

Litigators of the Week: Steven Bizar, Joseph Callow and Jay Levine

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Dechert's Steven Bizar, Christine Levin and Julia Chapman



Jay Levine

How do you convince a jury to rule in favour of three dominant producers in the egg industry after a decade-long class action suit? Lawyers at Dechert say it is about telling a convincing story and leaving the econometrics at home.

Last Thursday, a Philadelphia federal jury reached a verdict in the *Processed Egg Products* antitrust litigation. Plaintiffs accused egg producers of conspiring to reduce the supply of eggs, thus raising prices, and had negotiated settlements with more than a dozen companies.

Yet the jury found in favour of the remaining defendants: that Sauder and Ohio Fresh had not participated in the conspiracy, and that Rose Acre had participated but that the conspiracy did not impose an unreasonable restraint on supply.

For Dechert, Sauder's win resulted from a strategy to convince the jury that their client, a fourth-generation chicken farmer, had never participated in an anticompetitive scheme.

"It is not always the really sophisticated economic or econometric evidence that matters in these cases. Sometimes it is just telling the story in a cogent and effective way," said partner Steven Bizar.

What came through during the hearing, said Bizar, was that the plaintiffs' claims that producers exported eggs and participated in a certified animal welfare programme were, in fact, irrelevant in determining the supply of eggs.

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Partner Christine Levin emphasised the importance of their client's testimony during the trial. "Relying on the economic expert was not our primary strategy."

The defendants faced a significant setback when the judge held that the two cooperatives the producers had used for exporting and certification were not immune under the Capper-Volstead Act. However, Levin maintained that it was not a large impediment.

"It was never part of our strategy to rely upon Capper-Volstead immunity because it is a very technical defence and difficult to put in evidence."

Associate Julia Chapman also joined Bizar and Levin at trial, cross-examining witnesses for the first time in her career.

Even though Rose Acre was found to be part of the scheme, it was not held liable.

Lead counsel to Rose Acre, Jay Levine from Porter Wright Morris & Arthur, speculated this could be because the "jury saw that there were legitimate and competition-enhancing reasons for the conduct that was challenged."

Like Sauder, Rose Acre only exported excess eggs that it was unable to sell domestically. Levine said his client pursued the certified animal welfare programme that allegedly reduced the number of eggs "because it is what customers demanded."

He also noted Rose Acre's growth of more than 43% and investment of more than \$140 million as evidence to the jury that the company was not trying to restrict output.

"It was a hard-fought battle against worthy counsel," Levine said. "We are glad our position was vindicated after 10 years of battling against these claims."

Ohio Fresh's counsel, Joseph Callow at Keating Muething & Klekamp, emphasised the importance of making the complicated case as simple as possible for the jury.



Joseph Callow

"At the end of the day we wanted to attack the fallacies in the economic theory behind plaintiffs' allegations, as well as the plaintiffs' expert opinion testimony and his background," he said. "Ultimately, the defendants worked together during trial to present a cohesive story, that these allegations did not hold water in the real world."

Callow noted the rarity of having antitrust class actions on this scale go to trial, and called the case "a tremendous and unique opportunity".

"I worked with excellent defence counsel representing the co-defendants and I had a fantastic team with me at KMK. It was a great experience," he said.