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Foley's Quarterly Food Industry Web Conference Series

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- Today's program is being recorded and will be available on our Web site
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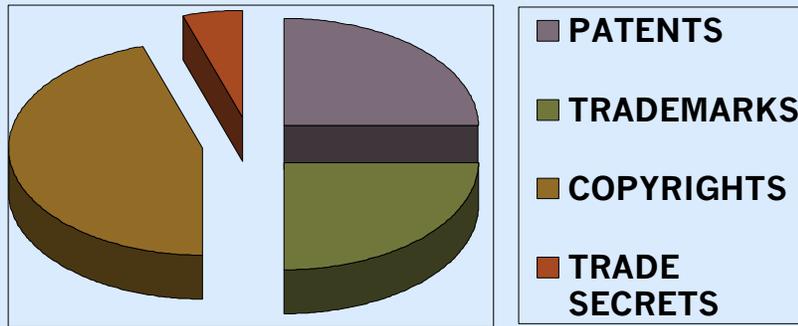
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Considerations When Protecting Food Innovations With Patents or Trade Secrets

Agenda

- Overview and Comparison of Patents and Trade Secrets
- Factors to Consider when Protecting Innovations with Patents or Trade Secrets

Four Basic Types of IP Rights

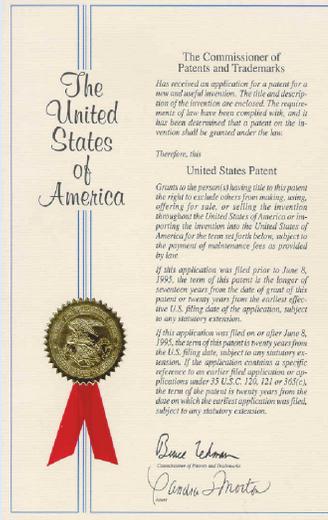


Options for Protecting Food Innovations

- A food product or the process for manufacturing it can be protected by patents, trade secrets, or both
- A major difference between patents and trade secrets is that patented technology is disclosed to the public while trade secrets can remain hidden forever

What is a Patent?

- A limited grant from a government giving the inventor the right to exclude others from making, using, offering to sell, selling or importing the patented invention
- A patent is not a right to make, use, or sell
- The rights afforded by a patent only exist in the country that the patent is granted in – no extraterritorial effect



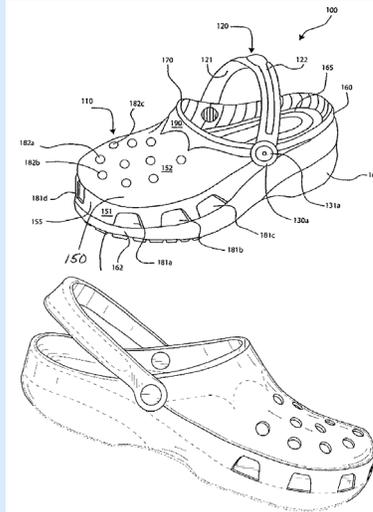
What is the Public Policy for the Patent System?

- To encourage inventors to disclose their inventions to the public in return for the limited right to exclude others from practicing the invention



Types of Patents

- Utility – functional aspects of processes, machines, articles of manufacture, compositions of matter, methods of manufacture, methods of use, and business methods
- Design – ornamental aspects of an article
- Plant – plants that can be asexually reproduced



Duration of a Patent

- Utility Patent: 20 years from the date the patent application is filed (subject to payment of maintenance fees)
- Design Patent: 14 years from the date of issuance (no maintenance fees)

Patentable Subject Matter

- A utility patent may protect a process, machine, article of manufacture, composition of matter, and/or improvements
- The laws of nature, physical phenomena, and abstract ideas are not patentable subject matter

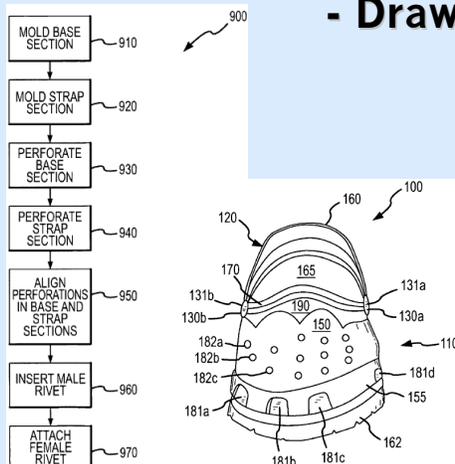
What are the Requirements for Patentability?

- **Novel** – It has not already been invented by someone else
- **Non-obvious** – It is not an obvious variation of a prior invention
- **Useful** – It has a useful purpose
- **Disclosure** – Patent specification must describe the invention in detail and enable one of skill in the art how to make and use it, and disclose the “best mode”
- **Statutory Bars** – Public use or commercial activity more than one year before the filing date of the patent application

Publication

- Patents are published at the time of issuance
- Most plant and utility patent applications are published
- Publication of an application occurs 18 months after the filing date (or earliest priority date claimed by an application)
- Provisional and design applications are not published

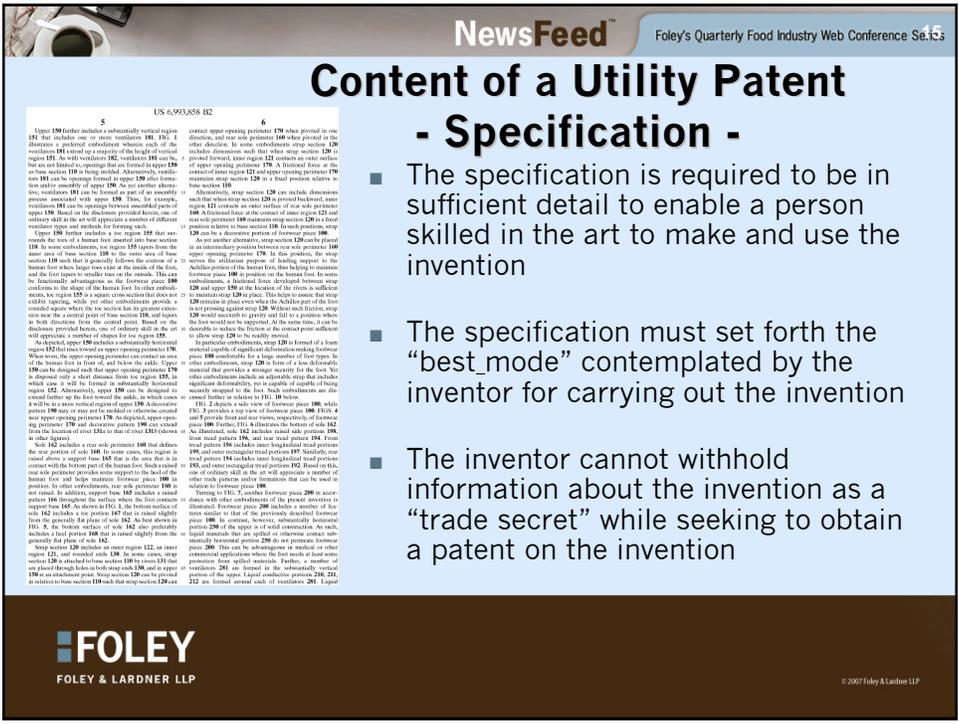
Content of a Utility Patent - Drawings -



- The drawing (or drawings) must show every feature of the invention specified in the claims

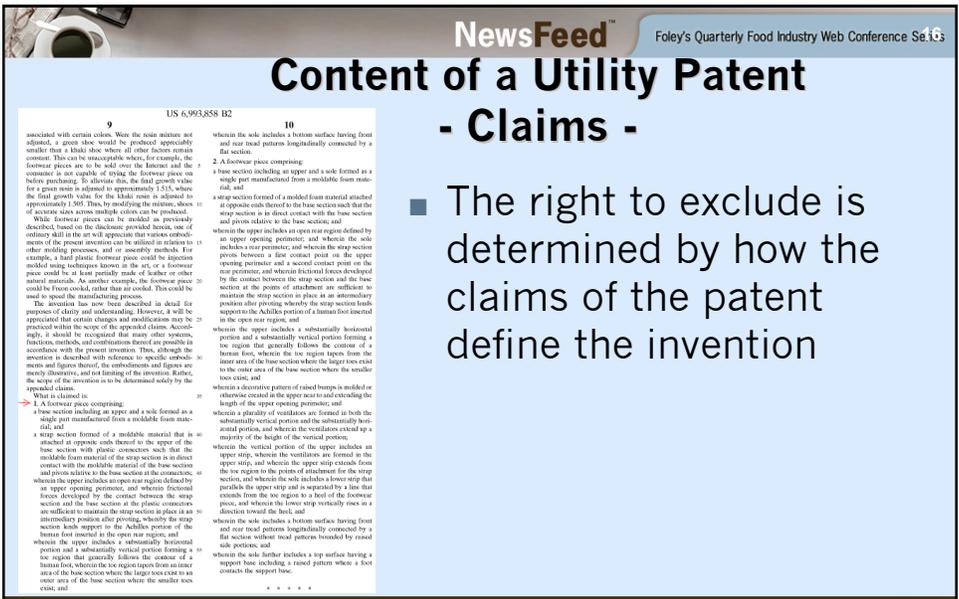
Content of a Utility Patent - Specification -

- The specification is required to be in sufficient detail to enable a person skilled in the art to make and use the invention
- The specification must set forth the "best mode" contemplated by the inventor for carrying out the invention
- The inventor cannot withhold information about the invention as a "trade secret" while seeking to obtain a patent on the invention



Content of a Utility Patent - Claims -

- The right to exclude is determined by how the claims of the patent define the invention

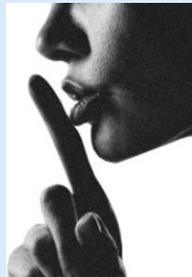


What is a Trade Secret?

- A trade secret is:
 - information;
 - that has value because it is not generally known; and
 - that is maintained in secrecy
- Rights in trade secrets are provided under state law

Duration of a Trade Secret?

Indefinitely, as long as you can keep it a secret!



Potential Trade Secret Subject Matter

- Predictions
- Opinions
- Reports
- Scientific processes
- Manufacturing processes
- Algorithms
- Engineering drawings
- Database compilations
- Technical data (such as the result of tests)
- Negative know-how (knowledge that certain approach does not work)
- Pricing information
- Business strategies
- Customer lists
- Formulae/Recipes

Protecting Trade Secrets

- Notice and Policies
 - Establish and distribute confidentiality policies to employees
 - Establish policies and procedures for destruction of documents
 - Conduct exit interviews with departing employees to remind them of their confidentiality obligations
- Inventory and Audit
 - Identify and document the existence of key trade secrets
 - Conduct audits periodically to identify new trade secrets and to track the use of existing trade secrets

Protecting Trade Secrets (cont'd)

- Use and Disclosure
 - Disclose only on a “need to know” basis
 - Enter confidentiality agreements with employees and third parties (e.g., suppliers, vendors, customers, partners, etc.) who will have access to confidential information
 - Note: Time limits in confidentiality agreements may result in the loss of trade secret protection
- Marking
 - Written and electronic communications containing the information should be marked/designated
 - “PROPRIETARY AND CONFIDENTIAL”

Protecting Trade Secrets (cont'd)

- Maintenance and Retention
 - Maintain trade secret information separately from other (public) information
 - Monitor the use/secretcy status of trade secrets
 - Control reproduction of materials containing trade secrets
- Security Measures
 - Limit access to offices, plants, facilities, etc.
 - Use proper signage for restricted areas
 - Keep confidential information in locked drawers

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Comparison of Patents and Trade Secrets

	Utility Patent	Trade Secret
Protectable Subject Matter	Process, machine, article of manufacture, composition of matter and/or improvement	Business or technical information or materials
Legal Requirements	<ul style="list-style-type: none"> Useful Novel Non-Obvious Application filed within one year of any public use or "on sale" event (commercial activity) relating to the claimed invention Disclosure that enables a person skilled in the art to practice the invention, and must disclose and describe the best mode of practicing the invention 	<ul style="list-style-type: none"> Derives commercial value from not being generally known Subject of efforts to maintain secrecy that are reasonable under the circumstances
Nature of Right	Exclude others from making, using, selling, offering to sell, or importing the claimed invention	Prohibit unauthorized use (misappropriation) and of the subject matter protected as the trade secret
Scope of Protection	Depends on what/how claimed Can be enforced against independent development	Cannot be enforced against independent development, including reverse engineering
Term	20 years from filing date	Indefinite; protected as long as the subject matter of the trade secret remains "secret" (confidential and not generally known)
Loss of Rights	Prior invention, inadequate disclosure, inequitable conduct, failure to pay maintenance fees	Public or non-confidential disclosure of the subject matter protected as the trade secret
Marking and/or Notice	Patent Pending/ Patent No. #,###,###	CONFIDENTIAL PROPRIETARY
Costs	Initial investment in preparing and prosecuting patent application followed by three maintenance fees	Ongoing cost of maintaining secrecy of the subject matter protected as the trade secret

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Prior User Rights

- Prior use may serve to invalidate a patent
- However, when the prior use was kept secret from the public, a patent may be obtained later and enforced against others, even the prior (secret) user
- Under current U.S. law, there is a statutory defense to infringement of patents involving **business methods**, if the prior user reduced the invention to practice at least one year before the patent application was filed

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Considerations

- How valuable is the information to you and your competitors?
- How expensive was it to develop or compile the information?
- How difficult would it be to safeguard the secrecy of the information?
- How difficult would it be to reverse engineer or otherwise acquire the information legally?

Considerations (cont'd)

- Does the innovation provide some sort of competitive advantage, enhanced margins, business opportunity, or marketing opportunity?
- Is the innovation protectable with a patent?
- Would infringement be detectable?
- Is publicly disclosing details of the innovation acceptable?

Dynamics Within Today's Food Industry Yes, everybody has to eat, but....

Today's Food Industry: Seismic Shifts

- What's going on? Economics 101
 - Global supply issues, no quick fix
 - The new consumer as “frugalista”
- How should food companies manage for success?
 - The old “tricks” won't work
- Profitable exit strategies: Can I still sell my business?
 - Understanding today's realism

Uncertain times create both problems and opportunities

Cost Drivers of Processed Food

Cost of Production
 +
 Margin
 +
 Grocery or Food Service Costs
 +
 Margin

Total food costs are spread across the full spectrum of the value chain

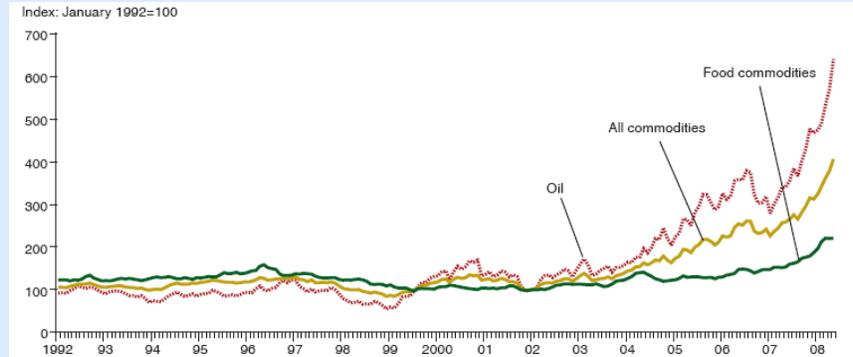
Cost of Production - Processed Food Manufacturer

Agricultural inputs	30%
Manufacturing	15%
Packaging	15%
Distribution	10%
Sales and marketing	20%
Other	10%
Total	100%

Source: Rabobank

Manufacturer costs can be managed at multiple levels

Fluctuating Key Inputs: A Complex Issue

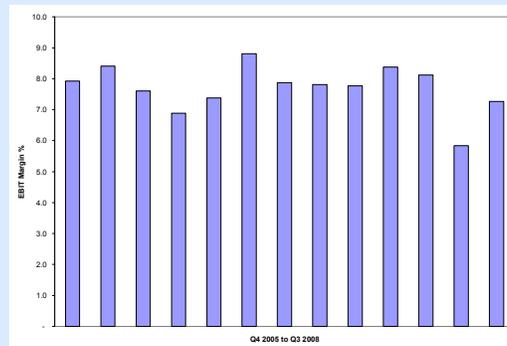


Source: USDA Economic Research using IMF and IFS data

Rising global demand, low commodity stocks, weak dollar, bio-fuels

Quarterly Processed Food Margins - Percent

2005 Q1 to 2008 Q3



Source: Capital IQ, Amherst analysis of EBIT margins for Top 50 NA food companies

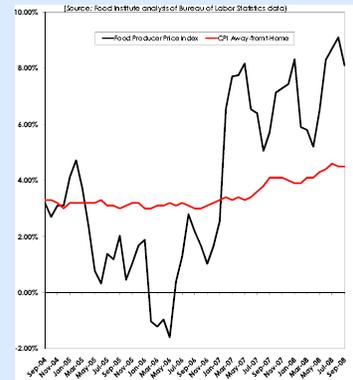
Processor margins are squeezed by high costs and retailer resistance

Retail and Eating-Out Margins Impacted

Wholesale-Retail Food Price Change



Wholesale-Eating Out Food Price Changes



Retailers and restaurants cannot pass through costs to consumers

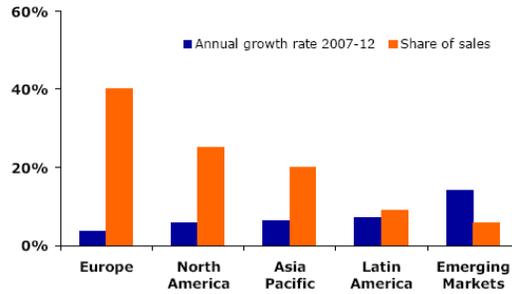
Consumer Drivers of Food

Demographics
+
Income
+
Preferences
(Health-Taste-Convenience)

Consumer demand varies at many levels

Demographic Changes

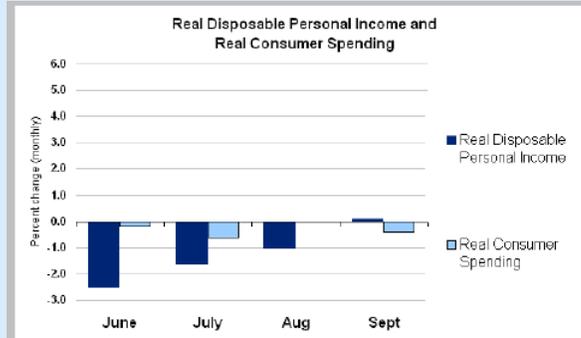
Global food & beverage sales by value, 2007



Source: AC Nielsen, Euromonitor, Rabobank

Global demand for food will increase due to population increases and GDP

U.S. Real Income Changes Last Four Months



Source: U.S. Bureau of Economic Analysis

Negative dollar demand for food: Grocery -3.5%; Eating-Out -3.1%

Consumer Preferences

Health and Wellness

- Healthy Foods
- Low Fat and Diets
- Organic/Natural

Taste

- Ethnic Foods and Flavors
- Gourmet Foods

Convenience

- Prepared Foods
- Food Away From Home

Preference structure has shifted dramatically in the past four months

Dramatic Switching to Maintain Preferences

- Consumers cutback dining-out (57%)
 - Reduced restaurant visits, brown bags, at home eating
 - Cheaper venues while eating out. McDonald's vs. Bennigan's
- Search for lowest cost retail source
 - Wal-Mart share of groceries up significantly. Savings 10-17%
 - Private labels soar. Retailer best positioned. Savings 30%
 - Slowing organic growth. Essentials only, dairy and produce
- Demand for real value
 - Quality for less

Consumers shifting buying patterns to maintain status quo eating

Facing The Challenges

Insight

- Attack all cost drivers, not just ingredients
- Give consumers what they want
- Business as usual not enough
- Maintain value and reputation
- Think partnerships
- Look outside your industry
- Invest for the future

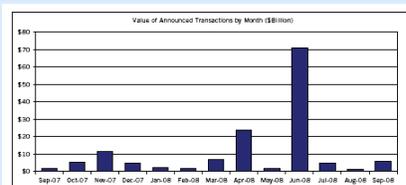
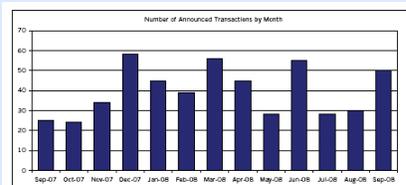
Actions

- Sourcing, substitution, efficiency, backward integration, financing
- Listen for core needs and segments
- Innovation is the key for success
- Evaluate pricing strategies by segment
- Leverage every relationship
- Analyze best practices to identify alternatives
- Technology, information systems

Align your company and processes against customer needs

New Realism in Food M&A

- Food M&A active in mid-market
- Shifts to at-home and basics
- Cash buyers advantaged
 - Strategic buyers
 - PEGs with available funding
- Multiples returning to historic levels. More equity required
- Distressed investors looking for bargains. Many below asset value



If you are even thinking about selling, start managing towards an exit today

Conclusions

- Structural changes are likely to be long term
- Dislocation creates winners. Do not sit back
- Get help from experts *before* you need it
- Management counts, now more than ever
- Be happy. You are not in the auto industry!

Recent Developments in and Future Impact of Antitrust Enforcement Within the Food Industry

Agenda

- Recent Food Industry Antitrust Enforcement Matters
- Antitrust Enforcement in Food Industry under an Obama Administration

Recent Food Industry Antitrust Matters

- Whole Foods/Wild Oats FTC Merger Challenge, Private Class Action
- DOJ JBS/National Beef Packing Merger Challenge
- DOJ Egg Products and Tomato Processors Criminal Investigations
- Fresh Egg Producers Private Class Action
- Processed Egg Products Private Class Action

Whole Foods/Wild Oats Merger

- Merger of two “premium natural and organic supermarkets” challenged by FTC in 2007, but ultimately allowed by federal district court based on idea that **relevant market was comprised of all supermarkets**; consummation followed
- In July 2008, federal appellate court reversed and remanded for additional fact-finding about the nature of the market. Noted that **standard needed to block merger is more lenient for FTC than DOJ—FTC just needs to raise substantial questions to justify preserving status quo while it builds its case**
- Appellate court found that there was potential submarket of **core customers** who would not switch between a premium natural store and a conventional grocery store, particularly with respect to “high quality perishables,” e.g., produce and meat
- Pending decision on petition for rehearing *en banc*, district court on remand may determine **how and whether to separate** Wild Oats and Whole Foods

Whole Foods/Wild Oats Class Action

- In October 2008, consumers filed antitrust **class action** against Whole Foods alleging that merger eliminated competition and raised prices
- Relies on notion that there is a relevant market comprised of core consumers of premium natural and organic groceries
- “Piggybacks” on appellate court’s reversal and analysis. Unique circumstance given that merger had already occurred
- Will focus on whether and by what degree pricing increased after merger

Whole Foods/Wild Oats Matters: Takeaways

- Emergence of distinct market of premium natural and organic groceries
- If analysis is adopted by other courts, could change focus from “fringe” consumers (who will switch retailers/products based on small price increase) to “core” consumers as submarket of all consumers
- FTC may be emboldened to stop mergers prior to developing full economic case

DOJ Challenge to JBS/National Beef Merger

- DOJ and 13 state attorneys general challenged merger between third and fourth largest beef packers in U.S. with civil lawsuit in federal court in October 2008
- Merged entity would be largest in U.S., and have 35% of market. Deal would concentrate 80% of the market in three firms
- Acquisition of Smithfield (fifth largest producer in U.S.) not being challenged, but has been criticized
- Alleged harm is increased beef prices for consumers and lower prices for feedlots and ranchers
- JBS claims that merger will create efficiencies, not anticompetitive effects

DOJ Criminal Investigations of Tomato Industry & Egg Product Industry

- Tomato investigation initiated in 2008 to look into potential price-fixing conspiracy among CA firms that processed tomatoes for ketchup, salsa, etc.
- Grew out of investigation of bribery of buyers by processor SK Foods, Inc.; subpoenas have been issued. FBI may have been led to other parties via trade industry group
- Egg product price-fixing conspiracy investigation initiated in March 2008; focuses on three major producers, MoArk (Land O Lakes), Michael Foods, Golden Oval Eggs. Unclear what conduct is targeted
- Commentators speculate is that both probes are result of increased concentration and potential "coordinated effects" resulting from fewer players in market. Largely thought to be sign that food industry will be focus of federal antitrust agencies

Private Class Action Against Egg Producers

- Class action filed in federal court in PA in September 2008 against United Egg Producers, trade association of approximately 96% of U.S. egg producers, and individual members
- Complaint alleges conspiracy to raise egg prices via constricting supply in the U.S. through exports and reduced production
- Increases in prices and profits well documented
- Plaintiff class of direct purchasers
- One main issue is whether UEP is co-op covered by Capper-Volstead Act exemption

Private Class Action Against Egg Product Producers

- Class action filed in federal court in MN in September 2008 against Golden Oval Eggs, MoArk, and Michael Foods, also targets of DOJ criminal probe
- Complaint alleges conspiracy to raise prices of processed egg products (i.e., dried or liquid eggs) via agreement
- Plaintiff class of direct purchasers
- DOJ criminal probe noted in complaint

Antitrust Enforcement in Food Industry Under an Obama Administration

- Look for increased enforcement activity, particularly from DOJ, in Democratic administration
- FTC may be emboldened to intervene earlier, due to Whole Foods decision
- Financial crisis may spur increase in consolidation of businesses, creating need for government to challenge mergers
- Food industry considered by some commentators to be a natural target because of price increases coinciding with concentration in the market

Obama on Record as Anticipating Increase in Enforcement Activity

- “Regrettably, the [Bush] administration has what may be the weakest record of antitrust enforcement of any administration in the last half century. Between 1996 and 2000, the FTC and DOJ together challenged on average more than 70 mergers per year on the grounds that they would harm consumer welfare. In contrast, between 2001 and 2006, the FTC and DOJ on average only challenged 33. And in seven years, the Bush Justice Department has not brought a single monopolization case.”
- “As president, I will direct my administration to reinvigorate antitrust enforcement. It will step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not.”

Both DOJ and FTC Poised to Increase Merger Enforcement

- Conventional wisdom is that high-level Obama appointees to DOJ more likely to support merger challenges. Counterpoint will be conservative judiciary, which may refuse to block mergers
- FTC, which will not see broad turnover after election, will be more stable; however, Whole Foods decision may embolden FTC to challenge mergers sooner, before case is fully developed

Financial Crisis, Increase in Consolidation Likely to Result in More Enforcement

- Current financial crisis resulting in consolidation in many industries
- Rule of thumb is that unlawful collusion and/or “coordinated effects” may be more likely when an industry is more concentrated
- Price increases that affect financially burdened consumers may spur regulatory action

Food Industry Likely Target of Increased Enforcement, Follow-on Private Actions

- Increase of 7.6% in food prices in one year could prove to be red flag of possible unlawful collusion, particularly in presence of increased concentration
- Capper-Volstead Act exception likely to be target of challenges. Scenario of small farmers banding together as co-ops is considered outdated by some regulators
- Webb-Pomerene Act exception also likely to be target of challenge. Collective exports may be shown to affect U.S. market

Questions & Answers

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