

Supplier Pacts, the Antitrust Laws and the Poultry Supplier Suits: Takeaways for a Group Collection Strategy

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Abstract

This article refines the supplier pact collection strategy and compliance with the antitrust laws by considering recent lawsuits filed by customers against poultry suppliers for allegedly violating the Sherman Act antitrust law by collectively limiting production as a strategy to raise prices.

In dealing with a delinquent account where the customer has gone silent, the credit team's collection strategy may be a go-it-alone approach or a supplier group approach. This article is part II of a previous work that was titled "INSOLVENT CUSTOMERS, SUPPLIER PACTS AND THE ANTITRUST LAWS: STRATEGY FOR THE CREDIT TEAM TO MAXIMIZE TRANSPARENCY AND LEVERAGE PAYMENTS". Part one in this series discussed the facts the credit team balances with these collection strategies. That article also discussed the antitrust law overlay with a supplier pact collection strategy and best practices.

This article refines the supplier pact collection strategy and compliance with the antitrust laws by considering recent lawsuits filed by customers against poultry suppliers for allegedly violating the Sherman Act antitrust law by collectively limiting production as a strategy to raise prices. Can the poultry lawsuits provide guidance for supplier pact members and compliance with the antitrust laws where the purpose of a supplier pact is collection of supplier pact members' debts?

Supplier Pact Collection Strategy

The credit team can join forces with similarly situated suppliers, often industry group members, holding delinquent accounts for a group collection strategy. The supplier group action gives members a unified voice and creates the leverage to negotiate with the insolvent debtor. The group action gives smaller suppliers a voice, given their limited resources or the balance due. The group action implies to the debtor that the group has standing to file an involuntary petition, something a standalone supplier does not have.

Antitrust Overlay for the Supplier Pact

In its broadest definition as it relates to the supplier trade relationship, the Sherman Act prohibits any person, including a supplier, from conspiring to restrain trade. The following may constitute illegal activity under the Sherman Act as they relate to the credit team:

- Agreement between competitors or credit group members to fix credit terms;
- Agreement between competitors or credit group members to “black list” or refuse to extend credit;
- Agreement between competitors to secure a particular outcome with new POs; and
- Agreement between competitors to allocate specific customer demographics or geographic territories.

The Grounds for Suppliers to Act Collectively to Deal with Delinquent Accounts

With customer information, the Sherman Act does not prohibit cooperation among suppliers to collect under competitively negotiated POs or supply contracts.¹ When bringing a claim under antitrust laws, the plaintiff needs to show actual collaboration because having similar supplier collection strategies does not counter a credit team’s self-interest, and does not give rise to price/term fixing under the Sherman Act.²

The Supplier Group Collection Strategy and the Antitrust Laws: Collection of Past Due Invoices vs. Negotiating New Orders

Courts evaluating the breadth of the Sherman Act regarding restraint on supplier group action appear uniform in distinguishing two types of group conduct: group action to collect debts is permissible, while group action to restrain trade, such as collectively refusing to sell a customer, is not permissible.

¹ See *CompuCredit Holdings Corporation v. Akanthos Capital Management LLC*, 916 F. Supp.2d 1326 (N.D. GA, 2011)

² *Anderson News, LLC v. American Media, Inc.*, 123 F. Supp.3d 478 (S.D.N.Y. 2015)

For example, the courts in *Burtch v. Milberg Factors, Inc.*,³ *United Airlines, Inc. v. U.S. Bank N.A.*,⁴ *CompuCredit Holdings Corporation v. Akanthos Capital Management LLC*,⁵ and *Anderson News, LLC v. American Media, Inc.*⁶ recognize that a group collection strategy does not violate the Sherman Act. The key for group collection action is group members do not agree to refuse to sell the customer or extend terms as a strategy to collect their debt. Rather, the decision whether to continue to sell the customer is a decision of each member.

By contrast, where suppliers act collectively to fix prices, or refuse to sell a customer so as to extract concessions, courts have found that form of supplier group action to violate the Sherman Act.

Poultry Supplier Suits and the Antitrust Laws: Alleged Price Fixing vs. Jointly Collecting Debt

A number of key poultry suppliers are being sued by customers, such as Sysco, US Foodservice and BiLo Markets, for allegedly collectively restricting supply, so as to increase price, which rises to a violation of Sherman Act antitrust law. How may the pending poultry antitrust suits guide supplier pacts when collecting past due debts? As a start, the poultry suppliers were not alleged to have been collecting past due debts against the suing customers, which is the purpose of a supplier pact in dealing with an insolvent customer and past due debts.

Rather, the poultry suppliers are alleged to have restrained trade in two forms which customers contend rises to a violation of the Sherman Act: collectively reducing the supply of their product into the market; and manipulation of prices through limiting supply.

By background, the suppliers were supposedly facing falling prices and narrow profits, and collectively cut their production to raise prices. This was allegedly done by public statements by senior executives about production cuts, and the need for industry-wide supply discipline. A supplier was also alleged to buy up excess production from its competitors supposedly to avoid a price drop.

In the context of supplier pacts, whose mission is to collect their members' past due debts from their insolvent customers, in the poultry suits there is no allegation by the customers that the poultry suppliers acted together to collect past due debts. Rather, the poultry suits dealt with customers who are solvent and are paying their debts when due. By contrast, **supplier pacts are formed because customers are insolvent and not paying suppliers.**

With the poultry litigation, the customers also alleged the suppliers, who controlled 90% of the supply, coordinated their output restriction using industry reports prepared by a third-party data source company. This data source company collected production, inventory levels and financial

³ *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212 (3d Cir. 2011).

⁴ *United Airlines, Inc. v. U.S. Bank N.A.*, 406 F.3d 918, 925 (7th Cir. 2005).

⁵ See *CompuCredit Holdings Corporation v. Akanthos Capital Management LLC*, 916 F. Supp.2d 1326 (N.D. GA, 2011).

⁶ *Anderson News, LLC v. American Media, Inc.*, 123 F. Supp.3d 478 (S.D.N.Y. 2015).

information from the suppliers, which is data that would supposedly allow suppliers to decipher through key metrics about what each competitor was producing.

The data source company met with each of the suppliers quarterly, and at these meetings allegedly shared competitors' production information. The suppliers also allegedly used a state agricultural benchmark price index, which was provided by suppliers to set prices.

By contrast, suppliers may rely on industry group reporting for initial reporting of member delinquent accounts. This type of industry group reporting, which may be used by suppliers to form a supplier pact, is entirely different than the kind of trade information allegedly shared in the poultry suits by the data source company.

With the poultry litigation, the customers allege the industry was susceptible to supplier collusion based on factors such as: a highly-concentrated market dominated by vertically-integrated producers; high barriers to market entry; commodity where competition is based on price; inelastic demand for the product; turning away from long term fixed priced contracts; and opportunities for suppliers to conspire through trade association meetings.

With a supplier pact, the above allegations are not relevant as the purpose of the supplier pact is to collect members' past dues. Rather, if the supplier pact were to attempt to use its leverage by having the insolvent customer pay their past due debts by collectively refusing to fulfill orders, then an argument may be raised that such conduct may be closer to those actions alleged in the poultry supplier suits. But supplier pact bylaws underscore that, whether a member will fulfill POs is the independent decision for each member.

Finally, in the poultry litigation, the customers allege that the alleged production cuts by the suppliers resulted in increased prices and record profits. They contend price competition was restrained or eliminated, prices were at artificially inflated levels, and customers were deprived of competition among suppliers.

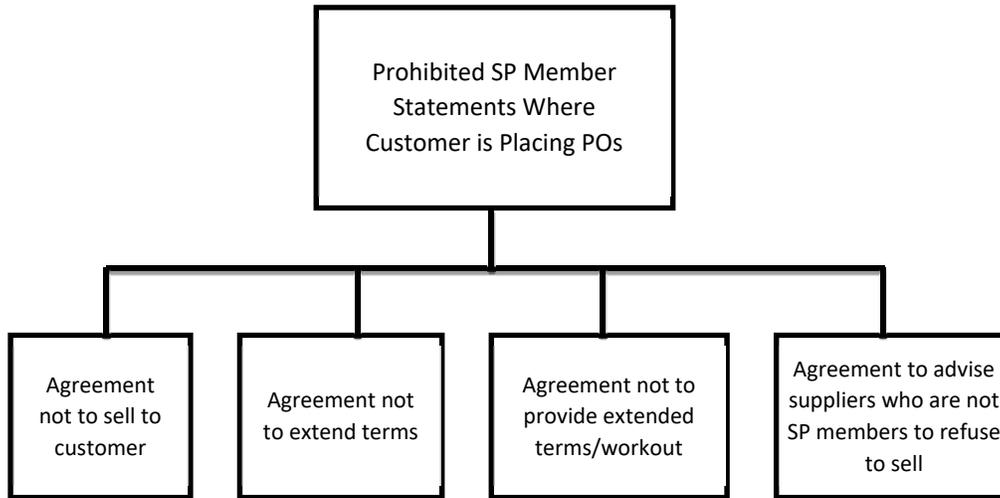
The antitrust litigation is in its early stages, and poultry suppliers are mounting vigorous defenses to the alleged collusion claims.

The Bright Line for Supplier Group Communications and Compliance with the Antitrust Laws

In the poultry litigation, the suppliers are alleged to have agreed to limit product so as to increase prices. As the chart below highlights, members of a supplier pact have the shared goal, as reflected in supplier pact bylaws, of maximizing payment on their delinquent accounts. Supplier pacts should not act with other members, or non-members, when deciding to extend credit terms or sell to the insolvent customer.

If supplier pact members were to use a group response declining to fulfill an insolvent customer's request for additional product as leverage to have their past due invoices paid, such strategy may be more akin to the allegations of the suppliers in the poultry litigation where they

were alleged to have limited supply. Supplier pact members must make an independent determination when a customer places a PO. Where a customer is going through a straight liquidation and no longer placing orders with suppliers, these restrictions on members' communications do not apply.



Takeaways and Best Practices

The poultry litigation is not dealing with the key objective of a supplier pact, that of supplier group action to collect on delinquent accounts. Rather, the poultry litigation is alleged to be supplier price fixing and restraint of trade by collectively limiting production. For the credit team, the bright line distinction is supplier pact members do not collectively deal with pending orders of an insolvent customer. The topic of fulfilling POs from an insolvent customer while a supplier pact member, is an issue for each supplier to independently evaluate. Given this, the poultry litigation and alleged violations by suppliers of the antitrust laws, is factually different than the mission and purpose of the supplier pact, that of collecting past due balances. Credit teams may find that the objective of a supplier group collection strategy indeed may lead to greater recovery on the delinquent account, better transparency of the customer's financial condition, and is in compliance with the antitrust laws.

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