

**Issues in Litigation on Behalf of Poultry and Livestock Producers under the
Packers and Stockyards Act as Amended by the 2008 Farm Bill**

**Lynn A. Hayes
Farmers' Legal Action Group, Inc.**

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I. Topics Covered

- A.** My presentation addresses problems livestock and poultry producers face as a result of two prominent methods used to accomplish vertical integration or coordination in today's highly concentrated agricultural commodities markets: (1) the use of production contracts in the poultry industry, and (2) the use of captive supplies procurement methods (forward contracts, marketing agreements, and packer ownership of livestock) in the hog and cattle sectors.
- B.** I also discuss how certain provisions of the 2008 Farm Bill (Food, Conservation, and Energy Act of 2008, Public Law No. 110-246, 122 Stat. 1651) amending the Packers and Stockyards Act, 7 U.S.C. § 181 *et seq.* may help to address some of the problems livestock and poultry producers face and how the statute and implementing regulations may further litigation on these issues.

II. Concentration and Vertical Integration in Livestock and Poultry Sectors

- A.** Over the last few decades, the markets for farmers' agricultural commodities have experienced a rapid consolidation of market share in the hands of a few large companies and a dramatic trend toward more vertical coordination by processing and packing companies. These trends have resulted in huge reductions in the number of buyers available to compete for farmers' products, a loss of transparency in the markets, manipulation of prices paid to farmers, a sharp increase in the use of production contracts, and a horrendous imbalance in bargaining power between farmers and processors.
- B.** One of the most dramatic recent trends in the agricultural sector is the rise of vertical integration through production contracting. The poultry industry pioneered this business model several decades ago. Today nearly 90% of poultry is raised through production contracts. *See, USDA/ERS, Agricultural Contracting Update: Contracts in 2003*, Economic Information Bulletin No. 9, January 2006. Although more recently, production contracting has increased dramatically in other agricultural sectors—notably the hog sector where, by 2003, nearly 58% of hogs were being produced through production contracts—it has reached its zenith in the poultry industry. *See, USDA/ERS, Agricultural Contracting Update: Contracts in 2003*, Economic Information Bulletin No. 9, January 2006. For this reason, I will use predominantly examples from the poultry industry to illustrate the problems farmers face under production contracts.

III. Description of Typical Poultry Production Contract

A. Take-It-or-Leave-It Contracts

A typical poultry production contract is drafted by the company and presented on a “take it or leave it” basis. Growers are described as “independent contractors.” The company owns the poultry and contracts with farmers to provide the labor, facilities, and services necessary to raise the birds.

B. Large Investments but Short-Term Contracts

Even though it is not unusual for growers to invest \$500,000 or \$1 million in a poultry farm, the contracts are usually of a short duration, such as one seven-week period for a flock of broiler chickens. Even where contracts appear to be for a number of years, there is typically a clause which allows the company to

cancel the contract at will. In addition, the contracts leave to the company's discretion when the grower will receive flocks, how much time will pass between flocks, and how many flocks a grower will receive in a year.

C. Tournament System of Payment to Growers

In most contracts for broiler chickens, the company provides the inputs needed by the grower, such as chicks, feed, and medications, though the grower is responsible for fuel and other costs. Broiler growers, for example, are generally paid according to a "tournament" or "ranking" system, in which a grower's flock production efficiency is ranked against that of other growers whose birds are processed in the same time period. The formula to calculate production efficiency essentially compares the number and weight of chickens harvested to the number of chicks and pounds of feed delivered to the grower, thus measuring the efficiency with which the flock converts feed to weight gain. Under this system, a grower will be paid more or less than other growers in the group depending on where the flock falls in the ranking system. Despite being paid based on the flock's efficiency in converting feed to weight gain, the grower has little or no control over key elements affecting how the flock will perform, e.g., the quality of the chicks, feed, and medications which are all provided by the company.

IV. Problems for Growers under Production Contracts

The following is a brief discussion of some of the significant problems that farmers, such as poultry growers, face under production contracts.

A. Oral Representations Regarding Take-It-or-Leave-It Contracts

In most instances, the poultry companies—often referred to as integrators—draft the contracts and present them to farmers on a take-it-or-leave-it basis. The farmers have little or no opportunity to negotiate the terms of the contract. As would be expected under these circumstances, contract terms are primarily designed to minimize the risks to the company rather than to protect the interests of the farmer. Thus, it is imperative that farmers have a fair opportunity to at least read and understand the full range of material risks they face before entering into company-dictated production contracts.

Despite the take-it-or-leave-it nature of the contracts, farmers are often persuaded to enter into them through promotional materials and oral statements of the companies' representatives touting the financial and lifestyle benefits to the farmers. Often these representations are not borne out in the contract provisions themselves.

For example, I once reviewed a contract for a farmer who was considering making a huge financial investment in barns to raise hogs under a production contract. The farmer provided me with the company's slick brochure which, among other things, touted the farmer's freedom to manage his own operation. However, when I reviewed the actual production contract, it would have required him to strictly follow the company's detailed management manual, leaving virtually no room for individual management decisions. The farmer, who was an experienced hog producer, was taken aback by this provision, having thought he would have management freedom. But even more disturbing to him was the contract provision that gave the company total discretion to declare that he was not properly caring for the animals or managing the operation, and giving the company the authority to kick him out of his own hog barns while the company hired someone else to run the facility and charged that cost to him. Incidentally, I recently provided legal advice on another hog production contract case in which the company had actually taken advantage of just such a provision and kicked the farmer out of his own hog barns while the company continued to raise animals in them using a company-hired manager. Clearly, contract terms relating to circumstances under which the contract may be terminated or the farmer may be required to turn over his facilities to the company are key factors of which the farmer must be aware when deciding whether to enter the contract.

B. Assurances of Financial Feasibility of the Contracts for Growers

In many instances, the farmers are also assured of the financial feasibility of the enterprise involved in the production contract by oral statements made by the company's representative or, in some cases, the lender who will finance the farmer's production contract enterprise. Often in the poultry sector, growers do not even see the production contract with the company until after they have taken out large loans to purchase a poultry farm or to build poultry houses on their existing property. Not long ago, I met with several growers who had made huge capital investments to purchase poultry farms based on the cash flow projections prepared by their lenders, who had relied, at least in part, on information from the companies. In reviewing those original projections, it became clear that there were many errors and that more accurate projections would have shown that the loans to purchase the farms could not have been paid off with the income received under the poultry contracts offered by the companies.

Though many oral representations are made to farmers to encourage them to enter into production contracts, rarely would such representations be enforceable. Many court decisions disregard any oral promises that contract growers allege were made by company representatives because the contracts included "entirety clauses" stating that the entire agreement between the parties is included in the contract, and, consequently, refusing to enforce any oral promises not in the written contract. Farmers should be made aware that the oral representations or promises will not change the actual terms of the contract.

C. Companies Control Number of Livestock to Be Produced under Contract

There are many terms in production contracts that pose substantial risks to the farmers by impacting the level of income they may receive, but which are rarely discussed or explained to the farmer. One significant example is a term that controls the number of animals that may be produced under the contract. For example, most poultry production contracts are written in such a way that it is left to the discretion of the company how many flocks will actually be delivered over any specific period of time. Some contracts are only for one flock and may provide for renewal as new flocks are delivered, but do not include any commitment to future flocks. Others may provide for a specified number of years in which the contract will apply, but do not establish how long the period between deliveries of flocks may be. This means that the company has the discretion as to when flocks will be delivered to the grower. When the companies choose to reduce their production levels due to market conditions or any other factors, they have the freedom to force longer periods between flocks. As the number of flocks per year decreases with the longer periods between flocks, growers' income is reduced dramatically, often causing them to default on loans and fail to pay their family living and farm operating expenses.

D. Risks Associated with Capital Investment Requirements

The great imbalance of bargaining power between companies and farmers in production contract relationships is exemplified by the disparity in the level of the capital investments made. For example, in the hog and poultry sectors, farmers make capital investments of many hundreds of thousands of dollars in the buildings, equipment, and real estate in order to raise animals owned by the company. The companies, on the other hand, have very little invested in this infrastructure needed for the production of their animals. Sometimes these capital investments are directly required in the contract, with the company's building design and equipment specs being included. Though more often there is simply a tacit understanding that if farmers will purchase or build the facilities, the company will give them production contracts. As mentioned above, many livestock contracts also include provisions that allow the company to demand that the grower make equipment and facility upgrades as the company deems necessary. Thus, growers may also be required to spend tens of thousands of dollars for capital improvements during the course of a production contract. Despite the large investments farmers make in order to obtain and retain the production contracts, the company-drafted contracts often are either for a very short duration or give the company the ability to terminate the contract at their discretion and with little or no notice to the farmer. Many poultry growers report that they have been told that their contracts will be cut off if they do not install equipment improvements such as tunnel ventilation. In a 1999 survey, 67% of respondent growers had implemented equipment upgrades costing at least \$3,000 per chicken

house. *Assessing the Impact of Integrator Practices on Contract Poultry Growers*, (Farmers Legal Action Group, *et. al.* 2001) at Appendix 2-C, page 2 (hereinafter referred to as “*Assessing the Impact of Integrator Practices*”). Half of growers agreed that their contracts would not be renewed unless they followed the company’s recommendations about building new houses or making major improvements. *Id.* at page 4. These growers state that, as a result of complying with these capital demands, they are carrying greater debt loads after five, ten, or fifteen years as poultry growers than when they first purchased the farm. Growers also report that, even though they have installed expensive upgrades, the companies have cancelled their contracts. A grower’s contract may be cut off, not because of any malfeasance on the grower’s part, but because of the sale of a processing plant, a contraction in the industry, the company’s desire to reduce production levels, or the desire of the company to save on transportation costs. Terminating a contract is often cost-free for the company, but devastating to the grower. Often, because of the concentration in the industry, there is no other company operating in the region for the grower to approach. And the barns are not readily converted to other uses.

E. Equipment and Facilities Upgrades Required by Companies

Another example of poultry contract terms that may pose significant risks for farmers are those addressing equipment and facilities upgrades and those that relate to the company’s provision of medication. Many contracts include provisions that explicitly or implicitly allow the company to require growers to make equipment and facilities upgrades as the companies see fit. Often it may cost growers thousands of dollars to install upgraded equipment. While some contracts may provide for sharing of the cost between the company and the grower or provide a small bonus on the payment of birds once the upgrades occur, these payments are often not sufficient to offset the cost for growers. Other contracts do not provide any additional payments to the grower, and it is often impossible for growers to recoup the costs of equipment upgrades merely through improved production efficiencies on which their payment per flock is based.

F. Medication and Veterinary Services Provided by the Companies

Many poultry contracts also set out that the company will provide the medication and veterinary services for the birds and often even prohibit growers giving the birds any medications not supplied by the company. Such a term may not on its face seem to have a huge impact on the grower’s income. But it can be devastating. I recently met a grower whose chickens contracted a highly contagious disease. When informed, the company would only provide one type of treatment which failed, and refused to provide the medication a veterinarian suggested. The grower lost thousands of birds and eventually took the risk of purchasing the recommended medication in order to save at least enough birds to obtain a miniscule payment on that flock. Not only did the grower receive no payment for the birds that died, but because of the feed efficiency method of payment, the feed which the birds consumed before dying counted against the feed-to-weight gain efficiency of those that survived, essentially decreasing the payment received for the surviving birds as well.

G. Environmental Impacts

As the size of livestock and poultry operations has increased, the public’s concern over their potential environmental impact has also grown, resulting in more stringent review and regulatory requirements at all levels of government—local, state, and federal. Compliance with these more stringent standards can be quite expensive, and many production contracts place compliance responsibility on the growers. This, too, can have a substantial impact on growers’ net income from the contract.

H. Financial Risks Based on Payment Formula in Contract

Possibly the most significant risk to farmers under production contracts involves how much they can reasonably expect to be paid under a contract’s payment formula. Yet under many poultry and livestock production contracts, the formula for calculating payment can be extremely complex and couched in technical language with no summary explanation provided. Even after some years of experience with

production contracts, I once spent an entire afternoon trying to decipher the two-page payment formula on one turkey contract.

Despite their complexity, often involving many pages of technical and legal language, some contracts include a provision that requires the farmer to keep the contract confidential. This often prevents farmers from obtaining the necessary legal and financial advice that is absolutely essential to making an informed decision on whether to sign the agreement.

The “tournament” or “ranking” system for calculating payment under many poultry contracts described above is presented by the companies as a way to create incentives for hard work and skill. However, as implemented, the tournament system depends largely upon factors controlled by the companies rather than on the quality of the growers’ work. In the 1999 survey cited previously, 78% of growers either agreed or strongly agreed with the statement, “My pay depends more on the quality of chicks and feed supplied by the company than on the quality of my work.” *Assessing the Impact of Integrator Practices on Contract Poultry Growers*, at Appendix 2-C, page 4. The health of chicks, the quality of feed, and the timeliness and effectiveness of the medications—all factors that vary greatly, and all of which the companies provide—control much of how efficiently birds put on weight. Thus, their distribution amongst growers is crucial to how much each grower will be paid under the contract. As such, the “tournament” or “ranking” system is rife with opportunities for companies to treat growers unfairly, discriminating against some while providing undue preferential treatment to others.

As an example of how such unfair and discriminatory treatment may occur, growers report being given sick chicks after speaking out about unfair treatment by the company. Other growers report being told by their field representatives that they were given sick chicks because the company hoped that as highly skilled growers, they would be able to nurse the chicks along.

I. Binding Arbitration

In the past, clauses providing for arbitration were a standard feature of most agricultural production contracts. Arbitration clauses essentially provide that any dispute that arises under the contract will be addressed through arbitration without recourse to review or appeal by any court. Arbitration clauses have blocked numerous contract growers who sought to have their day in court. Many more potential cases were never filed in court due to an arbitration clause. In addition, many disputes with the companies were never challenged even through arbitration, because a livestock producer or contract grower didn’t have the price of admission—the often thousands of dollars necessary to pay the arbitration proceeding cost and the fee of the private arbitrator or arbitrator panel. The costs of arbitration are a prohibitive barrier for farmers, as they are not for multinational corporations. *See, e.g., Steed v. Sanderson Farms, Inc.*, 2006 U.S. Dist. LEXIS 71752 (S.D. Miss. 2006); *Schoenrock v. John Morell & Co.*, 2003 U.S. Dist. LEXIS 11733 (D. Minn. 2003).

In one case, the swine contractor unlawfully sought to limit hog producers to binding arbitration as a remedy, while reserving to itself the right to go to court. *Tyson Foods, Inc. v. Stevens*, 2000 Ala. LEXIS 491 (Ala. 2000). Even where the contract binds both parties to arbitration, however, many arbitration provisions require producers to file arbitration requests within an unreasonably short period of time—sometimes just days—after the dispute arises, or else waive the right to be heard. Moreover, there is little evidence of a need for companies to seek legal action against contract farmers; they simply terminate the contract and move on to the next farmer. In contrast, before the widespread use of arbitration clauses, poultry growers were more able to challenge egregious violations of the Packers and Stockyards Act through the courts, as in the case of *Braswell v. ConAgra*, 936 F.2d 1169 (11th Cir. 1991), where the jury awarded over \$13 million in damages for purposeful misweighing of birds by the company resulting in underpayments to the growers for a period of more than eight years.

The inclusion of binding arbitration clauses in contracts is not a neutral tool to help both parties manage legal risk. Arbitration clauses are part and parcel of take-it-or-leave-it contracts presented by companies to farmers, and they compromise producers’ ability to resolve disputes and ensure justice is served.

V. Use of Captive Supply Procurement Practices in the Cattle and Hog Sectors

A. Market Concentration Levels in the Cattle and Hog Sectors

A few meat packers overwhelmingly dominate the livestock industry today. Over the last 20 years, there has been an unprecedented increase in horizontal market consolidation in both the beef and pork packing sectors. In 1985, the top four beef packing firms slaughtered 50% of steer and heifers and 39% of all types of cattle nationally. By 2005, the top four firms slaughtered 80% of all steers and heifers and 71% of all types of cattle in the U.S. *Livestock Marketing and Competition Issues*, CRS Report to Congress, Geoffrey S. Becker, updated February 27, 2007, at 3 citing 2006 issues of *Cattle Buyers Weekly* and various USDA data sources. Between 1985 and 2005, the top four packing firms' percentage of the U.S. hog slaughter increased nearly two-fold, from 32% to 63%. *Id.* at 4 citing *Cattle Buyers Weekly*. Such high levels of concentration in so few firms contribute to the packers' ability to exercise market power and control of the hog and cattle industries, reducing free market competition.

B. Vertical Integration in the Cattle and Hog Sectors

Compounding the problems for livestock producers associated with the horizontal consolidation in the meat packing sector is the rapid trend toward vertical integration. Packers and processors increasingly control their slaughter supplies through vertical coordination arrangements, such as production contracts with farmers who raise livestock owned by the packer; and marketing agreements and forward contracts in which the packer purchases livestock from producers securing a commitment of supply weeks in advance of its slaughter.

A recent study indicated that, between October 2002 and March 2005, the largest 29 U.S. beef packing plants acquired over 38% of their cattle through vertically coordinated arrangements: 28.8% through marketing agreements; 4.5% through forward contracts; and 5% through packer ownership or other unknown methods. *See*, GIPSA, *Livestock and Meat Marketing Study*, Executive Summary and Overview, January 2007, at ES-5. In 2003, six large producers—Smithfield, Premium Standard Farms, Seaboard, Prestage, Cargill, and Iowa Select—together accounted for nearly 30% of the U.S. hog production. *Id.* at 3 citing Informa Economic, *Special Report: The Changing U.S. Pork Industry*, November 1, 2004. The use of production contracts in the hog industry increased sharply from 29% of the production value in 1994-1995 to over 50% in 2003. *Id.* at 5 citing USDA/ERS, *Agricultural Contracting Update: Contracts in 2003*, Economic Information Bulletin No. 9, January 2006. According to a recent study, vertically coordinated arrangements account for an estimated 89% of finished hog volume, of which 20% to 30% (depending on assumptions) was from packer-owned hogs. GIPSA, *Livestock and Meat Marketing Study*, Executive Summary and Overview, January 2007, at ES-2.

C. Problems for Livestock Producers Resulting from Market Concentration and Vertical Integration

Because these vertically coordinated arrangements are individually negotiated outside any public market, they eliminate market transparency with regard to this rapidly increasing percentage of the total livestock slaughter in the U.S. In addition, packers tend to provide these individually negotiated contracts to larger livestock producers, excluding smaller producers who are then left to sell in the decreasingly competitive cash market that no longer reflects the price being paid for a large volume of livestock being slaughtered. Research suggests that it is the large farms that the vertically integrated companies rely on for their supplies, and that they are much less willing to work with small- or medium-size farms. *Id.* at 11 citing Gebremedin, Tefsa G. and Christy, Ralph D., 1996; "Structural Changes in U.S. Agriculture: Implications for Small Farms," *Journal of Agricultural and Applied Economics*, 28, 57-66, General Accounting Office (1998). Changes in Nebraska's and Iowa's Counties with Large Meatpacking Plant Workforces. GAO/RCED-98-62. Thus, packers' use of captive supply arrangements excludes small and independent livestock producers from much of the market for slaughter animals.

Meat packers' acquisition of slaughter supplies through vertically coordinated arrangements—such as packer-owned cattle or cattle committed through forward contracts and marketing agreements weeks in advance of slaughter—are often referred to as "captive supplies." Economic studies have repeatedly

shown an association between increases in use of captive supplies to fill slaughter capacity and declines in cash market prices. Livestock producers' belief that the use of captive supplies causes declines in spot market prices has been borne out in empirical analyses, "which found a price reduction of between \$1-2 a hundredweight for live cattle compared to a situation without captive supply practices." *See, Id.* at 11 citing Durham, C. (1998), *Formula Pricing (Marketing Agreements) v. Fixed Pricing (Forward Contracts)* (Unpublished analysis commissioned by Western Organization of Resource Councils). Even small (three percent or less) reductions in price from the use of captive supply practices can have a significant impact on livestock producers as it represents between 12 - 25% of long-run cattle feeding profits. *See, Id.* at 11 citing Lawrence, John (2004); *Packer Concentration, Captive Supplies, and Fed Cattle Prices*. Available online at [http://www.econ.edu/classes/econ135/lawrence/captive%20Supplies %20and%20price.ppt](http://www.econ.edu/classes/econ135/lawrence/captive%20Supplies%20and%20price.ppt).

There is also evidence in an economic study conducted for GIPSA showing that packers act differently with regard to formula-priced and fixed-priced forward contracts, tending to slaughter more fixed-priced forward contract cattle when cash market prices are relatively high, and to slaughter more formula-priced forward contract cattle when cash market prices are lower. Because the formula used to set the base price often references the cash market prices, the packers' different practices with regard to fixed-priced and formula-priced cattle indicate a strategic use of these contracts to manipulate prices paid to producers. *See, Durham, C. (1998), Formula Pricing (Marketing Agreements) v. Fixed Pricing (Forward Contracts)* (unpublished analysis commissioned by Western Organization of Resource Councils). Many economists have emphasized that formula-priced contracts that are based on cash market prices distort buyer (packer) incentives in concentrated markets such as exist in the hog and cattle sectors today. *See, Taylor, Robert C., Testimony to the United States House of Representatives Committee on Agriculture, Subcommittee on Livestock, Dairy and Poultry* (April 17, 2007), citing in footnote 5 statements of several economists at the Public Forum on Captive Supplies held by the United States Department of Agriculture, Denver, CO, September 21, 2000.

Contract and packer-owned supplies have also been found to be associated with decreases in market prices. For example, a recent study conducted for GIPSA found that "the effect of both contract and packer-owned hog supplies on spot market prices . . . are negative and indicate that an increase in either contract or packer-owned hog sales decreases the spot price of hogs," and that increases in use of such supplies leads to packers buying fewer hogs on the spot market. *GIPSA Livestock and Meat Marketing Study, Executive Summary and Overview, January 2007, at ES-10*. This study has been roundly—and I believe appropriately—criticized for the methodologies used to attempt to explain away its findings regarding the impact of vertical coordination agreements' impacts on livestock markets and prices. *See, Taylor, Robert C., Testimony to the United States House of Representatives Committee on Agriculture, Subcommittee on Livestock, Dairy and Poultry* (April 17, 2007).

The high concentration of market share in the top packing firms in both the hog and cattle sectors, coupled with the dramatic rise in the use of vertical coordination through packer ownership of livestock and formula-priced forward contracts, greatly reduces market transparency and creates an environment ripe for price manipulation and discrimination.

VI. Litigation under the Packers and Stockyards Act

A. Unlawful Practices

Livestock producers and poultry growers have a private right of action for harm caused by packer or poultry processor practices that fall within the unlawful practices enumerated in the Packers and Stockyards Act (P&S Act or Act). The Act provides:

Section 202. Unlawful practices enumerated.

It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device;
or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or

(c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspire, combine, agree or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section. (7 U.S.C. 192).

7 U.S.C. § 192.

B. Discussion of Possible Scenarios for Litigation on Behalf of Livestock and Poultry Producers

Many of the types of problems for poultry growers and livestock producers in their dealings with packers and processors addressed above may lend themselves to litigation under the unlawful practices section of the P&S Act. Discussion of examples.

C. Some Problems with Litigation on Behalf of Livestock and Poultry Producers

See materials for this conference, prepared by David A. Domina, which discuss in more detail some problems in bringing litigation under the P&S Act on behalf of producers, including his discussion of *London v. Fieldale Farm Corp.*, 410 F.3d 1295 (11th Cir. 2005); *Pickett v. Tyson Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005) *cert. denied*, 126 S.Ct. 1619 (Mar. 27, 2006); and *Wheeler v. Pilgrim's Pride Corp.*, 536 F.3d 455 (5th Cir. 2008).

VII. 2008 Farm Bill Amendments to the Packers and Stockyards Act

During the debate on the recent Farm Bill, many farm organizations banded together to fight for significant revisions to the P&S Act to make it more responsive to the changing structure of livestock and poultry markets and to better address producers' needs for protection from livestock packers' and poultry processors' actions that are unfair, deceptive, discriminatory, or anticompetitive. Though Congress was far from enacting all of the revisions that producers sought, it did address several important P&S Act issues in the 2008 Farm Bill (Food, Conservation, and Energy Act of 2008. Public Law No. 110-246, 122 Stat. 1651) (hereinafter referred to as the "2008 Farm Bill").

A. Arbitration Opt-Out Requirement Paves the Way to More Court Litigation of Disputes

As mentioned above, most poultry production contracts have in the past included provisions that require all disputes under the contract to be resolved through some form of binding arbitration. This has prevented many poultry growers from obtaining court decisions that could act as precedent to ensure fair and consistent application of the provisions of the P&S Act to all growers. It has also prevented them from obtaining full discovery regarding their claims and has made challenges to poultry processor practices often cost-prohibitive.

The 2008 Farm Bill addresses the issue of arbitration in livestock and poultry production and marketing contracts, making it much more likely in the future that cases under the P&S Act on behalf of livestock and poultry producers will be brought in court rather than an arbitration forum. Section 11005 of the 2008 Farm Bill (7 U.S.C. § 197c) amends the P&S Act to require that any livestock or poultry contract that contains an arbitration provision also include a provision that allows the contract producer or grower, prior to entering the contract, to decline the requirement to use arbitration to resolve any controversy that may arise under the contract. Any such “arbitration opt-out” term must be conspicuously displayed in the contract. This arbitration opt-out requirement applies to any contract “entered into, amended, altered, modified, renewed or extended after the date of enactment” of the Farm Bill. If a contract producer or grower chooses to decline the arbitration provision, the law provides that if, at some later date, both parties consent in writing, the producer could still seek to resolve a controversy under the contract through arbitration. The Farm Bill makes it a violation of the arbitration opt-out requirements by a packer, swine contractor, or poultry processor, an unlawful practice under the P&S Act. It includes as an unlawful practice “any action that has the intent or effect of limiting the ability of the producer or grower to freely make a choice” to decline the arbitration as a method for resolving disputes under the contract. The Packers and Stockyard Administration is required to issue regulations implementing this provision of the Farm Bill.

B. Notice of Right to Cancel Production Contracts

Section 11005 of the 2008 Farm Bill (7 U.S.C. § 197a) also grants poultry and swine production contract growers the right to cancel a production contract within three business days after the date on which the contract is executed or by any other date specifically provided for in the contract, whichever is later. The Farm Bill requires that this right of cancellation be “clearly disclosed” in the contract, along with an explanation of the method and deadline date for cancellation.

C. Required Disclosure of Additional Capital Investments in Production Contracts

Section 11005 of the 2008 Farm Bill (7 U.S.C. § 197c) also requires that any poultry growing arrangement or swine production contract contain on the first page a statement identified as “Additional Capital Investment Disclosure Statement.” This statement must conspicuously state that additional large capital investments may be required of the poultry grower or swine production contract grower during the term of the agreement. This requirement applies to “any poultry growing arrangement or swine production contract entered into, amended, altered, modified, renewed, or extended after the date of the enactment” of the Farm Bill.

D. Choice of Law and Venue

Section 11005 of the 2008 Farm Bill (7 U.S.C. § 197b) also addresses issues of the venue for actions involving disputes under production contracts and the choice of law to be applied in such actions. This section of the Farm Bill provides that the forum for resolving any dispute among the parties that arises under a poultry growing arrangement or swine production contract “shall be located in the Federal judicial district in which the principle [sic] part of the performance takes place under the arrangement or contract.” This section of the Farm Bill also allows any poultry growing arrangement or swine production contract or marketing agreement to specify which state’s law will apply to issues governed by state law in any dispute arising between the parties to the arrangement or contract, except to the extent that doing so is prohibited by the law of the state in which the principal part of the performance takes place.

E. Directed Rulemaking under the Packers and Stockyards Act

Section 11006 of the 2008 Farm Bill requires the Secretary of Agriculture to promulgate regulations with respect to the Packers and Stockyards Act that establish criteria that the Secretary will consider in determining –

- (1) whether an undue or unreasonable preference or advantage has occurred in violation of the Act;
- (2) whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under the poultry growing arrangement;
- (3) when a requirement of additional capital investments over the life of a poultry grower arrangement or swine production contract constitutes a violation of such Act;
- (4) if a live poultry dealer or swine production contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract.

1. Undue or Unreasonable Preference or Advantage Rules

Some farm organizations are working to convince the Grain Inspection, and Packers and Stockyards Administration (GIPSA) to issue rules that address the many types of livestock packer and poultry processor practices that provide some producers or growers with undue advantages over others, including such practices as:

- (a) Packers' methods for offering various types of purchase agreements (forward contracts, marketing agreements, or cash market purchases) to cattle and hog producers, and the variation in terms that affect producers' payment under such purchase agreement, including formula pricing terms, base prices, grade and yield premiums, volume premiums, and hauling cost coverage;
- (b) Packers' ownership of cattle and hogs in the production phase;
- (c) Packers' ownership of custom feedlots;
- (d) Poultry processors' use of "tournament" payment systems that allow the company to provide advantages to some growers over others through the distribution of essential inputs such as chicks, feed, medicine, and veterinary services;
- (e) Poultry processor practices by which they offer some growers purchase agreements and require other growers to raise the poultry only under a production contract;
- (f) Packer and poultry processor practices that adversely affect growers or producers that exercise their rights under the P&S Act.

2. Additional Capital Investment Rules

Poultry grower associations and other farm organizations are also working to convince GIPSA to issue rules making clear that it is a violation of the P&S Act for a processor to require significant capital investments in a grower's equipment and facilities in order to maintain a

production contract unless the company fairly compensates the grower for the cost of such investments.

3. Notice of Breach of Contract

Poultry grower associations and other farm organizations are also working to convince GIPSA to issue rules that any notice of an alleged breach must be provided to the grower sufficiently in advance of a possible termination of a production contract to allow the grower to remedy the breach, include a description of the method necessary to correct the breach, and be in a form that is readable and understandable to the grower.

4. Notice of Suspension of Delivery of Birds to Growers

Poultry grower associations and other farm organizations are also working to convince GIPSA to issue rules that, in order to be considered reasonable, any notice of suspension of delivery of birds must include any reduction of the number of birds normally delivered to the grower, and must be made sufficient time in advance of such suspension to allow the grower to plan for any resulting decrease in income, and, in order to comply with such notice provisions, require that all future production contracts include a term setting out the minimum number of birds the company will deliver to the grower under the contract.