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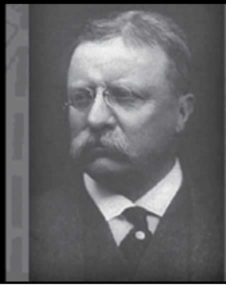

Honesty. Prosperity. Economic Liberty.
OCM NEWS | JULY 2009

Pursuing a Straight Game

BY FRED STOKES, EXECUTIVE DIRECTOR

Thanks to big agribusiness concentration and the inevitable abusive market power that results, America is losing its family farms, its rural culture and its food security. It's bad enough that these greedy goliaths have rigged the marketplace; gouging our farmers and ranchers when they buy their inputs and shortchange them when they sell their production, but it seems they have also captured our political and justice system.

Someone recently suggested that our political leaders should be required to wear NASCAR uniforms so we would know who is sponsoring them. The same might be said of some of our judges, especially the appointed federal judges. A number of incidents illustrate the point but perhaps none better than a class action court case in South Dakota.

In 2001, USDA underreported boxed beef prices and the three largest meat packers allegedly used the flawed reports as a pretext for underbidding for cattle. There were heavy cattle producer losses. Three cattlemen filed a class action suit in South Dakota in 2002. The case was tried in 2006, with the jury finding for the plaintiffs and awarding $9.25 million in damages.

The packers quickly filed an appeal and in January of 2008 the 8th Circuit Court reversed the jury. The three judge panel nullified the award and saddled the plaintiffs with court costs. The basis for the reversal was a failure to show that the acts by the packers were intentional. ABSURD! Tyson promptly took action that resulted in a U. S. Marshal posting a notice of lien on the front door of one of the three lead plaintiffs' home. Presumably this particular plaintiff was singled out because he lived in South Dakota, which made the lien-posting process easier.

This case brings back to mind Pickett v. Tyson, a case of several years back in which a unanimous jury verdict and a billion-dollar award was reversed by a federal judge. Again, the plaintiffs were required to pay court costs. The justification for this particular reversal was that Tyson had a business reason for cheating the cattlemen. A host of other court case outcomes and rulings strongly suggest judicial bias in favor of big business.

We're going to deal with this delicate issue during the OCM Conference in St. Louis on August 7th. In addition to an action-packed program revealing the intense concentration and anticompetitive practices in the marketplace, we're going to blow the whistle on what we believe to be a prejudicial judicial system that often denies justice for our farmers.

David Domina, our keynote speaker at the banquet will discuss whether or not the courts are the farmer's friend. Afterwards, he and other distinguished legal authorities will examine our judicial system and discuss whether it is tilted in favor of big business interests.

"Confronting Threats to Market Competition" is going to be a great conference! A final agenda will be posted on the OCM web site (www.competitivemarkets.com) by mid-July. There will be a number of government enforcement officials attending and we want to make them appreciate our situation. Make plans to join us and let's seize this opportunity to turn things around. Please let us know if you're coming so we can plan for the luncheon and banquet.

Let's all meet in St. Louis.[FS]

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WHAT'S INSIDE...

THE Stevenson REPORT

Economic Morality

by Terry A. Stevenson in late 2003. It was published in the OCM newsletter in September of 2004. The principles it explains still apply.

The livestock industry is in turmoil. But the main topic of conversation is not drought or disease. Livestock producers have endured chronic losses of money while the entire meat-processing sector has thrived with record profits. Over the past few years the livestock markets have changed so that meat processors no longer purchase livestock by means of competitive bids. Instead, they use direct purchase and private contracts. Many of these contracts are not priced when they are made. They also own or have control of many animals they slaughter well beforehand. As a result the industry buzzes with accusations of market manipulation from producers and counter arguments extolling the virtues of horizontal concentration and vertical integration from the meat packers. Everybody is looking for new ways to solve these problems.

But sometimes the oldest ideas are best. In a recent book by Hernando De Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else, the author suggests that the foundation of property rights has given western civilization what it has needed to succeed economically. The concept of property rights is but a corollary of the most ancient tenet of economic morality ever written, "Thou shalt not steal." Given at the same time as this well-known decree were some companion ordinances regarding weights and measures and the sanctity of property border markers. As the ancients implemented these elements of an honest economy their wisdom led them to a particular practice that facilitated simple and practical enforcement.

They didn't have a massive police force with an enforcement mandate, but relied instead on the simplest and least intrusive of all enforcement methods – the light of day. When a significant contract was to be made it was transacted at the gate of the city where the entire public could view and scrutinize the agreement. Thus, public scrutiny became an important part of maintaining economic morality.

In the ongoing debate about the proper role of the government in the economic health of our nation, the guidance of these oldest principles proves useful. Some would have the government play virtually no role at all, arguing that capitalism and free enterprise require absolute freedom. This libertine approach fails because it embraces the idea encapsulated in the statement by fictional character Gordon Gekko in the 1987 movie Wall Street, "Greed is good."

On the other hand there are those who would have the government control every aspect of an economy and take "from each according to his ability"

Please see MORALITY on page 6

A Moderate Recovery and Bull Market

PETER MORICI

Finally, some good news from labor markets—job losses are slowing, recovery is in sight, and the stock market is poised for robust rally.

The Labor Department reported the economy only lost 345,000 jobs in May, down from 504,000 in April and 2.1 million the prior three months.

Clearly, the economy must stop shedding jobs for the recession to end but a slowing pace indicates the bottom is near.

The consensus among forecasters is the economy will contract less than 2 percent in the second quarter, squeeze out less than one percent growth in the third quarter, and expand at about a 2.5 percent annual pace after that.

That is a very modest pace after such steep decline and much less than the 3.5 or 4 percent necessary to power rising living standards for most workers.

Why are prospects so limited? What does it mean for the stock market?

Through the Clinton and Bush years, U.S. markets were opened wide to the foreign manufactures—the inauguration of the World Trade Organization in 1995 and China's admission in 2001 were seminal events. As automotive technology advanced, the horsepower and weight of cars increased, and Americans paid more for imported oil.

Lacking new exports to pay for imported TVs and gasoline, Americans borrowed from abroad and consumed more than they produced. The annual trade deficit jumped from $91 billion in 1995 to about $700 billion from 2004 to 2008, and the external debt now stands at nearly $7 trillion.

Banks loaned Americans cash against homes, cars and credit cards, and bundled those loans into securities for sale to the People's Bank of China, Middle East royals and other investors. When payments became too burdensome, the bubble collapsed, the housing and car markets tanked, banks and GM needed bailouts, and Washington printed money as the creditor of last resort.

Now the federal government is borrowing even more from China and others to finance $789 billion in stimulus spending, but that can only jump start growth. Consumers need new good paying jobs, or must again borrow profligately, if they are to power a robust recovery.

Since December 1997, six million jobs have been destroyed—many in the high paying manufacturing, construction and financial services industries—and not enough equally rewarding jobs are likely to emerge in the months ahead.

The President talks about new industries, but jobs in alternative energy, health care and education will require huge government subsidies and taxes that limit private sector growth. Those jobs will not pay like working in an auto plant, putting up steel framing or marketing securities on Wall Street.

In 2010 and 2011, the economy will grow modestly, unemployment will stay above 9 or 10 percent, and the good wages necessary to power rising living standards and robust growth will not be forthcoming, especially in the face of rising state and local taxes, and the President's planned levies on energy and health insurance.

Stock prices will surge, because U.S. companies have slashed payrolls so much that even moderate growth will deliver big profits. Many will exploit opportunities in Asia through investments. Materials and energy will benefit from the upward pressure on commodity prices stimulated by Asian growth. High tech will emerge a winner as businesses seek more from fewer workers and less energy.

The Great Recession caused stock prices to fall twice. The first slide began in October 2007 in anticipation of the slump that began two months later, and another slide started about a year later on doubts about the banks.

In 2009, a surge in bank profitability was just about guaranteed by generous low cost Fed lending and a steep yield curve, FDIC guarantees on bank bonds, and stress tests for banks that reassured investors. And from its early March low to the May 7 release of stress tests, the S&P index jumped 36 percent.

Stock prices have continued strong, but not gained a lot, as I predicted on the Kudlow Report when the stress tests were reported.

Soon the stock market will soon smell economic recovery, as analysts drill down into the prospective profits of companies they cover.

That is how the stock market anticipates an economic expansion.

Those who get in now will be popping champagne in New Year, lots of it.

*Peter Morici is a professor at the Smith School of Business, University of Maryland School, and the former Chief Economist at the U.S. International Trade Commission.*PM

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London v. Fieldale

C. Robert Taylor

London v. Fieldale is another PSA landmark case. *London*, a contract poultry grower, alleged that defendant *Fieldale's* termination of their contract without economic justification violated sections 202 (a) of the PSA. A Jury found *Fieldale* guilty and awarded damages of $164,000. The 11th Appellate Court opined that *London* did show that *Fieldale's* challenged practice had an adverse effect on competition, thereby dismissing the jury verdict.

Section 202 (a) of the PSA, states simply that it is unlawful to *"Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device."* In opining that a poultry grower (and by implication any livestock producer) must show that a business practice harms competition, the 11th Appellate Court ignored the plain text of the PSA. Since many other parts of Section 202 specifically refer to harm to competition, it is reasonable to think that if Congress had wanted that condition in Section 202 (a0 that they would have written it into the law. In the words of the 5th Appellate Court in *Wheeler v. Pilgrims Pride*, the 11th Appellate Court"… *reached beyond the PSA's clear and unambiguous text."*

In *London*, the courts even ignored the *amicus curiae* brief of the Secretary of Agriculture that argued that *"the plain language of the statue, the purposes of the PSA, and the [Secretary's] interpretation all indicate that in order to prove that any practice is 'unfair' under 202(a), it is* ***not necessary*** *to prove predatory intent, competitive injury, or likelihood of injury."*

Showing harm to competition is an extremely high legal and economic hurdle for an individual livestock or poultry grower to overcome. Almost one-half of poultry production is in the 11th Court. Because the Court ignored the plain wording of the PSA in striking a Jury Verdict in London v. Fieldale, individual poultry growers in the South, as well as individual livestock producers generally, may no longer have legal protection under the PSA against unfair, discriminatory and deceptive business practices.[RT]

A Jury found Fieldale guilty and awarded damages of $164,000. The 11th Appellate Court opined that London did show that Fieldale's challenged practice had an adverse effect on competition, thereby dismissing the jury verdict.

REMINDER

REGISTRATION DEADLINES:

July 16th
ROOM RESERVATIONS
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July 25th
MEALS RESERVATIONS

See us on the web
www.competitivemarkets.com

Pickett v. Tyson Fresh Meats, Inc.

C. Robert Taylor

Pickett v. Tyson began out of independent livestock producers' frustration that USDA/GIPSA was not enforcing the PSA. In the same year *Pickett* was filed, the Western Organization of Resource Councils (WORC) submitted a petition for rule-making under Section 202 of the Packers and Stockyards Act to then Secretary of Agriculture Glickman, requesting that the Secretary and USDA enforce the PSA to stop the present and future harm to producers from what they called abusive market practices of the major packers. Now, thirteen years later, WORC is still awaiting response by USDA.

Tyson maintained that they had to engage in captive supply to be competitive with the other large packers, an argument the Courts accepted, even allowing Swift's head buyer to testify on Tyson's behalf. By accepting *Tyson's* meeting-competition defense in *Pickett*, the Courts have further muddled litigation under the PSA by invoking a defense that is not a part of the legislation, is inconsistent with the goals of antitrust law, and is inconsistent with published views of the Department of Justice.

The Courts also inserted what is known as the antitrust "rule of reason (ROR)" into the PSA. The ROR came from a 1911 Supreme Court opinion about the Sherman Act. Since the ROR preceded the 1921 PSA, Congress could have used the ROR wording in the law; significantly, they did not.

The consensus of almost a century of legal and economic opinion is that the antitrust ROR requires a balancing of any pro-business benefits of an alleged practice against harm to the market. If harm to the market exceeds the pro business benefit, then the practice should be prohibited. In Pickett, however, the Courts did not require any such balancing. Thus, their opinion is that any pro-business benefit, no matter how small, trumps any harm to the market, no matter how large.

The narrow interpretation of the ROR shown by the Courts in Pickett, if it comes to dominate case law, obviously weakens the Sherman and Clayton Acts, but seems particularly restrictive in the context of the PSA which was intended to go much further than the Sherman and Clayton Acts in protecting livestock markets from disproportionate buyer power.

Post-trial legal opinions by the Courts that depart significantly from the plain language of the law and depart from dominant case law, as was the case in Pickett, pinpoint another problem; namely, it is difficult to prove what you do not know you have to prove until the opportunity to prove it has passed.

Pickett was filed under the PSA, tried under Sherman and Clayton antitrust law, and overturned, in part, under the Robinson-Patman Act, with the Trial Court and the Appellate Court implicitly appointing themselves as fact-finders. This is not how our Founding Fathers intended the American judicial and legislative system to function. RT

This is a synopsis of a published article available from the Journal of Agricultural and Food Industrial Organization, downloadable at http://www.bepress.com/jafio/vol4/iss1/art9. Related articles on "Proving Anti-Competitive Conduct in the U.S. Courtroom: The Plaintiffs' Argument in Pickett v. Tyson Fresh Meats, Inc." by lead Plaintiff Counsel David Domina and by Lead Defense Counsel Tom Green are available at:http://www.bepress.com/jafio/vol2/iss1/art8, http://www.bepress.com/jafio/vol2/iss1/art12, and
http://www.bepress.com/jafio/vol2/iss1/art11. A more comprehensive version of the article is available from the American Antitrust Institute, http://www.antitrustinstitute.org/Archives/WP07-08.ashx

By accepting Tyson's meeting-competition defense in Pickett, the Courts have further muddled litigation under the PSA by invoking a defense that is not a part of the legislation, is inconsistent with the goals of antitrust law, and is inconsistent with published views of the Department of Justice.

MORALITY (continued from page 2

and give "to each according to his need." History is replete with this philosophy's failures. It has failed because it does not recognize the existence of greed in the human heart.

The right approach is to follow the God given principle that "every man should enjoy the good of all his labor" (Ecclesiastes 3:13). It is then the proper governmental role to make sure that no one is defrauded of the labor of his own hands. This method acknowledges the existence of greed in the human heart, and the necessity of channeling it for the benefit of all by means of the enforcement of economic morality.

As solutions are sought for issues in the agricultural marketplace (and in particular in the livestock markets) it would be wise to keep some of these most ancient guiding principles in mind. These principles have served the stock market quite well. It has flourished in an environment of openness governed by the constraints of economic morality.

Over the years it has been necessary to add certain corollaries to the simple preclusion of theft such as the prohibition of insider trading and, more recently, rules assuring honesty in accounting. Many suffered when the moral foundations required of a truly free economy were ignored because of the greed of certain individuals.

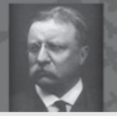
In 1999, Congress passed the Livestock Mandatory Price Reporting law, which required broader market reporting in the livestock markets. Unfortunately the USDA was left to implement the law. By the time the USDA was done, the original intent of Congress was effectively distorted and a small step toward exposing the important transactions of this marketplace to the light of day was thwarted. In fact the Packers and Stockyards Administration (the would-be enforcer in the livestock market) is still so hindered by limited information that it is constrained by that most egregious of all political immoralities, the dominance of symbolism over substance.

The solution is to grant the livestock markets a complete openness. Let them be more like the city gate of ancient times and the Wall Street of today. Doing so would make all information open to public scrutiny. It would be easy to discover market manipulation. Appropriate limitations could easily be justified. Of course a lesson could be taken from Wall Street and some obvious restrictions implemented concurrently, such as a prohibition of captive supply – the moral equivalent of insider trading.

But these improvements take leadership. The USDA is not providing it. This department of government is apparently so infected by the spawn of the very organizations and corporations that it is supposed to regulate that it has merely followed the big players in the market to a laissez faire immorality. Revelations concerning the USDA's published estimates of the implementation costs of country of origin labeling hardly enhance its image asan icon of moral leadership.

The opponents of an open market have not been quiet. The rules they have followed in the debate have been their own. They are highly motivated. And they have recruited a number of innocents by using the legitimate concern of excessive government interference in the market.

But the real reason they oppose an open market is clearly explained by Ancient Wisdom, "men loved darkness rather than light, because their deeds were evil." (John 3:19) TS



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____ **Number attending the Conference @ $50** $________________

(Friday August 7, 2009 - 7:30-8:30 REG)

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____ **Number attending Lunch** #________

____ **Number attending Dinner Banquet** #________

____ **Membership Dues** $________________

____ **Donation** $________________

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SEND REGISTRATION FORM TO: P. O. Box 6486, Lincoln, NE 68506

OCM's Annual Business Meeting will be held on
Saturday morning, August 8, 2009 - Registration 8:00 – 8:30 AM MTG following the Convention at the Westin St. Louis Hotel.

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July 2009

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