoting economic organization has become standard).

160. *See* 1 AREEDA & HOVENKAMP, *supra* note 101, ¶ 110(5), at 99 (arguing despite legislative history, populist goals should not be given weight in formulating antitrust rules because doing so would inhibit innovation and impose unacceptable social costs on consumers).

161. *See generally id.*

162. *See generally* Lauck, *supra* note 65 (discussing the issues with application of any antitrust law to agriculture).

The strength of the Populist position is that it arguably: (1) gives proper credence to the unique portions of the statutory language in, and legislative history of, § 202, and (2) permits PSA standards to develop that may be more sensitive to market conditions and public policy aims that are unique to the poultry, livestock, and meatpacking industries.[163] The weakness of the Populist's position is that a PSA providing increased protection for individual growers without requiring proof of an adverse impact on competition could entrench inefficient producers by insulating them from the discipline of a rigorous marketplace. This could cause prices to rise and ultimately harm consumers. Critically, the standards for what constitutes an "unfair" practice proposed by those who favor a more expansive interpretation and application of the PSA—one that does not require proof of an adverse impact on competition—simply do not address this concern.[164]

In view of the strengths and limitations of each position, it is natural to ask if a synthesis is possible. While a full elaboration of a recommended path is beyond the scope of this Article, a middle-way that allows for limited expansion of PSA liability under § 202(a) and (b) might begin with the premise from *Armour*: While PSA liability is broader than liability under general antitrust statutes, it cannot "ignore the general outline of long-time antitrust policy."[165] Also, the *De Jong* admonition that the "broader" PSA still "incorporates the basic antitrust blueprint of the Sherman Act" and "look[s] to decisions under the Sherman Act for guidance" is instructive.[166]

Such an approach would accept the rule of the *Pilgrim's Pride* majority that proof of adverse impact on competition is required to prove a violation of the § 202(a) and (b) prohibitions of "unfair," "unreasonable," and "unjust" conduct, but it would reject the complete convergence of PSA and Sherman Act standards.[167] It would then give some voice to the Populist view of the legislative history and statutory language of the PSA by constructing PSA-specific analyses and standards of proof, when such variations could be based on empirically verifiable economic realities—the unique market structures and dynamics that typically prevail in the livestock-raising and meat processing industries.[168]

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163. Mainstream antitrust thinkers would agree that these market dynamics will be fully accounted for under traditional analogous market power and market dynamics.

164. Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 384 (5th Cir. 2009) (en banc) (Garza, J., dissenting).

165. Armour & Co. v. United States, 402 F.2d 712, 722 (7th Cir. 1968).

166. De Jong Packing Co. v. USDA, 618 F.2d 1329, 1335 n.7 (9th Cir. 1980).

167. *Compare Pilgrim's Pride*, 591 F.3d at 371 (Jones, C.J., concurring), *with De Jong Packing Co.*, 618 F.2d at 1335 n.7.

168. *See* 1 AREEDA & HOVENKAMP, *supra* note 101, ¶ 110, at 99-100.

Potential PSA-specific rules which might be considered in a synthesis that does not reject antitrust's fundamental goal of promoting competition might include: an exception to the general rule that proof of adverse impact on competition is required for a defined category of violations of § 202(a) and (b)—violations that constitute "deceptive" acts. PSA-specific rules might also be considered which call for a rule of reason balancing test. The required proof of anti-competitive impact under the PSA might deviate from that under the Sherman Act, in order to comport with (1) the judicial recognition of liability for incipient "likely to" violations, and (2) a greater use of anti-competitive intent to prove adverse impact on competition in the PSA case law.

A PSA rule of reason balancing test could also differ from analogous Sherman Act tests. Two potential differences suggest themselves. First, the PSA might employ a rule of reason balancing test in situations where the Sherman Act requires a stricter, buying below-cost, *Brooke Group*-type test. Second, a PSA balancing test might put more initial burdens on the defendant than the Sherman Act would. For example, both (1) the burden of proving a pro-competitive justification and (2) the burden of showing that such a justification outweighs anti-competitive impact of the challenged practice could be placed initially on the defendant. In addition, a PSA exception to the rule of reason balancing test might be created for certain situations that almost always have anticompetitive impacts (and rarely, if ever, have pro-competitive justifications), such as horizontal price-fixing agreements. This approach would track the *per se* violation concept under the Sherman Act and might parallel the Sherman Act precisely to the extent the same conduct was held to trigger a *per se* violation under both statutes.

The battle between the Chicago School and the Populists and the potential emergence of a PSA "middle way" will be, and have been, impacted by two recent developments: (1) the failure of plaintiffs' attempt to appeal *Terry* and (2) the final form in which GIPSA's proposed rules are issued and permitted by the courts. The Supreme Court's denial of certiorari in *Terry* means that an adverse impact on competition will be required pursuant to existing case law, and development of a middle way may be possible.

GIPSA's proposed rules do not constitute a middle way synthesis. To the extent they retain a competitive injury requirement at all, the proposed rules attempt a black-is-white redefinition of "competitive injury" that would include injury to an individual competitor, not just injury to the competitive process.[169] This wholesale rejection of accepted antitrust principles to favor one class of competitors strikes a more Populist, and inefficient, balance than the synthesis

169. *See* Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338, 35341, 35351 (proposed June 22, 2010) (to be codified at 9 C.F.R. pt. 201).

suggested by the authors. GIPSA's proposed rules fail to adequately account for the fact that elimination of the adverse impact on competition requirement will risk the entrenchment of inefficient producers and ultimately raise the prices paid by consumers. If they are finalized without change and ultimately approved by the courts, they will result in a significantly more expansive definition of "unfair" in § 202(a) and (b) of the PSA.

IX. CONCLUSION

Since the founding of the republic, the idea of the independent farmer has held a special place in American economic and political life. The ideal of the independent yeoman farmer reflects and incorporates long-cherished principles of American political economy, including distrust of, and hostility towards powerful, centralized, urban economic interests and the belief that the diffusion of economic power among small business is critical to our democracy. Yet increasingly, as the rise of large, national discount stores has shown, these principles have lost out to another imperative—insatiable consumer demand for more choice and cheaper, higher-quality goods. The small businesses and retailers who have been eclipsed by these developments have found little relief from the Sherman Act as currently interpreted.

Will GIPSA or individual poultry and livestock producers have better luck with the PSA? As *Pilgrims' Pride* makes clear, given the ascendance of the Chicago School, the intellectual coherence of its standards, and the generally unquestioned belief that the goal of our nation's antitrust laws is to protect free markets and competition, not competitors, it is difficult to envision the development of a robust, Populist PSA jurisprudence. However, because the PSA can be read to provide some different protections to individual producers than those in the Sherman Act, and because the market structure of the livestock industries is unique, the PSA may develop a body of law that simultaneously comports with modern economic analysis and antitrust thinking, but also provides individual livestock and poultry producers with some additional protections from the special mischiefs and injuries that occur in their industries through specialized standards and burdens of proof within the mainstream of antitrust law developments.