



Agricultural Law Press

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Spotlight On Antitrust

-by Neil E. Harl*

It has been well over a century since enactment of the Sherman Antitrust Act of 1890.¹ That was the first serious effort to deal with a “contract, combination . . . or conspiracy to restrain commerce” which amounts to an “unreasonable restraint on trade or commerce.” The concern then was principally concentration in oil and gas, livestock slaughter, railroads and a few other areas. Antitrust law was an important government feature in the decades to follow. However, the change of attitude with the election of 1980 resulted in a significant down playing of the role antitrust would be playing in the years to come. The result was a shifting away from the activist role played by the federal government since 1890.

Concentration in the agricultural sector

In recent years, particularly since 1980, there has been growing concern about increasing concentration in seed production and sale, animal slaughter, grain handling and shipping, farm machinery and equipment and control of fertilizer supplies worldwide. Of that group of five, one of the group, farm machinery and equipment, has played, at most, a modest role in endeavoring to achieve a dominant role in farm machinery development and sale. The most intense focus in recent years has been on seed production and sale with more than 400 seed producers at the peak before the sharp decline in hybrid seed producers to a very small number of firms as seed patenting was approved by the United States Supreme Court in a decision issued more than 35 years ago. Today, the selling of patented seed is essentially in a handful of firms.

The merger of Pioneer Hybrid and DuPont and the several mergers by Monsanto and DeKalb Hybrids have been responsible for a high level of concentration in seed production and sale, influenced, again, by the patenting of seeds.

The current concern

The recent announcement of the possible merger of two of the largest grain merchandising firms in the world, Archer Daniels Midland (better known as ADM) and Bunge, Ltd, has rekindled the concerns voiced by those concerned about seed production and sale in recent years. The grain merchandising business was already fairly heavily concentrated. In 2017, ADM reported 60.8 billion in annual net sales and Bunge had

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45.8 billion in net sales in 2017.² The contemplated merger translates into fewer firms engaged in grain handling and less competition in buying grain. It is likely that the Department of Justice, Antitrust Division, will scrutinize the proposed merger but only rarely has that resulted in action to halt a proposed merger. Halting of mergers has been at a low ebb in recent years, as is widely known.

My position has been that the federal agencies monitoring concentration have been less than aggressive since the change of leadership in Washington in 1980, particularly in mergers. The Obama Administration early in that administration took the initiative to launch an effort to limit mergers (and other efforts to limit competition) but it ran into resistance and dropped the fairly aggressive effort to intervene in instances where competition was threatened.

The evils of high levels of concentration are well known. Healthy competition in the long run continues to be the most important feature of any economic system. It is difficult to see how anyone who is interested in enhancing competition (or even maintaining competition) could be complacent about the proposed merger.

ENDNOTES

¹ 15 U.S.C. §§ 1 and 2.

² See Todd Neeley, DTN Staff Reporter, "Weighing Possible Huge Mergers," February 21, 2018.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

CONTRACTS

PROMISSORY ESTOPPEL. The plaintiff had leased farmland from the defendant over several years. The plaintiff claimed that the defendant had promised that the plaintiff would have a first option to purchase the farmland but had sold the property to a third party without offering the property first to the plaintiff. The plaintiff sued for breach of contract and "equitable claims." The leases contained specific language allocating various farming expenses to the landlord defendant and to the tenant plaintiff but no language as to the plaintiff's alleged right of first option to purchase the property. In the trial court, the jury verdict was for the plaintiff on the breach of contract action but the trial court overruled the jury and dismissed the breach of contract claim for lack of substantial evidence. That ruling was upheld on appeal, with the appellate court holding that there was insufficient evidence of any agreement between the parties to grant the plaintiff a right of first refusal to purchase the farm. See *Kunde v. Bowman*, 888 N.W.2d 680 (Iowa Ct. App. 2016). The plaintiff sought a further appeal as to the equitable claims, arguing that there remained issues of fact on the claims not determined in the original jury trial. As to the equitable claims, the plaintiff argued that the equitable doctrines of *quantum meruit* and unjust enrichment entitled the plaintiff to recover the costs of improvements made to the farm in reliance on the right of first refusal. The appellate court ruled that such equitable claims could only be brought if there were no express agreements between the parties as to the improvements. Because the lease had specific provisions governing the allocation of improvement costs, the court held that neither equitable claim could be brought in this case. The final equitable claim was based on promissory estoppel. The court examined the history of the promissory estoppel doctrine in Iowa and noted that the Iowa Supreme Court had originally

established the elements of a claim of promissory estoppel as (1) a clear and definite oral agreement; (2) the plaintiff acted to the plaintiff's detriment solely in reliance on said agreement; and (3) a weighing of all the equities entitles plaintiff to the equitable relief of estoppel. See *Miller v. Lawlor*, 66 N.W.2d 267 (Iowa 1954). However, a later case changed the elements to "(1) a clear and definite promise; (2) the promise was made with the promisor's clear understanding that the promisee was seeking an assurance upon which the promisee could rely and without which he would not act; (3) the promisee acted to his substantial detriment in reasonable reliance on the promise; and (4) the injustice can be avoided only by enforcement of the promise." See *Schoff v. Combined Ins. Co. of America*, 604 N.W.2d 43 (Iowa 1999). The appellate court noted that subsequent Iowa cases were inconsistent in using the three-part test of *Miller* and the four-part test of *Scholl*. The appellate court ruled that the four-part test was the controlling authority. The appellate court remanded the case on the promissory estoppel claim because the trial court did not make findings as to whether a clear and definite promise had been made and whether the plaintiff reasonably relied on the promise to the plaintiff's detriment. *Kunde v. Estate of Bowman*, 2018 Iowa App. LEXIS 190 (Iowa Ct. App. 2018).

FEDERAL ESTATE AND GIFT TAXATION

PROPERTY ACQUIRED PRIOR TO 1990. The taxpayers were a father and mother and their six children. The taxpayers collectively purchased real property prior to 1990. The parents each acquired a life estate in the use and income from the property and the children each received a remainder interest in the property. Each taxpayer contributed separate funds for the purchase equal to the actuarial value of their interest in the property. At a date