

## **Chicken Price-Fixing Atty Tells How 3rd Trial Was The Charm**

By **Cara Salvatore**

*Law360 (July 15, 2022, 2:59 PM EDT)* -- Five poultry supplier executives and their defense teams gained a unique victory this month in their acquittals on price-fixing charges by a federal jury in Denver.

After two mistrials in a row prompted by hung juries, the U.S. Department of Justice's Antitrust Division pared the defendant circle from 10 to five and was determined to try a third time — but lost, giving the five defense teams not only a win, but a win in an ultra-rare third trial.

One of the lawyers responsible for that ultimate victory was Michael Feldberg of Reichman Jorgensen Lehman & Feldberg LLP, representing retired Pilgrim's Pride salesman Roger Austin. A few days after the verdict, Feldberg — "still decompressing," he noted — took some time to tell Law360 about the unusual experience.

This interview has been condensed and lightly edited for clarity.

### **Let me start with the huge question: What's it like to go through three trials in the same case?**

First of all, this is the first time I've ever done this. I've never tried a case more than once before, and I've been doing this quite a long time.

It is both more exciting and less exciting at the same time, from the lawyer's point of view. More exciting because each time you do it, the risks seem greater: You've avoided conviction the first time, you've avoided conviction the second time, could you possibly avoid conviction the third time?

On the other hand, the evidence is similar. It was not exactly the same in trial three, but it's similar. And therefore, there's a sense of Groundhog Day: I've already examined these witnesses, I've already looked at these documents and argued about their significance. So there's a sense that it's less new, it's less fresh, because for the most part, you've done it before.

### **Were there any new witnesses that you didn't see in trial one that you saw in two or three?**

There were not any new witnesses. There were fewer witnesses in the government's case. And in one important respect, a witness the prosecution had called in trials one and two — who was extremely knowledgeable and was the buyer for the buying cooperative for KFC, so he was really the customer — we thought we had made a lot of headway with him on cross in trials one and two. The prosecution did not call him in trial three.

So the defense did. And we got essentially the same information out of him in trial three. But that opened the door to the argument to the jury of, this man is incredibly knowledgeable, obviously an expert in his field — how come the prosecution did not call him? Which was a significant difference in the case.

And then there was one witness they called who was not an important witness; it was a document custodian from Pilgrim's Pride. We had made the point that Roger did not have authority to set prices, which happens to be true.

But the document custodian, the in-house lawyer from Pilgrim's, testified at trial three — and he had not testified the same way in one and two — that the pricing team at Pilgrim's headquarters in Greeley [Colorado] sent the prices to the sales team. That turned out to be a very important point for us because it indicated that somebody other than Roger was setting the prices.

**Talk to me a little bit about opening arguments and any changes you made. If I'm remembering correctly, you switched it up a bit from trial two to trial three.**

Well, I think I switched it up a little bit, perhaps not as much as you're remembering. Trial three's opening was in many ways similar to the trial two and trial one opening in the sense that I stressed that the prosecution had charged these defendants before they did a thorough investigation and, in fact, filed charges before they had interviewed a single witness from Pilgrim's Pride.

I did have the advantage of having gone through two prior trials and seen the government's evidence and listened to their closings in the two prior trials. So I think [the defense] could fairly anticipate what the evidence would be in this trial, and then what their arguments would be, and I tried to anticipate some of them.

Perhaps the main point of emphasis that was different is, I — and I think all of the defense counsel — acknowledged in trial three, look, there's going to be lots of evidence of communication among the suppliers. Nobody's trying to hide that. There's lots of evidence, but there's nothing illegal about communication among the suppliers.

We all knew there'd be plenty of evidence of it. We all knew that the judge would charge that it's not illegal by itself. And we worked with that both in opening and in closing.

**Besides the 'trial run' aspect — excuse the pun — are there any other advantages to having done multiple trials?**

None that I can think of. And I think, quite frankly, the advantages run in both directions. We obviously, on the defense side, had the advantage of knowing, broadly speaking, what the evidence would be and how the witnesses would testify, what the closing arguments would be.

But on the other hand, the prosecution had the advantage of knowing, broadly speaking, what our cross-examination would be like, what arguments we would make, what questions we would confront their witnesses with. So I think the advantages probably ran equally to both sides. And I don't think they helped or hurt one side more than the other.

**If everyone has a good idea of what the trial is going to look like the third time, does it just come down to the makeup of the jury, the mix of people? Is that the deciding factor?**

We all try very hard to use whatever knowledge or experience we have to pick juries that we think will be favorably disposed to our arguments. And at the end of the day, I'm not sure any of us is any good at it. [Laughs.] There's a lot of guesswork involved, and a lot of theorizing that may or may not be backed by substance. We're all doing — everybody, all sides — doing our best to pick a jury we think is favorably disposed.

This jury, you know, we liked. We liked the other juries too. I think the government intentionally tried a thinner case this time. Not just fewer defendants, but fewer witnesses. And I think they were counting on less witness testimony and more emphasis on documents. And I'm not sure that turned out to be successful — it didn't turn out to be successful. The strategy obviously didn't work for them.

The prosecution made a deliberate decision to rely heavily on the one supposed cooperating witness, a guy named Robbie Bryant, who was on the stand for three days in the prosecution's case, and then they called him once again as a rebuttal witness. And I think Bryant had two real problems as a witness.

One, he was an admitted liar, admitted lying to the government on multiple issues on multiple occasions, not having anything to do with the case. And also, he was kind of a mid-level guy who actually didn't know very much, and a lot of his testimony was based on what he called his understandings — but what were really assumptions. They relied on him more heavily in trial three than in the prior two trials.

**We talked about advantages, and of course I also want to talk about the toll. I know trials take a toll on lawyers and defendants, and then multiply that by three.**

Well, let me talk about Roger, my client. Roger had retired in 2018, two years before charges were brought. He's living with his wife on his farm in Georgia. His kids are nearby, his grandkids are nearby. He's enjoying the retirement he's earned after 40 years of working very hard. He's not a wealthy man. You know, he made a living, but he was never super-highly compensated. He's a thoroughly decent, kind, gentle family man. And he's living peacefully on his farm.

And one day out of the blue, with no warning, no discussion, he's charged with a felony.

I'd been representing him for a while, because DOJ had told Pilgrim's he needed separate counsel, as they told several people. But I had had just one meeting. I'd been summoned to one meeting by DOJ in July 2019, while at my prior firm. I was summoned to a room at DOJ. They have about 20 people in there. They put three emails up on a screen, and they say, 'We think your guy should plead guilty and cooperate. Call us back by Monday.'

Obviously, I discuss it with Roger. We decide he's not going to plead guilty. I call them back by Monday and tell them he's not pleading guilty.

And 10 months later, without any intervening communication of any kind — no emails, no discussion, no phone calls — they indict him, and he's charged with a felony. No investigation. They didn't interview anybody from Pilgrim's. They never sought to have a conversation with me to get our side of the story.

And for more than two years, he's lived with the threat of conviction, the threat of a significant prison term, and the threat of a fine that would bankrupt him, all hanging over his head — with a long list of people he's not allowed to speak with by court order, many of whom are his good friends, because they're potential witnesses.

He's gone from being an upstanding member of his community to a potential felon with all of those risks. And his life is completely upended. And the same was true for all of the defendants.

**With that heavy toll, I'm wondering, after the first trial, what kind of pep talks did you have with him and with yourself, your team?**

[Laughs.] Yeah. I mean, I certainly would never abandon a client in this situation, and certainly not a client like Roger, who's a wonderful human being. So you just keep on keeping on. You say to the client, 'Look, we'll keep fighting this if you want to, and we're fine with it.'

And you tell your team — and I don't know whether you noticed, I had a wonderful team, but a very young team with me. And you just say, 'We're going to keep on keeping on. We're going to try to do better. We're gonna try to learn.' You try to do a good job at a trial, but it's never perfect. You just keep trying.

And the same was true for Roger. I think Roger and the other defendants are heroes. I mean, the courage it takes to stand up to this, to not fold, to not say 'OK, I give up. I'll say whatever they want me to say just to get out of this, even if it's not true' — I mean, that takes guts. And Roger has guts, as do all of these defendants.

For the lawyers, I mean, it's hard work and all of that. But for the clients, it's amazing.

**I want to turn to the rarity of the third trial. You mentioned you've never had this situation happen before — have you heard of it happening to anyone else?**

I've never done it, and I'm not aware of any other case that's had three trials — you know, a third trial after two mistrials. I've not heard of any other case. Maybe there is one out there, but I don't know what it is. I've been doing this a long time, and I have not heard of any other instance in which the prosecution has insisted on a third trial after two mistrials.

**So what happens now?**

Roger and the other defendants go back to their families, they go home, they get their passports back, we will apply to get Roger's TSA PreCheck back, because that is taken away when you're under indictment, with lots of other things.

Roger is back with his family, will try to restore as much of his old life as he can. I'm sure the same is true for all of the other acquitted defendants. But their lives will never be entirely the same as they were before, because the experience is so scarring.

But I'm very happy to have been able to play a role in Roger getting acquitted. It's the right result, it's a just result, and I'm very happy to have had an opportunity to represent him to the jury. I'm honored to represent him, and I mean it.

**I really appreciate your taking the time to do this. I'm sure there's still a lot of decompressing left to go.**

My wife told me she'd never seen me on a Monday morning reading a book. [Laughs.]

--Editing by Philip Shea.

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