

## Chapter 4

# Contract Broiler Production — The Legal Context and Recommendations

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### I. Introduction

The vast majority of boiler chickens in the United States are raised through production contracts, sometimes referred to as growout agreements, between a poultry processing company and a grower. The relationship between the broiler grower and the processing company are to a great extent controlled by the terms of these contracts. However, the relationship between the grower and the companies may also be subject to government regulation. This regulation is intended to protect the rights of individuals and companies, as well as the integrity of the United States poultry industry as a whole. This chapter of the report addresses the legal context for contract poultry production, including government regulation of growout arrangements.

First, this chapter will provide an overview of important federal and state laws that govern the relationships between poultry companies and growers. Next, the chapter will consider issues identified in the Broiler Grower Survey as trouble spots in the relations between growers and poultry processing companies and will discuss how existing laws may provide redress for those problems. Decisions by federal and state courts on these subjects will also be discussed. Finally, the chapter will offer recommendations for further measures to address issues raised by broiler growers in their response to the survey described in Chapter Two of this report and to promote a stable and equitable poultry industry in the United States.

### II. Federal and State Laws Affecting Contract Poultry Production

An understanding of existing laws affecting grower-company relations is essential for fashioning workable improvements in the poultry industry. This section sets out an overview of federal and state laws that directly and indirectly govern poultry companies and growers.

#### A. Packers and Stockyards Act

The goal of the federal Packers and Stockyards Act (P&S Act) is to promote fair competition and ensure fair trade practices in livestock and poultry markets.<sup>1</sup> The U.S. Department of Agriculture (USDA) is charged with enforcement of the P&S Act and has passed regulations providing more detailed requirements than are found in the statutory

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<sup>1</sup> 7 U.S.C. §§ 181-231.

provisions. These regulations are found at Part 201 of Title 9 of the Code of Federal Regulations.<sup>2</sup> Within USDA, the Grain Inspection, Packers and Stockyards Administration (GIPSA) is the agency that implements these regulations and enforces the P&S Act.<sup>3</sup> GIPSA has headquarters located in Washington, D.C. and 12 regional offices.<sup>4</sup>

When the P&S Act was originally enacted in 1921, it applied only to sales of livestock and did not apply to poultry sales. In 1935, a provision regulating the sale of live poultry was added.<sup>5</sup> A “live poultry dealer” was defined in the Act as “any person engaged in the business of buying or selling live poultry in commerce.”<sup>6</sup> As the structure of the poultry industry changed to one in which processing companies owned the birds throughout their lives and raised them through contracts with growers, the P&S Act’s coverage of only the purchase or sale of live poultry left contract broiler growers unprotected. In 1987, the definition of a “live poultry dealer” in the P&S Act was changed to include companies that arranged for growers to raise and care for live poultry that the company continued to own.<sup>7</sup> This statutory change brought contract broiler growing arrangements under the P&S Act for the first time.

#### *1. Definitions Making P&S Act Applicable to Grower Contracts*

Key definitions included in the P&S Act make it apply to the relationship between processing companies and growers who raise birds owned by the companies under production contracts. A “live poultry dealer” is defined as:<sup>8</sup>

any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement for the purpose of either slaughtering it or selling it for slaughter by another, if poultry is obtained by such person in commerce, or if poultry obtained by such person is sold or shipped in commerce, or if poultry products from poultry obtained by such person are sold or shipped in commerce.

A “poultry growing arrangement” is “any growout contract, marketing agreement, or other arrangement under which a poultry grower raises and cares for live poultry for delivery, in accord with another’s instructions, for slaughter.”<sup>9</sup>

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<sup>2</sup> 9 C.F.R. pt. 201 (2001).

<sup>3</sup> 7 C.F.R. §§ 2.22(a)(3)(iii) and 2.81(a)(3) (2001).

<sup>4</sup> 9 C.F.R. § 204.2(b)(1), (e) (2001). Some of the regional offices nearest to areas where the poultry industry is concentrated include Atlanta, Georgia; Bedford, Virginia; Forth Worth, Texas; and Memphis, Tennessee.

<sup>5</sup> Act of Aug. 14, 1935, ch. 532, § 1, 49 Stat. 649 (1935) (codified until 1987 at 7 U.S.C. § 218b).

<sup>6</sup> This is the language in former 7 U.S.C. § 218b, which was repealed in 1987. Pub. L. No. 100-173, § 10, 101 Stat. 922 (1987).

<sup>7</sup> Pub. L. No. 100-173, §§ 2-3, 101 Stat. 917 (1987) (codified at 7 U.S.C §§ 182(10), 192).

<sup>8</sup> 7 U.S.C. § 182(10).

<sup>9</sup> 7 U.S.C. § 182(9).

A “poultry grower” is “any person engaged in the business of raising and caring for live poultry for slaughter by another, whether the poultry is owned by such person or by another, but not an employee of the owner of such poultry.”<sup>10</sup>

These definitions make clear that the P&S Act covers contracts between poultry processing companies and broiler growers.

## *2. The P&S Act Requires Some Practices and Prohibits Others*

Since the 1987 amendments, the P&S Act has provided comprehensive federal regulation of the U.S. poultry industry, prohibiting “any unfair, unjustly discriminatory, or deceptive practice or device” in the industry.<sup>11</sup> The P&S Act seeks to accomplish this goal by requiring some practices of live poultry dealers and prohibiting others.

### *a. Live Poultry Dealers Must Pay Poultry Growers Promptly and Fully*

The P&S Act requires live poultry dealers to make prompt and full payment to poultry growers.<sup>12</sup> Live poultry dealers must tender timely payment under a growing arrangement by delivering the full amount due to the poultry grower by the close of the 15th day following the week in which the poultry is slaughtered.<sup>13</sup> In the case of cash sales, payment must be made by the close of business on the day following the day the purchase was made.<sup>14</sup>

### *b. Live Poultry Dealers Must Take Steps to Weigh Birds Accurately*

Under most contract broiler growing agreements the broiler grower’s income depends in large part on the weight of the birds when they are handed over to the live poultry dealer for processing. The regulations issued under the P&S Act include detailed requirements for weighing procedures and other actions that may affect weight.<sup>15</sup>

#### *(1) Reasonable Care and Promptness*

Under the P&S Act, live poultry dealers must use reasonable care and promptness with respect to loading, transporting, holding, yarding, feeding, watering, weighing, or otherwise handling live poultry to prevent waste of feed, shrinkage, injury, death, or other avoidable loss.<sup>16</sup>

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<sup>10</sup> 7 U.S.C. § 182(8).

<sup>11</sup> 7 U.S.C. § 192(a).

<sup>12</sup> 7 U.S.C. § 192(a).

<sup>13</sup> 7 U.S.C. § 228b-1.

<sup>14</sup> 7 U.S.C. § 228b-1.

<sup>15</sup> 9 C.F.R. § 201.108-1 (2001).

<sup>16</sup> 9 C.F.R. § 201.82(a) (2001).

Live poultry obtained under a poultry growing arrangement must be transported promptly after being loaded.<sup>17</sup> The gross weight for grower-payment purposes must be determined immediately upon arrival at the processing plant, holding yard, or other scale normally used for such purpose.<sup>18</sup>

### *(2) Maintenance and Operation of Scales*

Under the P&S Act, all scales used by live poultry dealers to weigh live poultry for the purposes of payment must be installed, maintained, and operated to insure accurate weights and meet applicable standards.<sup>19</sup> Detailed USDA regulations describe the proper operation of scales on which poultry is to be weighed for purposes of determining a grower's payment.<sup>20</sup> Live poultry dealers must employ qualified people to operate the scales used to weigh live poultry.<sup>21</sup> Persons with a legitimate interest in a load of poultry—including poultry growers and poultry dealers—must be allowed to observe the procedures involved in balancing the scale between loads, in weighing, and in recording the actual weight.<sup>22</sup> The weigher must check the zero balance of the scale or reweigh a load of poultry when asked to do so by an interested party or by authorized GIPSA representatives.

### *(3) Scale Tickets*

Under USDA's P&S Act regulations, all scales used to weigh live poultry for the purpose of settlement by a live poultry dealer must have a printing device that records weight values on a scale ticket or other document.<sup>23</sup> The weight on a scale ticket should be machine-printed, not merely hand-

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<sup>17</sup> 9 C.F.R. § 201.82(b) (2001).

<sup>18</sup> 9 C.F.R. § 201.82(b) (2001).

<sup>19</sup> 9 C.F.R. § 201.71(a) (2001). The use of accurate scales to weigh poultry is also required by 9 C.F.R. § 201.108-1 (2001).

<sup>20</sup> 9 C.F.R. § 201.108-1 (2001). Scales must be inspected in accordance with the regulations at least twice a year, at approximately six-month intervals. 9 C.F.R. § 201.72(a) (2001). The live poultry dealer must file a report of tests and inspections with GIPSA. 9 C.F.R. § 201.72(b) (2001). If a scale fails a test and inspection, it may not be used again until it is found in a later test and inspection to meet all accuracy requirements. 9 C.F.R. § 201.71(d) (2001). All vehicle scales used to weigh live poultry for the purpose of settlement or payment must be long enough and have enough capacity to weight the entire vehicle as a unit. 9 C.F.R. § 201.71(c) (2001). A trailer may be weighed as a single unit.

<sup>21</sup> 9 C.F.R. § 201.73 (2001). The live poultry dealer must give copies of the instructions for weighing live poultry found in the Code of Federal Regulations to the scale operators, and require them to comply with the regulations. 9 C.F.R. §§ 201.73, 201.108-1 (2001).

<sup>22</sup> 9 C.F.R. § 201.108-1(e)(4) (2001).

<sup>23</sup> 9 C.F.R. § 201.71(b) (2001).

written.<sup>24</sup> The scale ticket must include certain information specified in the regulations.<sup>25</sup> If the poultry is weighed on a vehicle scale, the scale ticket must show weather conditions, whether the driver was on or off the truck at the time of weighing, and the license number of the truck or the truck number.<sup>26</sup> The payment or settlement to the grower must be based on the actual weight of the live poultry shown on the scale ticket.<sup>27</sup> The scale tickets should be in at least duplicate form, should be serially numbered, and used in numerical sequence.<sup>28</sup> One copy of the scale ticket is to be given to the grower, and one kept by the live poultry dealer.<sup>29</sup>

*c. Live Poultry Dealers Must Take Steps to Weigh Feed Accurately*

On May 5, 2000, new P&S Act regulations became effective requiring live poultry dealers to weigh feed whenever the weight of feed is a factor in determining payment or settlement for a poultry grower under a poultry growing arrangement.<sup>30</sup> Many of the rules for accurate weighing of feed are the same as those for weighing of live poultry.

*(1) Maintenance and Operation of Scales*

Under USDA's P&S Act regulations, all scales used by live poultry dealers to weigh feed for the purposes of payment to growers must be installed, maintained, and operated to insure accurate weights and meet applicable standards.<sup>31</sup> Detailed USDA regulations describe the proper operation of scales on which feed is to be weighed for purposes of determining a grower's payment.<sup>32</sup> Live poultry dealers must employ qualified people to operate the feed scales.<sup>33</sup>

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<sup>24</sup> 9 C.F.R. § 201.71(b) (2001).

<sup>25</sup> 9 C.F.R. § 201.49(b) (2001). In addition to the information mentioned in the text, that information includes: the name of agency performing the weighing service; the name of the live poultry dealer; the name and address of the grower; the name or initials or number of the person who weighed the poultry (state law may require a signature); the location of the scale; gross weight, tare weight, and net weight; the date and time gross and tare weights were determined; and the number of poultry weighed.

<sup>26</sup> 9 C.F.R. § 201.49(b)(9)-(11) (2001). The company's failure to accurately record truck identification numbers has been a factor in at least one poultry case under the P&S Act. See *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452, 1454-55 (8th Cir. 1995).

<sup>27</sup> 9 C.F.R. § 201.55(a) (2001).

<sup>28</sup> 9 C.F.R. § 201.49(b)(11) (2001).

<sup>29</sup> 9 C.F.R. § 201.108-1(e)(2) (2001).

<sup>30</sup> 65 Fed. Reg. 17,758 (2000) (codified at 9 C.F.R. pt. 201).

<sup>31</sup> 9 C.F.R. § 201.71(a) (2001).

<sup>32</sup> Scales must be inspected in accordance with the regulations at least twice a year, at approximately six-month intervals. 9 C.F.R. § 201.72(a) (2001). The live poultry dealer must file

*(2) Scale Tickets*

Whenever poultry feed weight is a factor in determining payment to a poultry grower, the payment must be based on the actual weight of feed as shown on a scale ticket.<sup>34</sup> USDA's P&S Act regulations require that all scales used by a live poultry dealer to weigh feed for payment purposes have a printing device that records weight values on a scale ticket or other document.<sup>35</sup> The weight on a scale ticket should be machine-printed, not merely hand-written.<sup>36</sup> The scale ticket must include certain information specified in the regulations.<sup>37</sup> In part, the scale ticket must show whether the driver was on the truck at weighing and the license number and other identification numbers on the truck and trailer weighed.<sup>38</sup> The scale tickets should be in at least duplicate form, should be serially numbered, and used in numerical sequence.<sup>39</sup> One copy should be given to the grower, and one kept by the live poultry dealer.

*(3) Returned Feed*

Whenever the weight of feed is a factor in determining payment to poultry growers, USDA regulations require that any feed that is picked up from or returned by a poultry grower must be weighed (or its weight reasonably determined) using a method that is mutually acceptable to the live poultry

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a report of tests and inspections with GIPSA. 9 C.F.R. § 201.72(b) (2001). If a scale fails a test and inspection, it may not be used again until it is found in a later test and inspection to meet all accuracy requirements. 9 C.F.R. § 201.71(d) (2001). All vehicle scales used to weigh feed for the purpose of settlement or payment must be long enough and have enough capacity to weight the entire vehicle as a unit. 9 C.F.R. § 201.71(c) (2001). A trailer may be weighed as a single unit.

<sup>33</sup> 9 C.F.R. § 201.73 (2001). The live poultry dealer must require the scale operators to comply with the P&S Act regulations governing weighing of feed for payment purposes. 9 C.F.R. § 201.73 (2001).

<sup>34</sup> 9 C.F.R. § 201.55(a) (2001).

<sup>35</sup> 9 C.F.R. § 201.71(b) (2001).

<sup>36</sup> 9 C.F.R. § 201.71(b) (2001).

<sup>37</sup> 9 C.F.R. § 201.49(c) (2001). In addition to the information mentioned in the text, that information includes: the name of agency performing the weighing service; the name and address of the grower; the name or initials or number of the person who weighed the poultry (state law may require a signature); the location of the scale; gross weight, tare weight, and net weight of each lot assigned to the individual grower; the date and time gross and tare weights were determined, if applicable; and the identification of each lot assigned to the grower, by vehicle trailer or compartment number and seal numbers, if applicable.

<sup>38</sup> 9 C.F.R. § 201.49(b)(9)-(11) (2001).

<sup>39</sup> 9 C.F.R. § 201.49(c)(2) (2001).

dealer and the poultry grower.<sup>40</sup> The live poultry dealer must document and account for the picked up or returned feed.<sup>41</sup>

*d. Growout Contracts Must Provide Basic Information*

Under USDA's P&S Act regulations, each live poultry dealer who enters into a growout contract with a poultry grower must furnish the grower with a true written copy of the contract that clearly specifies the duration of the contract and conditions for the termination of the contract by each of the parties.<sup>42</sup> The contract also must clearly specify "all terms relating to the payment to be made to the poultry grower."<sup>43</sup> These include, but are not limited to: (1) the party liable for condemnations, including those resulting from plant errors, (2) the method for figuring feed conversion ratios, (3) the method for converting condemnations to live weight, (4) the per unit charges for feed and other inputs furnished by each party, and (5) the factors to be used when ranking growers.

*e. Live Poultry Dealers Must Provide Final Accountings*

USDA's P&S Act regulations require that each live poultry dealer who acquires poultry through a contract with a poultry grower prepare a true and accurate "settlement sheet" and give a copy to the grower at the time of settlement.<sup>44</sup> The settlement sheet must contain all information necessary to compute the payment due to the poultry grower from the live poultry dealer.<sup>45</sup> If the weight of birds affects the payment, the settlement sheet must show the number of live birds marketed, the total weight and average weights of the birds, and the payment per pound.<sup>46</sup>

If the contract provides for payment based upon a ranking of growers, at the time of settlement the live poultry dealer must give the grower a copy of the ranking sheet showing the grower's precise position in the ranking, as well as the actual numbers upon which the ranking was based for each grower.<sup>47</sup> The names of other growers are not required.

If the growout contract provides that official USDA condemnations or grades, or both, are factors in determining the grower's payment, the live poultry dealer must obtain an official USDA condemnation grading certificate for the poultry

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<sup>40</sup> 9 C.F.R. § 201.55(b) (2001).

<sup>41</sup> 9 C.F.R. § 201.55(b) (2001).

<sup>42</sup> 9 C.F.R. § 201.100(a)(1) (2001).

<sup>43</sup> 9 C.F.R. § 201.100(a)(2) (2001).

<sup>44</sup> 9 C.F.R. § 201.100(b) (2001).

<sup>45</sup> 9 C.F.R. § 201.100(b) (2001).

<sup>46</sup> 9 C.F.R. § 201.100(b) (2001).

<sup>47</sup> 9 C.F.R. § 201.100(d) (2001).

and must provide a copy of that certificate to the grower prior to or at the time of settlement.<sup>48</sup>

*f. Live Poultry Dealers Must Keep Records and Provide Information*

The P&S Act requires that live poultry dealers keep complete and accurate records of their transactions, including records showing the true ownership of the business.<sup>49</sup>

Upon the request of the Secretary of Agriculture or persons designated by the Secretary, live poultry dealers must provide within a reasonable specified time information needed by GIPSA to carry out the provisions of the P&S Act and the implementing regulations.<sup>50</sup> Live poultry dealers must permit authorized representatives of the Secretary to examine their records and inspect their facilities subject to the P&S Act.<sup>51</sup> Disclosure of facts and information regarding a live poultry dealer's business acquired through such examination is strictly limited.<sup>52</sup>

*g. Monopolistic Practices Prohibited*

Practices that restrain competition or control prices are forbidden by the P&S Act.<sup>53</sup> The P&S Act uses broad language to describe the types of practices that are prohibited. In particular, a live poultry dealer may not "make or give an 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."<sup>54</sup> Under the P&S Act it is unlawful for a live poultry dealer to buy, transfer, receive, or sell any article for the purpose or with the effect of manipulating or controlling prices, or of apportioning the supply, if the apportionment will tend to restrain commerce or create a monopoly.<sup>55</sup> It is also unlawful under the P&S Act for a live poultry dealer to conspire, combine, agree, or arrange with any other person to apportion territory for carrying on business.<sup>56</sup>

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<sup>48</sup> 9 C.F.R. § 201.100(c) (2001).

<sup>49</sup> 7 U.S.C. § 221.

<sup>50</sup> 9 C.F.R. § 201.94 (2001).

<sup>51</sup> 9 C.F.R. § 201.95 (2001).

<sup>52</sup> 9 C.F.R. § 201.96 (2001).

<sup>53</sup> 7 U.S.C. § 192(c)-(g).

<sup>54</sup> 7 U.S.C. § 192(b).

<sup>55</sup> 7 U.S.C. § 192(c)-(e).

<sup>56</sup> 7 U.S.C. § 192(f).

### 3. Enforcement of the P&S Act

#### a. Regulation

GIPSA is authorized to issue regulations necessary to carry out and enforce the P&S Act.<sup>57</sup> GIPSA's publication of P&S Act rules in the publicly available Federal Register and Code of Federal Regulations is intended to give all members of the poultry industry clear direction about what is needed for compliance with the P&S Act.

#### b. Investigation

Many of the powers given the Secretary of Agriculture under the P&S Act relate to gathering information, whether by investigation, required reports, subpoena, or deposition.<sup>58</sup> The Secretary is authorized to gather and compile information and to conduct investigations of any company subject to the provisions of the P&S Act.<sup>59</sup> The Secretary may issue subpoenas requiring the attendance and testimony of any person or requiring the production of documentary evidence relating to any matter under investigation.<sup>60</sup> The Secretary has broad powers to require live poultry dealers to file annual or special reports and answers made under oath to specific questions.<sup>61</sup> The President may direct various government agencies to provide information to the Secretary relating to live poultry dealers.<sup>62</sup>

The Secretary may investigate and report on live poultry dealers' compliance with final decrees entered in lawsuits brought by the United States.<sup>63</sup> At the request of the President or either House of Congress, the Secretary may investigate and report on any alleged violation of the P&S Act.<sup>64</sup> The Secretary

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<sup>57</sup> 7 U.S.C. § 228.

<sup>58</sup> The United States General Accounting Office has issued a report evaluating GIPSA's efforts to implement the P&S Act. "Actions Needed to Improve Investigations of Competitive Practices," United States General Accounting Office, GAO/RCED-00-242 (Sept. 2000). While the report focuses on GIPSA's efforts with respect to the cattle and hog industries, it may provide general insight into GIPSA's investigative function.

<sup>59</sup> 7 U.S.C. § 222; 15 U.S.C. § 46(a). GIPSA has created "rapid response teams" of investigators that are "designed to deal with high priority investigations that require fast action to prevent or minimize major competitive or financial harm caused by violations of the Act." *USDA Responds to Mississippi Poultry Growers' Concerns*, GIPSA Release #04-00 (Feb. 11, 2000), available at <http://www.usda.gov/gipsa/newsinfo/release/04-00.htm>.

<sup>60</sup> 7 U.S.C. § 222; 15 U.S.C. § 49. See also *United States v. Marshall Durbin & Co. of Haleyville, Inc.*, 363 F.2d 1, 4-5 (5th Cir. 1966).

<sup>61</sup> 7 U.S.C. § 222; 15 U.S.C. §§ 46(b), 50.

<sup>62</sup> 7 U.S.C. § 222; 15 U.S.C. § 48.

<sup>63</sup> 7 U.S.C. § 222; 15 U.S.C. § 46(c).

<sup>64</sup> 7 U.S.C. § 222; 15 U.S.C. § 46(d).

may also report to Congress and make recommendations for additional legislation related to the P&S Act.<sup>65</sup>

GIPSA maintains a telephone hotline for participants in the poultry industry to alert the agency to possible violations of the P&S Act. The toll-free number is 1-800-998-3447. Callers who identify themselves may be better able to facilitate GIPSA's investigative efforts. GIPSA asks that anonymous callers leave complete information. Poultry growers may also complain to their regional GIPSA office about many problems related to the poultry industry.

*c. Administrative Hearings*

While the Secretary has extensive investigatory powers for all possible violations of the P&S Act, secretarial powers are limited in other respects. The Secretary lacks the authority to provide formal administrative hearings for most problems in the poultry industry. In other words, the Secretary may investigate, but may not bring an administrative action to resolve many types of violations of the Act. For the poultry industry, the Secretary only has authority to institute formal administrative hearing procedures for problems related to payment.<sup>66</sup>

*d. Statutory Trust to Secure Grower Payment*

The P&S Act provides a specific, strong administrative remedy to ensure that growers are paid for all poultry and poultry products they deliver to live poultry dealers. If a grower does not receive full and prompt payment, he or she may file a notice with the Secretary of Agriculture.<sup>67</sup> Once a poultry grower files a timely notice of non-payment, GIPSA will invoke a "statutory trust," which forces the poultry company to hold certain assets in trust until the poultry grower has been paid in full.<sup>68</sup> The purpose of the trust is to ensure that if a live poultry dealer is unable to pay all of its debts, the poultry growers will be paid before the live poultry dealer's other creditors. The assets that must be held in trust are generally those that can be traced to the poultry company's purchase or sale of poultry and poultry products.<sup>69</sup>

A grower's administrative notice about a live poultry dealer's failure to pay must reach GIPSA within 30 days of the final date the live poultry dealer should have

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<sup>65</sup> 7 U.S.C. § 222; 15 U.S.C. § 46(f).

<sup>66</sup> 7 U.S.C. § 228b-2. GIPSA has greater enforcement authority relating to unfair practices in the livestock industry. 7 U.S.C. §§ 193-195.

<sup>67</sup> 7 U.S.C. § 197. The complaint must also be sent to the poultry company.

<sup>68</sup> 7 U.S.C. § 197(b).

<sup>69</sup> The assets that must be held in trust include "[a]ll poultry obtained by a live poultry dealer, by purchase in cash sales or by poultry growing arrangement, and all inventories of, or receivables from such poultry or poultry products derived therefrom." 7 U.S.C. § 197(b).

paid the grower.<sup>70</sup> The grower must also send written notice to the live poultry dealer within the required time frame.<sup>71</sup> In most cases involving growout contracts, the company should make payment to the grower by the fifteenth day following the week in which the poultry is slaughtered.<sup>72</sup> If a grower receives notice that payment which was timely offered was dishonored—for example, a check was rejected for insufficient funds—he or she may file a notice of nonpayment within 15 days.<sup>73</sup>

The grower need not use a specific complaint form or method. The notice should state that it is notice of intent to preserve trust benefits and it should include the grower's name and address, the live poultry dealer's name and address, a description of the problem, the date on which the problem occurred (including the date notice was received that the live poultry dealer's payment was dishonored, if applicable), and the amount of money which has not been paid or is in dispute.<sup>74</sup>

GIPSA will process the complaint even if some of this information is left out, as long as there is timely written notice to the live poultry dealer and the Secretary of the live poultry dealer's failure to pay.<sup>75</sup> While other complaints to GIPSA may be anonymous, non-payment claims must identify the grower.

GIPSA may file a formal complaint against the live poultry dealer and require the dealer to attend and testify at an administrative hearing.<sup>76</sup> Following the hearing, if it is found that there has been a violation, the Secretary will make written findings of fact and will order the live poultry dealer to "cease and desist" from continuing violations.<sup>77</sup> The Secretary may also levy a civil penalty against the live poultry dealer.

Furthermore, whenever the Secretary has reason to believe that a poultry company has failed to pay or is unable to pay a poultry grower what is due under a poultry growing arrangement, the Secretary may go to federal district court to seek a temporary injunction or restraining order against the company.<sup>78</sup> The court could prohibit the company from acting as a "live poultry dealer"

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<sup>70</sup> 7 U.S.C. § 197(d).

<sup>71</sup> 9 C.F.R. § 203.15 (2001).

<sup>72</sup> 7 U.S.C. § 228b-1.

<sup>73</sup> 7 U.S.C. § 197(c), (d).

<sup>74</sup> 9 C.F.R. § 203.15(a) (2001).

<sup>75</sup> 9 C.F.R. § 203.15(b) (2001).

<sup>76</sup> 7 U.S.C. § 228b-2(a).

<sup>77</sup> 7 U.S.C. § 228b-2(b).

<sup>78</sup> 7 U.S.C. § 228a.

within the meaning of the P&S Act until a final resolution of the payment dispute is reached.

The trust requirement does not apply to small live poultry dealers with annual sales of live poultry—or average annual value of live poultry obtained by purchase or by poultry growing arrangement—of \$100,000 or less.<sup>79</sup>

*e. Civil Action by the U.S. Department of Justice*

The Secretary of Agriculture may report violations of the P&S Act to the United States Department of Justice. The Attorney General has a duty to file a civil lawsuit for violations of the P&S Act reported by the Secretary of Agriculture.<sup>80</sup>

*f. Civil Action by Growers*

Growers may file suit against live poultry dealers for violations of the P&S Act whether or not the growers file a complaint with GIPSA.<sup>81</sup> The P&S Act explicitly provides for damages as a remedy for violation of the Act.<sup>82</sup>

## **B. Agricultural Fair Practices Act**

The Agricultural Fair Practices Act (AFPA)<sup>83</sup> protects the right of farmers and ranchers to “join together voluntarily in cooperative organizations as authorized by law.”<sup>84</sup> Under this law, the right of contract poultry growers to decide freely whether or not to join associations of growers is protected from interference by poultry companies.

### *1. AFPA Establishes Standards for “Handlers”*

The AFPA establishes standards of fair practices required of handlers of agricultural products.<sup>85</sup> A “handler” is any person who: (1) acquires agricultural products from producers or associations of producers for processing or sale; (2) grades, packages, handles, stores, or processes agricultural products received from producers or associations of producers; (3) contracts or negotiates contracts or other arrangements—written or oral—with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acts as an agent or broker for a handler in any of the above actions.<sup>86</sup>

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<sup>79</sup> 7 U.S.C. § 197(b).

<sup>80</sup> 7 U.S.C. § 224.

<sup>81</sup> 7 U.S.C. § 209(b).

<sup>82</sup> 7 U.S.C. § 209(a).

<sup>83</sup> 7 U.S.C. §§ 2301-2306.

<sup>84</sup> 7 U.S.C. § 2301.

<sup>85</sup> 7 U.S.C. § 2301.

<sup>86</sup> 7 U.S.C. § 2302(a).

## *2. Coercion, Discrimination, or Intimidation Related to Membership in an Association Prohibited*

The AFPA prohibits handlers from knowingly taking a variety of actions against an individual grower because of the grower's decision to join or not to join an association of growers.<sup>87</sup> In general, attempts to persuade growers to join or dissuade growers from joining producer associations are unlawful if they involve coercion, discrimination, or intimidation of any kind.

Specific unlawful practices include: (1) coercing a grower to either join or refrain from joining an association of producers; (2) refusing to deal with a producer because he or she has exercised the right to join and belong to a producer association; (3) discriminating against a producer in terms of price, quality, or other terms because of his or her membership in or contract with a producer association; (4) coercing or intimidating a producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with a producer association or a contract with a handler; (5) paying or loaning money, giving anything of value, or offering any reward to a producer for leaving or refusing to join a producer association; (6) making false reports about producer associations; or (7) arranging with another person to do any act prohibited by the AFPA.<sup>88</sup>

A recent **Georgia** case, which appears to be the only case addressing these AFPA issues in a poultry production context, included some important holdings.<sup>89</sup> First, the court held that the grower association need not satisfy the technical definition of an "association" under the federal Capper-Volstead Act or the Agricultural Marketing Act in order to qualify for protection under the AFPA.<sup>90</sup> The court found that the focus of the AFPA is the handler's motivation for its treatment of the producer, not the producer's technical membership in an association.<sup>91</sup> Second, the court rejected the company's argument that the grower must be a member in good standing of an association to bring an AFPA claim. The court concluded that Congress did not intend to deny AFPA protection to growers due to a technicality such as failure to pay

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<sup>87</sup> 7 U.S.C. § 2303.

<sup>88</sup> 7 U.S.C. § 2303.

<sup>89</sup> *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 12-15 (N.D. Ga. Oct. 11, 2000) (order denying defendant's motion for judgment as a matter of law), aff'd without opinion by 260 F.3d 627 (11th Cir. 2001).

<sup>90</sup> The technical definition that the company sought to impose as a threshold test for AFPA coverage is the standard for authorized farm cooperatives, including a one-member/one-vote rule, a limitation on dividends paid on member capital, and a limitation on the percentage of products handled by the association for nonmembers rather than members. See 7 U.S.C. § 291; 12 U.S.C. § 1141j(a).

<sup>91</sup> *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 9 (N.D. Ga. Oct. 11, 2000) (order denying defendant's motion for judgment as a matter of law), aff'd without opinion by 260 F.3d 627 (11th Cir. 2001).

membership dues. Therefore, the court held, a handler violates the AFPA if the handler retaliates against a producer based on the producer's perceived membership in an association, even if the producer is technically not a member.<sup>92</sup> This decision was affirmed by the Eleventh Circuit Court of Appeals in May 2001.<sup>93</sup>

### 3. Limitations of the AFPA

It is important to keep in mind, however, that the AFPA does not require that a poultry company deal with growers who are members of an association or with the association itself so long as the reason for the decision not to deal with them is not based on membership in the association. The AFPA states: “[n]othing in this Act shall prevent handlers and producers from selecting their customers and suppliers for any reason other than a producer's membership in or contract with an association of producers, nor require a handler to deal with an association of producers.”<sup>94</sup> This means that a poultry company may defend against a claim of violating the AFPA by showing that it had another, lawful reason for the decision not to deal with the grower or the association.

This then puts the burden on the grower or the association to show that the reason offered is not the real reason for the refusal to deal, but is just a pretext. Poultry growers who cannot show that a poultry company refused to deal with them *because* the growers are members of an association are not likely to bring successful AFPA claims. This burden on growers may be mitigated to a certain extent. In the recent **Georgia** case discussed above, the court held that the grower did not have to show that his membership in a grower association was the *sole* reason for the company's adverse action in order to receive protection under the AFPA.<sup>95</sup> Furthermore, in at least one **Florida** case, the court held that if a company cites no economic justification for its refusal to deal with a producer, the court may conclude that the refusal stemmed from the grower's membership in a producer association, in violation of the AFPA.<sup>96</sup>

### 4. Enforcing the AFPA

The AFPA may be enforced in a variety of ways. If a poultry grower has been adversely affected by a handler's failure to abide by the requirements of the AFPA, or

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<sup>92</sup> *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 16 (N.D. Ga. Oct. 11, 2000) (order denying defendant's motion for judgment as a matter of law), aff'd without opinion by 260 F.3d 627 (11th Cir. 2001).

<sup>93</sup> See *Burger v. Cagle's Farms, Inc.*, 260 F.3d 627 (11th Cir. 2001).

<sup>94</sup> 7 U.S.C. § 2304.

<sup>95</sup> *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 12-15 (N.D. Ga. Oct. 11, 2000) (order denying defendant's motion for judgment as a matter of law), aff'd without opinion by 260 F.3d 627 (11th Cir. 2001).

<sup>96</sup> *Baldree v. Cargill, Inc.*, 758 F. Supp. 704, 706 (M.D. Fla. 1990), aff'd without opinion by 925 F.2d 1474 (11th Cir. 1991).

if a poultry grower has reasonable grounds to believe that a handler is about to engage in a prohibited act, that grower may bring a civil action for preventive relief in court.<sup>97</sup> A grower who has been injured in his or her business or property by any violation of the AFPA may sue the handler and recover money damages and attorneys' fees.<sup>98</sup> Suits under the AFPA must be brought within two years after the violation occurred.<sup>99</sup>

Any party may also complain to USDA about an AFPA violation. If the Secretary of Agriculture has reason to believe that any handler or group of handlers has engaged in any act prohibited by AFPA, the Secretary may bring a civil action against the handler.<sup>100</sup>

### **C. Other Federal Laws Impacting Poultry Growout Arrangements**

In addition to the P&S Act and the AFPA, a number of other federal laws may affect relations between poultry companies and broiler growers. These include laws having to do with alternative dispute resolution, the environment, and taxation. These laws are discussed briefly in this section to complete the picture of federal laws that may affect contract broiler production.

#### *1. Federal Arbitration Act*

As discussed in the contract analysis in Chapter Three of this report, many poultry production contracts include a clause stating that any disputes that arise under the contract will be resolved in arbitration. Inclusion of this type of arbitration provision in a growout contract generally means that disputes covered by the provision cannot be taken to court for resolution.

There has been some controversy over the general issue of whether a person's waiver of the right to go to court to resolve contract disputes should be enforceable even when the waiver was included in a contract that was signed before the person knew what the dispute would be. The Federal Arbitration Act (FAA) resolves this issue for contracts that involve interstate commerce.<sup>101</sup> The FAA provides that written agreements to arbitrate disputes that may arise during the course of the contract are valid and enforceable, if the contract involves interstate commerce.<sup>102</sup> Interstate commerce simply means trade across state lines. Because poultry raised under most broiler contracts is likely to cross states lines once processed, it is very likely that

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<sup>97</sup> 7 U.S.C. § 2305(a).

<sup>98</sup> 7 U.S.C. § 2305(c).

<sup>99</sup> 7 U.S.C. § 2305(c).

<sup>100</sup> 7 U.S.C. § 2305(b). The Secretary's authority to enforce the AFPA is delegated to the Administrator of the Agricultural Marketing Service, an agency within USDA. 7 C.F.R. §§ 2.22(a)(1)(viii)(Q), 2.79(a)(8)(xxiii) (2001).

<sup>101</sup> 9 U.S.C. §§ 1-16.

<sup>102</sup> 9 U.S.C. § 2.

broiler growout contracts would be considered contracts involving interstate commerce.

The FAA includes some general procedural provisions. If the agreement does not describe how arbitrators will be appointed, or if for any reason an arbitrator has not been chosen, a court may name one.<sup>103</sup> Regardless of how the arbitrators have been selected, they may summon witnesses and direct witnesses to bring material evidence.<sup>104</sup> If a person who has been summoned by an arbitrator does not appear, a court may compel the witness's attendance or find him or her in contempt.<sup>105</sup>

If a party attempts to bring to court a dispute that is subject to an arbitration agreement, the FAA authorizes the court to issue a "stay of proceedings."<sup>106</sup> This means that the judge declines to hear the matter, and refers the dispute to arbitration. In very rare cases, a court might be persuaded to deny a request for a stay of proceedings. A party would need to show that there were serious problems with the contract from the outset, such as fraud, duress, or a mutual mistake made by the parties to the contract.<sup>107</sup> Under the FAA, courts may also compel arbitration if a party fails, neglects, or refuses to arbitrate in accordance with a written arbitration agreement.<sup>108</sup>

There is no automatic appeal to a court of an arbitrator's award. In fact, once a dispute has been submitted to arbitration, it is extremely difficult to get the arbitrator's decision overturned by a court. However, an award could be set aside if the arbitrator engaged in misconduct.<sup>109</sup> Examples of misconduct would be accepting money in return for deciding a certain way or refusing to hear relevant evidence. A court could

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<sup>103</sup> 9 U.S.C. § 5.

<sup>104</sup> 9 U.S.C. § 7.

<sup>105</sup> 9 U.S.C. § 7.

<sup>106</sup> 9 U.S.C. § 3.

<sup>107</sup> 9 U.S.C. § 2 (providing that arbitration provisions in contracts involving interstate commerce are valid, irrevocable, and enforceable, unless there are grounds that would lead to the revocation of any contract).

<sup>108</sup> 9 U.S.C. § 4.

<sup>109</sup> 9 U.S.C. § 10. The narrow circumstances under which the FAA allows a party to the arbitration to seek an order from a court to vacate the decision include: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. If the award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

also modify an arbitration award to correct an obvious factual mistake.<sup>110</sup> However, an arbitration decision that is incorrect under the law will not necessarily be overturned. Some judges' willingness to review arbitration awards for "fundamental fairness" has been criticized and reversed by appeals courts.<sup>111</sup>

Many individual states also have arbitration laws. Provisions of state arbitration laws that are in conflict with the FAA may be preempted.<sup>112</sup> Preemption recognizes the supremacy of federal law over conflicting state laws. For example, under the laws of some states, arbitration agreements entered into prior to the dispute are not enforceable by either party.<sup>113</sup> However, to the extent a contract involves interstate commerce, the arbitration clause in the contract would be enforceable against an individual who had signed the contract regardless of state law because the FAA would preempt any conflicting state law.<sup>114</sup>

## 2. Clean Water Act

A thorough analysis of federal environmental regulation of poultry operations is beyond the scope of this report. However, it is important to note that the potential for water pollution from poultry operations is receiving increasing attention from federal and state environmental regulatory agencies and legislatures. Contract poultry growing facilities face the potential for significantly more stringent environmental regulation in the future. How the responsibilities for and costs associated with obtaining required environmental permits and compliance with environmental regulation are distributed between the grower and the poultry company in growout contracts will have a significant impact on the financial returns growers may receive from that contractual relationship.

The federal Clean Water Act addresses water pollution from concentrated animal feeding operations (CAFOs).<sup>115</sup> Regulations issued under the Clean Water Act prohibit CAFOs from discharging potential pollutants, such as animal wastes, into waters of the United States except in a 25-year, 24-hour storm event.<sup>116</sup> These regulations also

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<sup>110</sup> 9 U.S.C. § 11. Courts may only modify an arbitration award under the FAA if: (1) there was a material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award; (2) arbitration award is on a matter not submitted for arbitration; or (3) the arbitration award is imperfect in form not affecting the merits.

<sup>111</sup> See, for example, *Hoffman v. Cargill, Inc.*, 59 F. Supp. 2d 861 (N.D. Iowa 1999), reversed and remanded by 236 F.3d 458 (8th Cir. 2001).

<sup>112</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>113</sup> See, for example, Ala. Code § 8-1-41(3).

<sup>114</sup> See *Continental Grain Co., Inc. v. Beasley*, 628 So. 2d 319 (Ala. 1993).

<sup>115</sup> 33 U.S.C. §§ 1251-1387. See, 33 U.S.C. § 1362(14), defining "point source."

<sup>116</sup> 40 C.F.R. pt. 122, Appendix B (2001). For CAFO non-discharge regulations generally, see 40 C.F.R. pt. 412 (2001).

require many CAFOs to obtain National Pollution Discharge Elimination System permits.<sup>117</sup> Currently, the regulations only apply to chicken facilities if they use continuous overflow watering or liquid manure handling systems, conditions that exempt most, if not all, broiler operations.<sup>118</sup>

However, on January 12, 2001, the Environmental Protection Agency (EPA) published proposed rules that would require permits for all poultry operations of a certain size, regardless of the type of manure management system or watering system used.<sup>119</sup> The rule would also require operators to develop a nutrient management plan for both the production site and any manure application sites and would require certain record keeping, monitoring, and reporting.<sup>120</sup> The proposed EPA rules also provide that all entities that exercise substantial operational control over a CAFO would be subject to the NPDES permitting requirements as an “operator” of the facility.<sup>121</sup> The EPA has entered into a Consent Decree requiring it to take final action on the proposed rule by December 15, 2002.<sup>122</sup>

### *3. National Poultry Improvement Plan*

Although not a law, the National Poultry Improvement Plan is a potentially significant voluntary program that may impact company-grower relations. This plan is a cooperative program of the federal government, participating state governments, and participating members of the industry.<sup>123</sup> The chief goal of this program is preventing the transmission of disease by breeding flocks, as well as the spread of disease by hatcheries.<sup>124</sup> The Plan is updated regularly to incorporate new sampling

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<sup>117</sup> 40 C.F.R. § 122.23 (2001).

<sup>118</sup> 40 C.F.R. pt. 122, App. B (2001).

<sup>119</sup> 66 Fed. Reg. 2959 (2001). For a discussion of the expanded coverage of chicken operations, see 66 Fed. Reg. 3010-12 (2001). For proposed rule language, see 66 Fed. Reg. 3135 (2001) (proposing two alternatives to be codified at 40 C.F.R. § 122.23(a)(3)).

<sup>120</sup> See the discussion in the prefatory comments at 66 Fed. Reg. 2964, 3032-42, 3065-66 (2001). Proposed rule language can be found at 66 Fed. Reg. 3139, 3142 (2001) (proposed to be codified at 40 C.F.R. §§ 122.28(b)(2)(ii), 412.31(b)(1)) and 66 Fed. Reg. 3143 (2001) (proposed to be codified at 40 C.F.R. § 412.37).

<sup>121</sup> See the discussion in the prefatory comments at 66 Fed. Reg. 3023-29 (2001). Proposed rule language can be found at 66 Fed. Reg. 3136-37 (2001) (proposed to be codified at 40 C.F.R. § 122.23(a)(5)(ii), (c)(3)).

<sup>122</sup> See 66 Fed. Reg. 2962 (2001) for a discussion of the consent decree as it relates to regulation of animal feeding operations.

<sup>123</sup> 9 C.F.R. pt. 145 (2001). A list of participating states may be found at [www.aphis.usda.gov/vs/npip/osa-npip.pdf](http://www.aphis.usda.gov/vs/npip/osa-npip.pdf).

<sup>124</sup> There are special provisions for meat-type chicken breeding flocks and products. See 9 C.F.R. pt. 145, subpart C (2001).

and testing procedures for Plan participants and participating flocks.<sup>125</sup> If companies meet the requirements of the plan, participating flocks and the eggs and chicks produced from them may be described using certain terms.<sup>126</sup> These terms may also be used in official USDA designs on the product packaging.<sup>127</sup>

While participation in the Plan is voluntary, some states mandate that companies meet its requirements.<sup>128</sup> Non-participating and non-compliant companies may not describe their flocks as “clean” with respect to specified diseases, a description and label that is available to compliant participants. If a company were participating in a poultry improvement plan, but failed to use the prescribed disease control measures, the company could be excluded from the program, after receiving notice and the opportunity to become in compliance or show that they already are compliant.<sup>129</sup> Several leading poultry producing states treat violations of the requirements of the Plan as misdemeanors, and some levy fines for violations.<sup>130</sup>

#### 4. Internal Revenue Code

As discussed in Chapter Three, poultry growing contracts typically describe the growers as “independent contractors.” Defining the relationship between the poultry company and the poultry grower is important because, if there were an employment relationship, the companies’ responsibilities towards the growers could be significantly altered. For example, if growers were employees, companies would be required to make certain tax payments, as well as withhold income and other taxes from the growers’ checks. In the absence of an employment relationship, the growers must make these payments on their own behalf.<sup>131</sup>

An extensive body of court decisions considers the issue of when someone is an employee and when he or she is an independent contractor.<sup>132</sup> These opinions

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<sup>125</sup> See, for example, 65 Fed. Reg. 8014 (2000) (final rule amending the National Poultry Improvement Plan and its Auxiliary Provisions); 66 Fed. Reg. 37,919 (2001) (proposed rule to amend the Plan and its Auxiliary Provisions).

<sup>126</sup> 9 C.F.R. § 145.33 (2001).

<sup>127</sup> 9 C.F.R. § 145.10 (2001).

<sup>128</sup> See, for example, Ala. Code § 2-16-4 (only applies to chick sales); N.C. Gen. Stat. § 106-543 (only applies to chick sales); Tex. Agric. Code Ann. § 168.002.

<sup>129</sup> 9 C.F.R. § 145.13 (2001).

<sup>130</sup> See, for example, Ala. Code § 2-16-9; Ga. Code Ann. § 4-7-8; N.C. Gen. Stat. §§ 106-549, 106-549.01.

<sup>131</sup> A full discussion of federal tax issues is beyond the scope of this report. For general information on federal tax obligations of employers and self-employed individuals, see Internal Revenue Service publications *Circular E, Employer's Tax Guide*, Publ. 15 and *Self Employment Tax*, Publ. 533.

<sup>132</sup> See, for example, *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (discussing the common law test for determining whether a person is an employee or an independent contractor within the context of an ERISA case).

generally look at a whole range of characteristics of the relationship, including the degree of control exercised by the purported employer. How the relationship is described in the contract is not the determining factor.

In 1958, the Internal Revenue Service issued a ruling that a farmer who had a broiler production agreement with a feed company was not an employee of the company for federal employment tax purposes.<sup>133</sup> The ruling noted that the feed company did not supervise the grower's operation. Significant changes in the poultry industry since the 1958 ruling might make this a closer question.<sup>134</sup> In the absence of a revenue ruling or binding court case overruling the previous IRS ruling, however, poultry growers are generally not treated as employees for federal tax purposes.

#### **D. State Laws Affecting Poultry Growout Arrangements**

In addition to federal laws, state laws may also apply to the contractual relations between contract broiler growers and poultry companies. The state law analysis in this chapter focuses on the laws of the leading poultry producing states including: Alabama, Arkansas, Delaware, Georgia, Maryland, Mississippi, North Carolina, South Carolina, Texas, and Virginia. Laws from other states are also discussed to demonstrate both typical and unique legislative approaches to regulating business relationships such as those found in the U.S. poultry industry. This analysis aims to address the most significant state law provisions related to contract broiler production, but it makes no claim to address every potentially relevant law. For example, state laws having to do with taxation and labor and employment are not discussed.

Section 1 below addresses two threshold issues that must be considered when reviewing possible state law claims: jurisdiction and choice of law. Section 2 focuses on certain state statutes that may specifically regulate agricultural production contracts. Section 3 discusses broad state laws that may affect the rights and responsibilities of growers and poultry companies. It is important to note that state laws which do not specifically mention poultry contracts—or even target agricultural production—may still set limits on lawful conduct under poultry growing arrangements.

##### *1. Threshold Questions for State Law Claims*

If a dispute between a poultry company and a grower involves questions of state law, it will necessary to first resolve two issues. First, where may the lawsuit be brought? That is, which state's courts have the power to decide the issue? This issue is called "jurisdiction." Depending on the circumstances, more than one state may have jurisdiction over a case. In such cases, the party bringing the suit can choose which

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<sup>133</sup> Rev. Rul. 58-568, 1958-2 CB 730.

<sup>134</sup> Okla. Atty. Gen'l Opinion 01-17 (Apr. 11, 2001) (stating that contract growers and producers may be employees). See also, *Tyson Foods, Inc. v. Stevens*, 783 So. 2d 804 (Ala. 2000) (upholding a finding that a contract hog producer was an agent of the company and describing independent contractor status as a question of fact).

jurisdiction the dispute will be heard in. Some growout contracts may include a provision that sets out the state in which a lawsuit must be heard.

The second threshold issue is which state's laws will be followed to decide the dispute. Usually, the court hearing the case will apply its state's laws when making a decision. However, in some cases a contract may include what is called a "choice of law" provision stating that a specific state's laws will apply to disputes under the contract no matter what court has jurisdiction.

## *2. State Statutes Directly Regulating Agricultural Production Contracts*

Some state statutes clearly and directly govern aspects of agricultural production contracts. These laws may govern agricultural production generally, or they may govern one specific type of commodity, such as poultry, swine, livestock, grains, or vegetables. Some states have laws that govern the purchase and sale of agricultural commodities through marketing contracts, but do not yet have laws that address modern production contracts. The statutes and rules discussed below either regulate poultry growing arrangements or are examples of regulation of other commodities that could be applied to poultry growing arrangements.

### *a. Licensing Requirements*

A number of states have licensing requirements for at least some livestock or produce dealers.<sup>135</sup> Licensing requirements not only ensure initial compliance with the license standards, their renewal provisions also provide a quick and easy method for the state to check on and enforce on-going compliance. In **Mississippi**, poultry companies that produce baby chicks in their own hatchery operations in order to provide them to growers who produce broilers must obtain a license.<sup>136</sup> Other states, including **Georgia** and **North Carolina**, also require that hatcheries obtain licenses.<sup>137</sup> Some poultry companies would likely fall under these provisions.

While not a top poultry producing state, **Minnesota** is a state with significant poultry production that has a powerful licensing requirement. Under Minnesota's Wholesale Produce Dealers Act, poultry is defined as "produce" and comes under that Act's protections.<sup>138</sup> This Act requires that all produce dealers

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<sup>135</sup> Some sample state requirements may be found at: Ala. Code § 2-16-3; Cal. Food and Agric. Code § 56181; Del. Code Ann. tit. 3, § 2502; Fla. Stat. § 604.17; Idaho Code § 22-1303; Md. Code Ann., Agric. § 13-203; Minn. Stat. § 27.03; Miss. Code Ann. § 69-7-203; N.C. Gen. Stat. § 106-418.11; Or. Rev. Stat. § 585.020; S.C. Code Ann. § 46-41-30; Va. Code Ann. §§ 3.1-722.2, 3.1-722.17; and W. Va. Code § 19-10B-2. Some states specifically exclude poultry companies. See, for example, Ga. Code Ann. § 2-9-1(1).

<sup>136</sup> Miss. Code Ann. § 69-7-203. See also, Miss. Attorney General Opinion, 2000-0210 (May 8, 2000).

<sup>137</sup> See Ga. Code Ann. § 4-7-3; N.C. Gen. Stat. § 106-542.

<sup>138</sup> Minn. Stat. § 27.01, subd. 2(3).

must be licensed.<sup>139</sup> The definition of “produce dealer” under the Act was revised in 2000 to make it clear that companies that contract with farmers for production of agricultural commodities are produce dealers within the meaning of the Act.<sup>140</sup> Companies may face civil or criminal penalties or lose their licenses if they violate certain requirements.<sup>141</sup> Potential violations include making false statements, breaching the terms of the contract, and failure to make payment in full. Administrative rules implementing the **Minnesota** statute also list “unfair trade practices” as violations that could place a company in danger of losing its license.<sup>142</sup>

*b. Commercial Feed Laws*

Commercial feed generally refers to several materials mixed together for use as feed for animals. Chicken feed would be considered a type of commercial feed under most state laws. Many states have laws regulating the manufacture, sale, and distribution of commercial feed. In general, state commercial feed laws may require licensing, registration, labeling—or a combination of these—and they may forbid misbranding (false or misleading labeling) and adulteration (adding poisonous or harmful substances). A number of states require that commercial feed come with a legible label, delivery slip, or invoice. These laws generally require that the label, delivery slip, or invoice must state the net weight (or other quantity term) of the feed, or of each commercial feed or feed ingredient that is part of the mixture.

States vary in the consequences they impose for violation of their commercial feed laws. States may impose assessments for violations, seize or detain feed, impose orders to stop its sale, warn persons not to distribute it, or condemn it.<sup>143</sup> States may also seek legal action against persons who violate their commercial feed laws by issuing written warnings, seeking injunctions, imposing penalties, and initiating misdemeanor prosecutions.<sup>144</sup>

The laws vary in the protection they potentially provide to contract growers in another way as well. Some states regulate only sales of commercial feed, while

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<sup>139</sup> Minn. Stat. § 27.03.

<sup>140</sup> 2000 Minn. Laws 477, § 24 (codified at Minn. Stat § 27.01, subd. 8).

<sup>141</sup> Minn. Stat. § 27.19, subds. 2-3.

<sup>142</sup> Minn. R. 1500.1401. These practices include making a false or misleading statement for a fraudulent purpose, including statements made to persuade a person to sign a contract, as well as using coercion, intimidation, or the threat of retaliation or contract termination to achieve various ends.

<sup>143</sup> For example, Del. Code Ann. tit. 3, § 1711; Md. Code Ann., Agric. § 6-113; Miss. Code Ann. § 75-45-177; Tex. Agric. Code Ann. § 141.121; Va. Code Ann. §§ 3.1-828.11, 3.1-828.14.

<sup>144</sup> One of the most comprehensive enforcement schemes is in Texas. Tex. Agric. Code Ann. §§ 141.121 through 141.149.

other states regulate the kinds of transfers that take place under a typical poultry production contract. This review focuses on commercial feed laws in the major poultry producing states covered by the Broiler Grower Survey, beginning with those state commercial feed laws that apply to poultry growing arrangements. States whose commercial feed laws appear to apply in cases where poultry companies supply feed to contract growers include: **Delaware, Maryland, Mississippi, Texas, and Virginia.**

**Delaware's** commercial feed law specifically applies to the provision of commercial feed to contract growers.<sup>145</sup> In Delaware, each type of commercial feed must be registered and labeled.<sup>146</sup> The labels must include several pieces of information, including the net weight of the feed (or each type of feed in the case of a mixture). It is unlawful to supply a grower with feed that has been misbranded or adulterated.<sup>147</sup>

**Maryland's** law is similar to Delaware's, though the label for feed delivered to a contract grower may be in the form of an invoice or delivery ticket.<sup>148</sup>

**Mississippi** provides some protection to contract growers related to feed.<sup>149</sup> The state commercial feed law's registration, labeling, misbranding, and adulteration provisions also apply to feed provided to contract growers.

**Texas's** commercial feed law applies to the "distribution" of commercial feed.<sup>150</sup> "Distribute" under this law is defined to include "sell, offer for sale, barter, exchange, or otherwise supply."<sup>151</sup> This language appears to be broad enough to make the law's licensing and labeling requirements applicable to feed provided under poultry growing contracts.

**Virginia's** commercial feed law provisions relating to licensing and labeling apply only to manufacturers and guarantors who distribute commercial feed.<sup>152</sup> "Distribute" is defined to include providing commercial feed to contract growers.<sup>153</sup> A guarantor is defined as a person or company whose name appears on the label of commercial feed.<sup>154</sup> Thus the commercial feed law requirements

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<sup>145</sup> Del. Code Ann. tit. 3, § 1703(2).

<sup>146</sup> Del. Code Ann. tit. 3, §§ 1704, 1705.

<sup>147</sup> Del. Code Ann. tit. 3, §§ 1703(2), 1707, 1708.

<sup>148</sup> Md. Code Ann., Agric. §§ 6-101(e), (f), 6-110.

<sup>149</sup> Miss. Code Ann. §§ 74-45-153(b), 74-45-159, 74-45-161.

<sup>150</sup> Tex. Agric. Code Ann. §§ 141.051-141.054.

<sup>151</sup> Tex. Agric. Code Ann. § 141.001(9).

<sup>152</sup> Va. Code Ann. §§ 3.1-828.5, 3.1-828.6.

<sup>153</sup> Va. Code Ann. § 3.1-828.2, "Distribute."

<sup>154</sup> Va. Code Ann. § 3.1-828.2, "Guarantor."

apply if the company manufactured the feed or if the company's name appears on the label of the feed.

Other states' laws clearly do not apply to poultry growing contracts, or are unclear whether they apply. **Arkansas** law states that feed supplied to independent contractors—the status of most poultry growers under the terms of their contracts—is not considered to be commercial feed, and is exempt from the licensing requirement if granted an exemption license.<sup>155</sup>

**Alabama** law recognizes a specific category of feed that is “vertical-integrator feed,” defined as feed manufactured by a livestock or poultry owner for the purpose of feeding to livestock or poultry.<sup>156</sup> It appears that the state licensing requirements still apply, but the labeling information for vertical-integrator feed may be kept at the manufacturing site and need not be given to the grower.<sup>157</sup>

In **Georgia**, license and labeling requirements apply to all persons or companies that distribute—meaning to offer for sale, sell, exchange, or barter—commercial feed.<sup>158</sup> It seems likely that most poultry companies would not fall within this requirement for their activities related to poultry growing contracts. Similarly, **North Carolina** law requires registration and labeling of commercial feed and prohibits misbranding or adulteration, but these requirements reach only traditional buy/sell and barter exchanges.<sup>159</sup>

**South Carolina's** commercial feed law is confusing because it regulates distribution without defining “distribute,” which is an important clue to the scope of the law in other states.<sup>160</sup> South Carolina's rule with respect to labeling appears to apply only to commercial feed that is “sold or offered or exposed for sale.”<sup>161</sup>

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<sup>155</sup> Ark. Code Ann. §§ 2-37-103(c), 2-37-104(f).

<sup>156</sup> Ala. Code § 2-21-17(25).

<sup>157</sup> Ala. Code §§ 2-21-19, 2-21-20(3).

<sup>158</sup> Ga. Code Ann. §§ 2-13-1(4), 2-13-6, 2-13-8.

<sup>159</sup> N.C. Gen. Stat. §§ 106-284.30 through 106.284.46. The law expressly recognizes “contract feeder” arrangements, such as would exist under a typical broiler growout contract. N.C. Gen. Stat. § 106-284.33(4a). However, the only special provision for such arrangements is that feed is exempt from the inspection fees and reporting requirements of the law to the extent the feed is delivered to a contract feeder. N.C. Gen. Stat. § 106-284.40(6).

<sup>160</sup> S.C. Code Ann. § 46-27-40.

<sup>161</sup> S.C. Code Ann. § 46-27-310.

*c. Marketing and Bargaining Laws*

Several states have enacted state agricultural marketing, bargaining, and fair practices laws.<sup>162</sup> Some of these laws are concerned with protecting farmers from retaliation due to their membership in a producer association. Some of these laws also empower associations of farmers to bargain on behalf of their members. The most relevant laws for the poultry industry address not only collective bargaining relative to price in buy/sell situations, but also address collective bargaining relative to production contract terms.

A number of state marketing and bargaining laws also require alternative dispute resolution for disputes between a company and a grower association. This issue is discussed further in the section below dealing with alternative dispute resolution.

**Maine** has one of the more comprehensive state marketing and bargaining acts.<sup>163</sup> In Maine, individuals who produce under contract are explicitly included as producers who have the right to join associations and receive the protections of the act.<sup>164</sup> The law requires that associations be “qualified” in terms of their ability to represent a majority of growers in relations with a given company.<sup>165</sup> Maine law imposes an obligation on growers and handlers to negotiate in good faith; it also specifies prohibited practices.<sup>166</sup>

**Minnesota**, though not one of the 10 top broiler producing states, has a marketing and bargaining act that would cover most broiler growout situations.<sup>167</sup> A producer is defined under this act as someone who owns agricultural commodities or who provides management, labor, machinery, facilities, or any other production input with the assumption of risk under a written contract.<sup>168</sup> A handler is defined to include those who contract with

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<sup>162</sup> States with marketing and bargaining laws include: California, Cal. Food and Agric. Code §§ 54401-54463; Kansas, Kan. Stat. Ann. §§ 16-1501 through 16-1506 (swine marketing pools); Maryland, Md. Code Ann., Agric. §§ 10-201 through 10-204 (appears to apply to sales transactions only); Michigan, Mich. Comp. Laws §§ 290.701-290.726; Minnesota, Minn. Stat. §§ 17.691-17.710; and Washington, Wash. Rev. Code §§ 15.83.005-15.83.905.

<sup>163</sup> Me. Rev. Stat. Ann., tit. 13 §§ 1953-1965.

<sup>164</sup> Me. Rev. Stat. Ann., tit. 13 § 1774(8-A).

<sup>165</sup> Me. Rev. Stat. Ann., tit. 13 § 1957.

<sup>166</sup> Me. Rev. Stat. Ann., tit. 13 §§ 1958, 1965.

<sup>167</sup> Minn. Stat. §§ 17.691-17.710.

<sup>168</sup> Minn. Stat. § 17.693, subd. 4.

producers for the production of any agricultural commodity.<sup>169</sup> Agricultural commodities are defined broadly, and include poultry and poultry products.<sup>170</sup>

The Minnesota law specifies unfair practices—including coercion, discrimination, and intimidation—that are prohibited for handlers and producer associations.<sup>171</sup> A company may not refuse to bargain with a grower association that the company has had prior dealings with, but there is no requirement that either party enter into a contract if the negotiations are unsuccessful.<sup>172</sup>

The Minnesota Commissioner of Agriculture is authorized to investigate complaints alleging violations of the act and to hold hearings if needed.<sup>173</sup> If the commissioner determines that there has been a violation of the act, he or she may order that the violation cease and may order other affirmative action necessary to effectuate the purposes of the act.<sup>174</sup> The act gives the authority to adopt implementing rules, but these rules currently do not include fines or other penalties for violations.<sup>175</sup>

To receive the benefits of the Minnesota law, an association of growers must be accredited by the state Commissioner of Agriculture.<sup>176</sup> The commissioner will determine the bargaining unit for the association, considering factors such as the plant, processor, company, and geographic area represented by the association’s members.<sup>177</sup>

The marketing and bargaining process provided for under the Minnesota law begins when representatives of a grower association and the company agree to meet to discuss a contract for the upcoming marketing year.<sup>178</sup> Once the process begins, the company and association must meet at least twice a minimum of 60 days prior to the beginning of the marketing year.<sup>179</sup> The parties are required to make a “serious, fair, and reasonable” attempt to reach agreement.<sup>180</sup> If the parties fail to reach agreement during the two information meetings, they may

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<sup>169</sup> Minn. Stat. § 17.693, subd. 6.

<sup>170</sup> Minn. R. 1500.3300, subpt. 2.

<sup>171</sup> Minn. Stat. § 17.696.

<sup>172</sup> Minn. Stat. §§ 17.696, subd. 1(g), 17.697, subd. 4.

<sup>173</sup> Minn. Stat. § 17.70, subd. 1.

<sup>174</sup> Minn. Stat. § 17.70, subd. 2. The Commissioner may also ask the Attorney General to seek enforcement in the courts.

<sup>175</sup> Minn. Stat. § 17.701; Minn. R. 1500.0101-1500.3600.

<sup>176</sup> Minn. Stat. § 17.694, subd. 1.

<sup>177</sup> Minn. Stat. § 17.694, subd. 2.

<sup>178</sup> Minn. Stat. § 17.697.

<sup>179</sup> Minn. Stat. § 17.697, subd. 2.

<sup>180</sup> Minn. Stat. § 17.697, subd. 1.

continue negotiations at mutually agreeable times or may pursue mediation, as discussed in the next section.<sup>181</sup>

**Michigan** law authorizes producer associations for contract producers of perishable fruits and vegetables, but not contract poultry growers.<sup>182</sup>

*d. Dispute resolution*

As discussed in Chapter Three, many poultry growing contracts provide for use of alternative dispute resolution (ADR) in case of a dispute arising under the contract. ADR is a general term for mechanisms for resolving problems that do not involve going to court.

The most common forms of ADR in the poultry industry are mediation, peer review, and arbitration. In mediation, the mediator—a neutral third party—tries to help the parties to resolve their disagreement. A mediator may persuade the parties but has no power to impose a solution on them. If the parties do not agree to a solution in mediation, they may go to court or, if required by the contract, seek arbitration.

In peer review, a small group of people decides how to resolve a dispute. The contract states who will be in the group. Typically the group will be made up of experienced growers, but in some cases it will also include company employees. If a party to the dispute objects to the peer review committee's decision, the party generally may go to court or, if required by the contract, seek arbitration.

In arbitration, one or more arbitrators—neutral third parties—hear the arguments from each side and make a final decision on how to resolve the dispute. As discussed above in the overview of the Federal Arbitration Act, it is very likely that the parties will not be able to appeal to anyone, including a court, if they are unhappy with the arbitrator's decision.

Most states have adopted an arbitration act setting forth procedural rules for arbitration.<sup>183</sup> There may be case law in the state that elaborates on the rules. In addition, state laws may address two types of ADR situations. One of these

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<sup>181</sup> Minn. Stat. § 17.697, subd. 3.

<sup>182</sup> Mich. Comp. Laws § 290.702(f).

<sup>183</sup> One good source of information on arbitration is the American Arbitration Association. The Association's website has links for the arbitration acts for most states. The website is [www.adr.org](http://www.adr.org). The arbitration acts of the leading poultry states can be found at: Ala. Code §§ 6-6-1 through 6-6-16; Ark. Stat. Ann. §§ 16-108-101 through 16-108-224; Del. Code Ann. tit. 10, §§ 5701-5725; Ga. Code Ann. §§ 9-9-1 through 9-9-18; Md. Code Ann., Cts. & Jud. Proc. §§ 3-201 through 3-234; Miss. Code Ann. §§ 11-15-1 through 11-15-37; N.C. Gen. Stat. §§ 1-567.1 through 1-567.20; S.C. Code Ann. §§ 15-48-10 through 15-48-240; Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001-171.098; Va. Code Ann. §§ 8.01-577 through 8.01-581.016.

involves disputes between an individual poultry grower and the company he or she has a contract with. The other is where a grower association and a poultry company turn to ADR because they have been unable to successfully negotiate on their own.

*(1) Individual Disputes*

Some states require that agricultural contracts contain a clause providing that the parties will attempt to resolve certain disputes through ADR. None of the top 10 poultry producing states currently has such a requirement.

**Minnesota** requires that agricultural production contracts include a clause providing for mediation or arbitration of contract disputes.<sup>184</sup>

**Wisconsin** law provides for voluntary mediation or arbitration of vegetable production contracts and requires companies to submit disputes to arbitration if the producer so requests.<sup>185</sup> In **Iowa**, mediation is required before a dispute relating to a livestock “care and feeding contract” can be brought to court, but the statute does not define livestock.<sup>186</sup>

Some state laws—not particular to agriculture—attempt to make arbitration agreements non-binding in some cases. According to **Alabama** law, for example, arbitration agreements entered into prior to the dispute are not enforceable by either party.<sup>187</sup> However, as discussed above, the Federal Arbitration Act provides that written agreements to arbitrate disputes that may occur in the future are valid and enforceable if the contract involves interstate commerce.<sup>188</sup> In a 1993 case, the Supreme Court of Alabama determined that a contract between poultry growers and a poultry company involved interstate commerce because the parties expected most of the poultry produced to be sent to other states.<sup>189</sup> Thus, under the Federal Arbitration Act, the arbitration clause in the contract was enforceable against growers who had signed the contract, despite the state law to the contrary.

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<sup>184</sup> Minn. Stat. § 17.91, subd. 1; Minn. R. 1500.0901, subpt. 3; Minn. R. 1572.0020, subpt. 6. Kansas has a similar provision. Kan. Stat. Ann. § 16-1505 (swine production contracts). A contract that provides for just one form of ADR is permissible under these state laws.

<sup>185</sup> Wis. Stat. § 93.50, Wis. Admin. Code § 101.02(6).

<sup>186</sup> Iowa Code § 654B.3. In another context, an Iowa statutory definition of “livestock” does not include poultry. Iowa Code § 202.1(10).

<sup>187</sup> Ala. Code § 8-1-41(3).

<sup>188</sup> 9 U.S.C. § 2.

<sup>189</sup> *Continental Grain Company v. Beasley*, 628 So. 2d 319 (Ala. 1993). The current rule in Alabama looks at whether the transaction in the contract involves interstate commerce in fact, regardless of what the parties expected. *Coastal Ford, Inc. v. Kidder*, 694 So. 2d 1285, 1287 (Ala. 1997).

**Iowa** law provides that an agreement to submit a future dispute to arbitration is valid and enforceable, unless the arbitration agreement is part of an adhesion contract.<sup>190</sup> An adhesion contract is a form that is offered as a “take it or leave it” proposition, where individual clauses or provisions are not subject to negotiation.<sup>191</sup> It seems likely that this law, too, would be preempted by the Federal Arbitration Act in cases involving interstate commerce.<sup>192</sup> Iowa has not had any cases that have considered this issue.

### (2) *Group Disputes*

As part of their agricultural marketing and bargaining laws, some states have ADR requirements for negotiations and disputes between grower associations and companies. ADR is mandatory in certain circumstances in some states; in other states it is always optional.<sup>193</sup>

**Minnesota** has developed an elaborate dispute resolution system for contract negotiations between producer associations and companies, including formal negotiation and mediation.<sup>194</sup> Under the Minnesota act, once a company and a producer association have begun contract negotiations covered by the act, either party may trigger a mandatory mediation process.<sup>195</sup> If an agreement on contract terms is not reached during mediation, and both parties give written consent, binding arbitration may be used to resolve the dispute.<sup>196</sup> Within five days after the arbitrator’s decision, the company must prepare a contract that includes all terms agreed to in the bargaining or awarded in arbitration.<sup>197</sup> The association must accept the contract within five days of its presentation.

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<sup>190</sup> Iowa Code § 679A.1(2).

<sup>191</sup> See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 600 (1991) (Justice Stevens, dissenting).

<sup>192</sup> See *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>193</sup> See, Cal. Food & Agric. Code §§ 54451-54458; Me. Rev. Stat. Ann. tit. 13, § 1958-B; Mich. Comp. Laws § 290.714; Minn. Stat. § 17.697.

<sup>194</sup> Minn. Stat. § 17.697.

<sup>195</sup> Minn. Stat. § 17.697, subd. 6. The parties may agree on a mediator, or the state Commissioner of Agriculture will appoint one.

<sup>196</sup> Minn. Stat. § 17.697, subd. 12. The parties must notify the commissioner of their desire to use binding arbitration. The notice must (1) set forth in contractual language all matters that the parties agree on, (2) identify all matters that the parties do not agree on, and (3) set forth in contractual language each party’s final offer for resolution of each of those disagreements. The parties must notify the commissioner of their desire to use binding arbitration. Minn. Stat. § 17.697, subd. 13.

<sup>197</sup> Minn. Stat. § 17.697, subd. 15.

The Minnesota act sets forth 14 categories of factors that are to be considered in mediation and arbitration.<sup>198</sup> Those factors include prices paid by competing companies, the producers' cost of production, cost of production of similar-sized companies, and a fair return on investment.<sup>199</sup>

In **Michigan**, if a grower association and handler are unsuccessful in mediation, either party may simply choose not to bargain with the other party for that marketing period.<sup>200</sup> If a party does not make this choice, however, it must continue to negotiate, or the dispute will be sent to arbitration.<sup>201</sup>

In **Maine**, the parties may begin with voluntary mediation, but if they are unable to reach agreement by 30 days before the contract date, they are required to participate in mediation, and then arbitration, of the dispute.<sup>202</sup>

#### *e. Payment Protections*

As discussed earlier, the federal Packers and Stockyards Act protects the right of contract growers to full and prompt payment by creating a statutory trust. States may also have laws that seek to protect agricultural producers' right to full and prompt payment, using a variety of means to achieve that end, including trusts, bond requirements, and liens. It is not always clear, however, whether these laws apply to contract poultry production.

##### *(1) Prompt Payment Requirements*

**Minnesota** law requires wholesale produce dealers, which include contract poultry processors, to pay producers by the date specified in the contract *or* by 10 days after delivery if the contract does not specify a due date.<sup>203</sup> The statute provides for 12 percent interest on payments not received by the required date.

**Georgia** has a law requiring prompt payment when an independent contractor harvests an agricultural product, with "prompt" meaning within 20 days after delivery unless another term is specifically set out in the contract.<sup>204</sup> The provision does not appear to apply to poultry.<sup>205</sup> In addition,

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<sup>198</sup> Minn. Stat. § 17.698.

<sup>199</sup> Minn. Stat. § 17.698(1), (4), (6), and (11).

<sup>200</sup> Mich. Comp. Laws § 290.715.

<sup>201</sup> Mich. Comp. Laws § 290.716.

<sup>202</sup> Me. Rev. Stat. Ann tit. 13, § 1958-B(2), (5).

<sup>203</sup> Minn. Stat. § 27.03, subd. 4; Minn. R. 1500.1101, subpt. 2(D).

<sup>204</sup> Ga. Code Ann. § 2-9-11.1(b).

<sup>205</sup> Compare the definitions of "agricultural products" in Ga. Code Ann. §§ 1-3-3 and 2-9-1. The latter, more restrictive, definition appears to apply.

the statutory language addresses “purchases” of agricultural products, so it is not clear how much protection it would provide in the contract growout context.

**California** law requires payment for farm products within 30 days from delivery or by the time set in the contract.<sup>206</sup> Poultry is included in the farm products covered by the requirement, but only in cases of *purchases*.<sup>207</sup>

In another agricultural sector, **Arkansas** law provides prompt payment protection for catfish producers in part by authorizing civil penalties against processors who fail to make timely payment.<sup>208</sup> **Mississippi** similarly offers special protection for catfish producers, making it an “unfair practice” and a violation of statute for processors to delay or attempt to delay payment.<sup>209</sup>

### (2) Statutory Trusts

**Minnesota** law creates a statutory trust similar to that created at the federal level, but allows producers 40 days to file notice of a claim.<sup>210</sup> This trust clearly applies to contract poultry growers.<sup>211</sup>

**California** law creates a state-operated farm products trust fund.<sup>212</sup> The fund is supported by fees charged to farm product dealers and is available to *sellers* of farm products.<sup>213</sup>

### (3) Bonds

A number of major poultry producing states—including **South Carolina**,<sup>214</sup> **Virginia**,<sup>215</sup> and **Georgia**<sup>216</sup>—have bonding requirements for dealers and handlers of agricultural products, including poultry. However, these

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<sup>206</sup> Cal. Food & Agr. Code § 56302.

<sup>207</sup> See Cal. Food & Agr. Code § 56109.

<sup>208</sup> Ark. Code Ann. § 2-6-106(d) (up to \$50 per day for failure to pay by statutory deadline of 14 days; up to \$100 per day for failure to pay by contractual deadline; up to \$200 per day for invalid or non-sufficient funds checks).

<sup>209</sup> Miss. Code. Ann. § 69-7-659(3).

<sup>210</sup> Minn. Stat. § 27.138, subd. 2 (wholesale produce dealer’s trust); Minn. R. 1500.1101.

<sup>211</sup> Minn. Stat. § 27.01, subds. 2(3) and 8 (defining “produce” and “wholesale produce dealer”).

<sup>212</sup> Cal. Food & Agr. Code §§ 56701-56717.

<sup>213</sup> See Cal. Food & Agr. Code §§ 56702.5, 56704.5.

<sup>214</sup> S.C. Code Ann. § 46-41-60 (maximum bond \$25,000). See S.C. Code Ann. § 46-41-10(1) for a definition of “Dealer in agricultural products.”

<sup>215</sup> Va. Code Ann. § 3.1-722.4 (maximum bond \$40,000). See Va. Code Ann. § 3.1-722.1 for a definition of “agricultural products.”

<sup>216</sup> Ga. Code Ann. § 2-9-4 (maximum bond equals highest amount of products purchased from Georgia producers in one month). See Ga. Code Ann. § 2-9-1(1) for a definition of “agricultural products.”

requirements do not seem to apply to contract poultry production, whether because of the specific agricultural products covered or because they only address cases of purchase or consignment. Most other state bonding laws have similar limitations.

**Arkansas** requires bonding of all out-of-state poultry processors, distributors, and truckers, but the provision only applies to those who *purchase* poultry from Arkansas producers.<sup>217</sup>

**Minnesota's** bond requirements for wholesale produce dealers clearly apply to contract poultry production arrangements.<sup>218</sup>

In the mid-1980s, **Arkansas** and **Mississippi** enacted legislation to ensure full and prompt payment to catfish producers, including requiring all catfish processors having more than \$100,000 in average annual purchases to be bonded.<sup>219</sup>

#### (4) Liens

A number of states create liens in favor of agricultural producers or suppliers, but most of these appear to apply only to sales, or do not apply to poultry.<sup>220</sup>

**Minnesota** law provides for a statutory lien on poultry in favor of growers who have not been paid for their labor.<sup>221</sup> The lien is only available for 20 days after delivery, unless it is perfected by filing within those 20 days.<sup>222</sup>

**Oregon** also creates a lien on all agricultural produce, apparently including poultry, which is “delivered” to a processor.<sup>223</sup>

**Mississippi**, a leading poultry producing state, provides for a statutory lien against the interest of a company in harvested crops.<sup>224</sup> The lien is in favor of

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<sup>217</sup> Ark. Code Ann. § 2-35-213 (bond amount \$10,000). This statute has not been changed since 1957, before the production contract model came to dominate the poultry industry.

<sup>218</sup> Minn. Stat. § 27.041, subd. 1 (maximum bond \$1 million).

<sup>219</sup> Ark. Code Ann. § 2-6-107(b) (bond amount \$250,000); Miss. Code Ann. § 69-7-659(2) (bond amount \$250,000).

<sup>220</sup> See, for example, Ala. Code § 35-11-91 (agricultural laborer's lien); Cal. Food & Agr. Code § 57510 (lien on poultry and eggs for feed and materials supplied); Ga. Code Ann. § 44-14-320 (laborer's lien); Idaho Code § 45-1802 (agricultural producer's lien for commodity sales); and Tex. Prop. Code Ann. § 58.002 (farm worker's lien).

<sup>221</sup> Minn. Stat. § 514.945 (agricultural producer's lien). See Minn. Stat. § 17.90, subds. 2 and 4 for definitions of “agricultural commodity” and “producer.”

<sup>222</sup> Minn. Stat. § 514.945, subd. 2.

<sup>223</sup> Or. Rev. Stat. §§ 87.700, 87.705. See Or. Rev. Stat. § 603.010 for a definition of “meat animal.”

<sup>224</sup> Miss. Code Ann. § 85-7-1(2).

persons who contract with the company for the making, gathering, or preparing for sale of “any crop” with their labor.<sup>225</sup> It is not entirely clear whether this provision applies to animal crops, including poultry.

**Iowa** law provides for a statutory lien in favor of custom cattle feedlot operators and non-poultry commodity production contracts.<sup>226</sup> It does not apply to poultry production contracts.

*f. Recapture of Capital Investment*

Though not a top broiler producing state, **Minnesota** is a state with significant poultry production that has enacted legislation designed to provide some protection for growers’ investments in the poultry industry. Minnesota law provides that until certain conditions are met, a poultry company must not terminate or cancel a written contract that requires a grower to make a capital investment of \$100,000 or more in buildings or equipment with a useful life of five years or more.<sup>227</sup>

The conditions are: (1) the company must have given the grower written notice of its intent to terminate or cancel at least 180 days before the effective date of the termination or cancellation, and (2) the grower must have been reimbursed for damages incurred by the termination or cancellation. Even if the company believes that the grower has breached the contract, the company may not cancel or terminate the contract in most cases unless it gives the grower written notice of the problem and the grower fails to correct the problem within a specified time.<sup>228</sup>

Minnesota’s recapture rule does not apply if the term of the contract simply expires and the company chooses not to renew it.<sup>229</sup> This is a significant limitation on the scope of the protection for broiler growers, in light of the prevalence of flock-to-flock contracts in that industry.

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<sup>225</sup> Miss. Code Ann. § 85-7-1(2). There is no accompanying definition of “crop” in this portion of the Mississippi Code. Elsewhere in the Code, “emerging crops” include both plant and animal crops. Miss. Code § 69-2-9(b). The lien is against the crop for which the labor was supplied. *Flora Compress & Whse. Co. v. Virden*, 642 F. Supp. 466 (S.D. Miss. 1986).

<sup>226</sup> Iowa Code §§ 579A.1-579A.5, 579B.1-579B.7. The first lien type is upon cattle and identifiable cash proceeds for the contract price for feed and care of cattle. The second is on livestock, raw milk, and crops and their proceeds.

<sup>227</sup> Minn. Stat. § 17.92. Kansas has adopted a rule similar to the Minnesota rule for contract swine production. Kan. Stat. § 16-1502.

<sup>228</sup> Minn. Stat. § 17.92, subd. 1.

<sup>229</sup> Minn. R. 1572.0030, subpt. 1.

*g. Allocating Responsibility for Environmental Management*

Many of the leading poultry producing states are beginning to address the questions of what is required and who is responsible for the proper disposal of dead birds and poultry litter when poultry is raised by independent contractors. In some cases, new state laws may demand more than is currently required under the federal Clean Water Act and the regulations that implement it.

In December 2000, a new general permit rule for poultry waste management went into effect in **Virginia**.<sup>230</sup> The rule, adopted by the state Water Control Board, provides general regulation of poultry waste management at all operations with 20,000 or more chickens or 11,000 or more turkeys.<sup>231</sup> Growers whose operations are covered by the rule must complete a waste management training program and must develop a nutrient management plan for proper storage, treatment, management, and tracking of poultry waste, including dry litter.<sup>232</sup> Routine disposal of dead birds in disposal pits is not permitted under the general permit rule, but this form of carcass disposal would still be allowed if a grower were operating under an individual waste management permit.<sup>233</sup>

**Georgia** requires “any person who owns or is caring for” a dead animal, to dispose of it within 12 hours after death or discovery of the carcass.<sup>234</sup> The definition of dead animal includes poultry, and applies to carcasses, parts of carcasses, effluent, or blood of the bird.<sup>235</sup> The regulations quarantine the land of people who grow poultry for themselves or others, unless they use a method of carcass disposal approved by the state Commissioner of Agriculture.<sup>236</sup> Growers who provide and maintain an approved method of poultry carcass disposal are issued certificates of compliance by the state Commissioner of Agriculture.<sup>237</sup>

**Maryland** is currently phasing in requirements for farm nutrient management plans that were adopted in 1998.<sup>238</sup> The requirements apply to all farms in the state except agricultural operations with less than \$2,500 in annual gross farm income and livestock operations with less than 8,000 pounds of live animal weight.<sup>239</sup> The focus of the requirements is chemical fertilizer, sludge, and manure

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<sup>230</sup> 17 Va. Regs. Reg. 398 (Oct. 23, 2000) (codified at 9 Va. Admin. Code §§ 25-630-10 through 25-630-60). The program was required by Va. Code Ann. § 62.1-44.17:1.1.

<sup>231</sup> 9 Va. Admin. Code §§ 25-630-10 through 25-630-60.

<sup>232</sup> 9 Va. Admin. Code § 25-630-50.

<sup>233</sup> Va. Code Ann. § 3.1-743; 9 Va. Admin. Code § 25-32-260(2).

<sup>234</sup> Ga. Code Ann. § 4-5-5.

<sup>235</sup> Ga. Code Ann. § 4-5-2.

<sup>236</sup> Ga. Comp. R. & Regs. 40-16-2-06(1).

<sup>237</sup> Ga. Comp. R. & Regs. 40-16-2-06(2).

<sup>238</sup> 1998 Md. Laws 324-325 (codified at Md. Code Ann., Agric. §§ 8-801 to 8-807).

<sup>239</sup> Md. Code Ann., Agric. § 8-803.1(b).

use. A farm operator who uses manure must have a nutrient management plan for nitrogen by December 31, 2001, and a plan for both nitrogen and phosphorus by July 1, 2004.<sup>240</sup> The operator must be in compliance with the nitrogen plan by December 31, 2002, and the nitrogen and phosphorus plan by July 1, 2005.

In addition to direct regulation of the water quality impacts of poultry operations through the nutrient management plans, **Maryland** uses Poultry Processor Discharge Permits to require poultry companies to ensure that their contract growers have nutrient management plans and are making a good faith effort to comply with them.<sup>241</sup> The permits require companies to provide sufficient technology and assistance to growers to ensure that poultry litter is disposed of properly. The permit language explicitly holds the company responsible for the management of poultry litter generated at contract growers' farms and makes compliance with the permit requirements the responsibility of the company, regardless of any language in a contract between the grower and the company.<sup>242</sup> Although the Poultry Processor Discharge Permit does not directly regulate growers and growers are not liable for penalties under the permit, these permits can have a serious impact on grower operations. If the company is notified that certain violations of the state water quality law have occurred at a grower's farm, the company is prohibited under the permit from placing additional chickens at the grower's farm until the violations are corrected.<sup>243</sup>

**Maryland** law also requires that feed used for chickens grown under contract contain enzymes to reduce phosphorus in poultry waste.<sup>244</sup> Maryland has also created a four-year voluntary pilot program offering cost-share assistance to poultry companies to encourage them to transport poultry litter from areas with too much phosphorus in the soil to other parts of the state.<sup>245</sup> Finally, Maryland grants a tax deduction to farm owners or tenants for the purchase of poultry manure spreading equipment to be used in accordance with a nutrient management plan.<sup>246</sup>

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<sup>240</sup> Md. Code Ann., Agric. § 8-803.1(e).

<sup>241</sup> "MDE Announces Final Determination in Poultry Industry Integrator Permit," Maryland Dep't of the Environment News Release 039-01 (July 18, 2001), available at [www.mde.state.md.us/press/nr\\_mde-010718.html](http://www.mde.state.md.us/press/nr_mde-010718.html).

<sup>242</sup> See [www.mde.state.md.us/wma/poultry/intelang.PDF](http://www.mde.state.md.us/wma/poultry/intelang.PDF), part IV.E.1, page 2.

<sup>243</sup> See [www.mde.state.md.us/wma/poultry/intelang.PDF](http://www.mde.state.md.us/wma/poultry/intelang.PDF), part IV.E.6.f, pages 5-6.

<sup>244</sup> Md. Code Ann., Agric. § 6-107.1.

<sup>245</sup> Md. Code Ann., Agric. § 8-704.2; Md. Regs. Code tit. 15, § 20.05.01.

<sup>246</sup> Md. Code Ann., Tax-Gen. §§ 10-208(m), 10-308(b)(4).

**Delaware** will require individual poultry growers to develop a nutrient management planning program by a specified year between 2003 and 2007.<sup>247</sup> These plans are to address generation, handling, and land application of poultry litter and other agricultural wastes. Delaware also imposes special waste handling and storage requirements for poultry operations that qualify as confined animal feeding operations (CAFOs) under federal Clean Water Act regulations.<sup>248</sup>

The major poultry companies operating in **Delaware** have entered into a Memorandum of Understanding (MOU) with the Delaware Nutrient Management Commission, Department of Agriculture, and Department of Natural Resources and Environmental Control.<sup>249</sup> In the MOU, the poultry companies committed themselves to assist growers with nutrient management and litter and manure disposal.

**Kentucky** law requires that the owner of poultry that have died or been destroyed due to disease must dispose of the carcasses within 48 hours after the carcass is found.<sup>250</sup> The disposal must be by a scientifically proven method, including incineration, composting, rendering, or burial under specific conditions.

In August 2000, administrative rules became effective in **Kentucky** that place conditions on National Pollutant Discharge Elimination System permits issued by the state for CAFOs.<sup>251</sup> As related to contract broiler production, the rules required the grower and the company to apply for and obtain a pollution discharge permit for the operation and made them jointly and severally liable for any violation of the permit.<sup>252</sup> Joint and several liability means that the state could sue either the company or the grower, or both, in case of violations.<sup>253</sup> The rule

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<sup>247</sup> Del. Code Ann. tit. 3, §§ 2201-2290. If the disposal of poultry carcasses and dry poultry litter are conducted in a manner that threatens human health or the environment, the poultry growing operation might come under the state's Solid Waste Disposal regulations. Code of Del. Regs. § 70-100-102(2)(C).

<sup>248</sup> Del. Code Ann. tit. 3, § 2248.

<sup>249</sup> Del. Dep't of Natural Resources and Environmental Control News, Jan. 12, 2001, p. 4. The newsletter can be found on the Internet at [www.dnrec.state.de.us/dnrec2000/admin/news/01-12/0112news.htm](http://www.dnrec.state.de.us/dnrec2000/admin/news/01-12/0112news.htm).

<sup>250</sup> Ky. Rev. Stat. Ann. § 257.160.

<sup>251</sup> See the August 25, 2000, entry in the online "Latest News and Updates" from the Kentucky Division of Water, available at <http://water.nr.state.ky.us/dow/cafo2.htm>.

<sup>252</sup> 401 Ky. Admin. Reg. 5:072.

<sup>253</sup> If only one party were sued, that party could sue the other party to pay its share of the penalty.

expired when the state legislature adjourned in March 2001.<sup>254</sup> The state Natural Resources and Environmental Protection Cabinet then issued an emergency rule establishing standards for NPDES permits.<sup>255</sup> This rule was challenged in court, and in May 2001, a state district court judge held that the rule was void because its adoption violated Kentucky's laws of administrative procedure.<sup>256</sup> This situation is continuing to develop, with appeals in the court system and further initiatives by the agency and the legislature.

**Alabama** requires "every person who raises, grows, feeds, or otherwise produces poultry for commercial purposes" to be equipped with adequate facilities for disposing of dead poultry, poultry carcasses, and other poultry waste.<sup>257</sup> Poultry operations that are not equipped with adequate waste disposal facilities may be quarantined.<sup>258</sup>

#### *h. Implied Promise of Good Faith*

In some states, companies and growers who enter into poultry production contracts are held by law to be promising to act in good faith, whether or not they actually make such a promise. Generally, "good faith" means honesty in fact in making and carrying out the contract.<sup>259</sup> This type of law can be important because it can provide a remedy for behavior that, although not otherwise illegal, creates unfair advantage through deception.

**Minnesota** has imposed a duty of good faith on participants in the poultry industry by statute.<sup>260</sup> In **North Carolina**, an implied promise of good faith has been recognized for poultry growing contracts in a federal court opinion, rather than in a statute.<sup>261</sup> In a recent **Georgia** case, another federal district court recognized an implied promise of good faith and fair dealing in a poultry

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<sup>254</sup> *Kentucky Farm Bureau Federation v. Commonwealth of Kentucky*, Civ. Action No. 00-CI-00706, p. 3 (Franklin Circuit Ct., May 25, 2001). Available as an attached document from <http://water.nr.state.ky.us/dow/caf02.htm>.

<sup>255</sup> 401 Ky. Admin. Reg. 5:074E.

<sup>256</sup> *Kentucky Farm Bureau Federation v. Commonwealth of Kentucky*, Civ. Action No. 00-CI-00706 (Franklin Circuit Ct., May 25, 2001).

<sup>257</sup> Ala. Code § 2-16-41.

<sup>258</sup> Ala. Code § 2-16-42.

<sup>259</sup> See, for example, Uniform Commercial Code § 1-201(19).

<sup>260</sup> Minn. Stat. §§ 17.94, 336.1-201(9).

<sup>261</sup> *Philson v. Cold Creek Farms, Inc.* 947 F. Supp. 197, 203 (E.D.N.C. 1996), aff'd in relevant part sub nom. *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998) (citing *Dull v. Mutual of Omaha Ins. Co.*, 354 S.E.2d 752, 756 (N.C. App. 1987) and *Weyerhaeuser Co. v. Godwin Building Supply Co.*, 253 S.E.2d 625 (N.C. App. 1979).

production contract.<sup>262</sup> Some states also impose a duty on grower associations and poultry companies to negotiate in good faith.<sup>263</sup>

*i. Disclosure of Contract Terms*

In **Minnesota**, a growout contract between a grower and a poultry company may not include terms that prohibit the grower from disclosing the terms, conditions, and prices agreed to in the contract.<sup>264</sup> Any clause that purports to bar disclosure is void. **Iowa** has a similar law, but it does not currently apply to poultry.<sup>265</sup>

*j. Plain Language and Risk Disclosure Requirements*

Few states currently have laws addressing the use of plain language in agricultural contracts, but this issue is one focus of the proposed model Producer Protection Act being promoted by a group of 16 state Attorneys General.<sup>266</sup>

In **Minnesota**, a law passed in 2000 provides that all agricultural contracts that were first entered into or substantively modified after January 1, 2001, must meet certain plain language requirements.<sup>267</sup> First, the contract must be accompanied by a cover sheet to help the grower understand the terms of the contract as well as the risks associated with the contract.<sup>268</sup> The cover sheet must state that the document is a legal contract, direct the parties to read the contract carefully, describe the material risks the grower would face if he or she entered into the contract, note the grower's right to cancel the contract within three days (this right under Minnesota law is discussed in the next section), and provide an index of the major provisions of the contract and the pages they are on (if the contract is more than one page).<sup>269</sup> The risks associated with the contract may be described in a clear written statement or in a checklist.

Second, the law requires that the contract itself use "words and grammar that are understandable by a person of average intelligence, education, and experience

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<sup>262</sup> *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 20-21 (N.D. Ga. Oct. 11, 2000) (order denying defendant's motion for judgment as a matter of law), aff'd without opinion by 260 F.3d 627 (11th Cir. 2001).

<sup>263</sup> See, Me. Rev. Stat. Ann. tit. 13, §§ 1953, 1958; Mich. Comp. Laws § 290.713.

<sup>264</sup> Minn. Stat. § 17.710. This is true for contracts entered into, renewed, or amended on or after July 1, 1999.

<sup>265</sup> Iowa Code §§ 202.1(2), 202.3.

<sup>266</sup> See Appendix 4-A of this report.

<sup>267</sup> 2000 Minn. Laws 470 (codified at Minn. Stat. §§ 17.90–17.9443).

<sup>268</sup> Minn. Stat. §§ 17.91, subd. 2, 17.942.

<sup>269</sup> Minn. Stat. § 17.942.

within the industry.”<sup>270</sup> The law also forbids the use of “fine print,” stating that the typeface used in the contract must be of a certain minimum size.<sup>271</sup>

Individual growers may not waive these protections, but these requirements do not apply to contracts negotiated by an accredited bargaining organization.<sup>272</sup> A violation of the plain language requirements by the company does not excuse a breach of the contract by a grower.<sup>273</sup> However, the grower may recover actual damages if the company’s violation of the statute caused the grower to not understand the rights, obligations, or remedies of the contract.<sup>274</sup>

#### *k. Cooling Off Period*

In **Minnesota**, a law passed in 2000 provides that a grower may cancel an agricultural contract by mailing a written cancellation notice to the company within three business days after the grower receives a copy of the signed contract.<sup>275</sup> A later cancellation deadline may apply if included in the contract. The grower’s right to cancel, the method a grower must use to cancel, and the deadline for canceling the contract must be disclosed in every agricultural contract entered into or substantively modified after January 1, 2001.<sup>276</sup> The law is not clear about the timing and process for cancellation if a grower does not in fact receive a copy of the signed contract.

#### *l. Parent Company Liability*

In **Minnesota**, if a poultry company that is the subsidiary of another company fails to pay its debts, the law clearly makes the parent company liable for those debts.<sup>277</sup> Neither “parent company” nor “subsidiary” are defined in the statutes.

#### *m. Use of Insurance Proceeds*

In **Wisconsin**, written contracts or poultry growing arrangements must clearly set out how payments received due to loss of poultry because of fire, disease, or unanticipated causes will be divided between the parties.<sup>278</sup> This is in contrast to many of Wisconsin’s other laws relating to agricultural production contracts, which apply only to certain vegetables.

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<sup>270</sup> Minn. Stat. § 17.943, subd. 1. Factors in determining readability are listed in Minn. Stat. § 17.944, subd. 3.

<sup>271</sup> Minn. Stat. §§ 17.943, subd. 1, 17.90, subd. 3a.

<sup>272</sup> Minn. Stat. §§ 17.9442, subd. 3, 17.9443.

<sup>273</sup> Minn. Stat. § 17.9441, subd. 4.

<sup>274</sup> Minn. Stat. § 17.9441, subd. 4.

<sup>275</sup> 2000 Minn. Laws 470, § 5 (codified at Minn. Stat. § 17.941).

<sup>276</sup> 2000 Minn. Laws 470, § 6 (codified at Minn. Stat. § 17.942, subds. 1, 2(4)).

<sup>277</sup> Minn. Stat. §§ 17.93, subd. 2, 27.133; Minn. R. 1500.1001, subpt. 2; Minn. R. 1572.0040. Kansas has a similar law for contract hog production. Kan. Stat. Ann. § 16-1501(d).

<sup>278</sup> Wis. Stat. § 100.04.

*n. Waivers Unenforceable*

In **Minnesota** and **Iowa**, contract provisions that require waiver of certain producer protections are void or unenforceable.<sup>279</sup> This means that farmers who agree to forego the exercise of their rights as a condition of receiving a contract are free to decide to exercise those rights later.

*3. General State Law Claims*

All states have generally applicable laws that may help resolve specific disputes in the poultry industry. The following general state law claims are available in most states—including the major poultry producing states—to determine the outcome of disputes between private parties. The availability and particular requirements for each type of law varies from state to state.

*a. Unfair and Deceptive Trade Practices*

A state's unfair and deceptive trade practices act could be similar to the federal Packers and Stockyards Act, though it is unlikely to be limited to agriculture. States vary on the range of practices regulated by their unfair and deceptive practices acts. Unfair and deceptive trade practices in agriculture may also be regulated through licensing requirements and marketing and bargaining acts.<sup>280</sup>

**Alabama** law prohibits actions in restraint of trade and deceptive trade practices.<sup>281</sup> At the end of a list of specific prohibited activities, the law generally prohibits “engaging in any other unconscionable, false, misleading, or deceptive act or practice in the conduct of trade or commerce.”<sup>282</sup>

**Arkansas** law prohibiting deceptive trade practices similarly includes a general prohibition on “engaging in any other unconscionable, false, or deceptive act in business, commerce, or trade.”<sup>283</sup> Arkansas law also includes a specific prohibition on unfair trade practices in the catfish industry, making it “unlawful for any processor to engage in or use any unfair, unjustly discriminatory, or deceptive trade practice.”<sup>284</sup>

**Minnesota** law specifies prohibited business and trade practices in the context of agricultural production contracts.<sup>285</sup> Prohibited acts include failure to make a

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<sup>279</sup> Minn. Stat. § 17.9443; Iowa Code § 579B.6.

<sup>280</sup> See Cal. Food and Agric. Code § 54431; Minn. Stat. §§ 17.692, 17.696; Wis. Stat. §§ 96.02, 100.01.

<sup>281</sup> Ala. Code §§ 8-19-1 through 8-19-15.

<sup>282</sup> Ala. Code § 8-19-5(26).

<sup>283</sup> Ark. Code § 4-88-107(a)(10).

<sup>284</sup> Ark. Code § 2-6-106(a)(1).

<sup>285</sup> Minn. Stat. § 27.19; Minn. R. 1500.1401; Minn. R. 1572.0045, subpt. 1.

settlement with a producer within the required time and failure to comply with the terms and conditions of the contract.<sup>286</sup>

**North Carolina's** unfair and deceptive trade practices law has been tested in a case involving a poultry growing contract.<sup>287</sup> In that case, a turkey grower recovered against a poultry company under the state unfair and deceptive trade practices act for the company's admitted misweighing of birds.<sup>288</sup>

*b. Fraud*

Fraud is an intentional deception that causes harm to another person. A fraud claim generally includes the following elements: (1) a statement by a person who either knows that it is false or does not know whether it is true; (2) the person making the statement intends and reasonably believes that the person to whom it was said will rely upon it; (3) the person to whom the statement was made is unaware of its falsity and reasonably relies upon it; and (4) the person relying on the false statement suffers harm.<sup>289</sup>

Sometimes a fraud claim may be based on misrepresentations that led a person to enter a contract that he or she would not have entered if the truth had been known.<sup>290</sup> This is generally referred to as "fraudulent inducement to contract."

**Alabama** law prohibiting fraud has been tested in a case involving contract poultry growing. In *Braswell v. ConAgra, Inc.*, a large class of growers brought a successful fraud claim against a poultry company based on the company's misweighing of birds.<sup>291</sup> In another poultry case in Alabama, growers recovered on a claim of fraud after showing that the company had entered into a written

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<sup>286</sup> Minn. Stat. § 27.19, subd. 1(a)(4) and (5).

<sup>287</sup> N.C. Gen. Stat. § 75-1.1.

<sup>288</sup> See *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998). In denying the company's motion for summary judgment, the district court had disavowed the holding of an earlier poultry case that had held that only consumers were able to bring an action under North Carolina's unfair and deceptive trade practices law. *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D.N.C. 1996).

<sup>289</sup> See, for example, Ala. Code §§ 6-5-100 through 6-5-104; *MFA Mutual Ins. Co. v. Keller*, 623 S.W.2d 841, 842-43 (Ark. 1981); *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983); Ga. Code. Ann. §§ 51-6-1 through 51-6-4; *Ellerin v. Fairfax Savings*, 652 A.2d 1117, 1124 (Md. App. 1995); *Allen v. Mac Tools, Inc.*, 671 So. 2d 636, 642 (Miss. 1996); *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 374 S.E.2d 385, 391 (N.C. 1988); *Mishoe v. General Motors Acceptance Corp.*, 107 S.E.2d 43, 49 (S.C. 1958); *Sears, Roebuck & Co. v. Meadows*, 877 S.W.2d 281, 282 (Tex. 1994); *Jefferson Std. Life Ins. Co. v. Hedrick*, 27 S.E.2d 198, 202 (Va. 1943).

<sup>290</sup> See, for example, *Allen v. Mac Tools, Inc.*, 671 So. 2d 636 (Miss. 1996).

<sup>291</sup> 936 F.2d 1169 (11th Cir. 1991).

agreement to place birds with them if certain improvements were made, when it knew that it was likely to cease operations in the growers' county.<sup>292</sup>

An action that by itself is a violation of the federal P&S Act may also be the basis of a fraud claim. For example, if a poultry company misweighs poultry, this is likely to be a P&S Act violation. If the company then intentionally includes the inaccurate weights on a settlement sheet, this may be a fraudulent act. In one case, a group of turkey growers successfully argued that settlement sheets including incorrect or deceptive figures or calculations may be submitted as evidence in support of a fraud claim under **Arkansas** law.<sup>293</sup> More recently, an Arkansas state court held that deliberately issuing false weighing tickets may constitute concealment of fraud, which may stop the running of the statutory deadline for bringing a fraud claim.<sup>294</sup>

### *c. Negligence*

Negligence involves situations where a person owes a duty of care to another person or to the public and the failure to use reasonable care causes harm to another person. Negligence may also include cases where a person should have known how to prevent a problem, but failed to act in a way that would have prevented the problem.

In some circumstances, persons injured by the negligence of another are not able to recover damages or are limited in their recovery if they do not attempt "self-help" measures to minimize their damages. Self-help measure may include substitution, which means finding replacement goods or services if the negligent party fails to provide them or provides ones of inferior quality.

In a **Georgia** case from 1980, an egg producer refused to pay for feed that he believed was defective and had caused a drop in his production.<sup>295</sup> The supplier sued to recover payment for the feed and the producer counterclaimed for his lost production damages, arguing that the supplier had been negligent in supplying bad feed. The jury found in the supplier's favor, and the Court of Appeals of Georgia affirmed. The court's decision was based in large part on the producer's failure to take any steps to avoid harm by changing feed or stopping delivery of the feed once he had reason to believe that it was bad.

### *d. Breach of Contract*

A breach of contract claim arises when one party promises to perform certain actions in a contract, but partially or entirely fails to do so. Lawsuits brought by

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<sup>292</sup> *Marshall Durbin Farms, Inc. v. Landers*, 470 So. 2d 1098 (Ala. 1985).

<sup>293</sup> *Renfro v. Swift Eckrich*, 53 F.3d 1460 (8th Cir. 1995).

<sup>294</sup> *Adams v. Wolf*, 2001 Ark. App. LEXIS 336 (Ark. App. 2001).

<sup>295</sup> *Brooks v. Ralston Purina Co.*, 270 S.E.2d 347 (Ga. App. 1980).

growers against poultry companies frequently allege breach of contract, as do many cases brought by companies against growers. In *Braswell v. ConAgra, Inc.*, a large class of growers recovered under **Alabama** law against a poultry company for the company's breach of production contracts by misrepresenting the weight of broilers and paying the growers less than they were entitled to under the contracts.<sup>296</sup> In another case, turkey growers recovered under **Arkansas** law on claims that the company breached their contract by mishandling and misweighing their birds.<sup>297</sup>

One type of damages that may be available under a breach of contract claim is the loss of profits that the plaintiff would have earned if the other party had not breached. In an early **Arkansas** case, a grower was awarded lost profits resulting from a company's failure to supply a flock of chicks as required under the contract.<sup>298</sup> In a **Georgia** case involving a claim for lost profits, a grower had entered a contract to develop a breeder flock and produce eggs for a poultry company.<sup>299</sup> The grower alleged that the company provided bad feed, breaching the contract and caused the grower to suffer lost profits. The trial court allowed the grower to bring the lost profits claim and awarded the damages against the company. On appeal, the Court of Appeals of Georgia affirmed, finding that lost profits were recoverable because there was a "patent correlation" between the feed given to the chicks and the number of eggs produced, so that bad feed provided by the company would reduce the amount of profit that a grower could earn from the contract.

#### *e. Breach of Fiduciary Duty*

A fiduciary is a person who has accepted a duty to act primarily for the benefit of another person in certain matters. In a 1999 Iowa case, contract hog producers were allowed to go to trial to make the claim that the hog company was in a fiduciary relationship to them based upon contractual language placing "unprecedented control, dominance, and influence" in the company's hands.<sup>300</sup> This case suggests that, depending on the circumstances and a state's particular standards for fiduciary duty, a poultry grower might be able to claim that a poultry company has a fiduciary duty to act for the benefit of the grower with respect to certain terms of the contract.

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<sup>296</sup> 936 F.2d 1169 (11th Cir. 1991).

<sup>297</sup> *Renfro v. Swift-Eckrich, Inc.*, 53 F.3d 1460 (8th Cir. 1995).

<sup>298</sup> *Farmers Cooperative Assn., Inc. v. Phillips*, 422 S.W.2d 418 (Ark. 1968). The case does not address language in the contract that allowed the company to change or cancel the contract due to changes in the industry.

<sup>299</sup> *Glennville Hatchery, Inc. v. Thompson*, 298 S.E.2d 512 (Ga. App. 1982). The court's analysis of the ongoing vitality of the oral contract, despite a merger clause in the written contract, is notable.

<sup>300</sup> *Corcoran v. Land O' Lakes, Inc.*, 39 F. Supp. 2d 1139 (N.D. Iowa 1999).

This argument may be even stronger for growers for agricultural cooperatives. One **Georgia** court emphasized that the “confidential relationship” between growers and a cooperative might entitle the growers to rely on statements by the cooperative where reliance would otherwise not be reasonable.<sup>301</sup>

*f. Interference with Contractual Relationships*

In some states, statutes or case law prohibit intentional interference with an existing contractual relationship or with one that could form in the future.<sup>302</sup> To establish interference, a person generally must show: (1) the existence of a contract between the parties; (2) actual or implied knowledge on the part of a non-party that the contract existed; (3) intent by the non-party to induce a breach of contract by one of the parties; (4) action by a party which breaches the contract; and (5) damages to the other party. In a 1999 Iowa case, contract hog producers were allowed bring a claim that the hog company’s actions made it impossible for the producers to cash flow and therefore wrongfully interfered with their existing and potential contracts with lenders.<sup>303</sup>

*g. Nuisance*

Nuisance is a legal claim based on interference with a person’s use and enjoyment of their own property.<sup>304</sup> Flooding and odor are two common types of nuisance claims. A nuisance claim would generally be brought by someone other than the grower or the poultry company, such as a neighbor of the grower. Disputes over whether the grower or the company must defend against nuisance lawsuits and pay for them if they lose are beginning to arise in the poultry industry. Unlike many other laws, nuisance laws may be “strict liability,” meaning that the claimant need only prove that the nuisance was caused by the defendant, not that the defendant did anything wrong.

Although it is beyond the scope of this report to discuss the full range of possible types of nuisance lawsuits and defenses to them, one issue that may be addressed in nuisance lawsuits is whether the poultry company can be held liable for a nuisance caused by a contract grower’s facility.<sup>305</sup> A legal issue that is related to whether a company may be held liable for a nuisance caused by a contract grower’s facility is the issue of agency. An agent acts on behalf of another party, called the principal. Because of this relationship, the principal may be liable for the agent’s actions that are taken for the principal’s benefit. Neighbors or others bringing a nuisance claim may argue that the grower is an

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<sup>301</sup> *Gold Kist v. Wilson, Inc.*, 444 S.E.2d 338 (Ga. App. 1994).

<sup>302</sup> See, for example, *Nicholson v. Simmons First Nat’l Corp.*, 849 S.W.2d 483, 487 (Ark. 1993).

<sup>303</sup> *Corcoran v. Land O’ Lakes, Inc.*, 39 F. Supp. 2d 1139 (N.D. Iowa 1999).

<sup>304</sup> See, *Nugent v. Pilgrim’s Pride Corp.*, 30 S.W.2d 562 (Tex. App. 2000).

<sup>305</sup> For more on nuisance generally, see Neil D. Hamilton, *A LIVESTOCK PRODUCER’S GUIDE TO: NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW* (1992).

agent of the company and therefore the company should be liable for odors, water pollution, or other nuisances caused by the poultry operation. If the grower is held to be an agent of the company, generally the neighbor who brings the lawsuit may attempt to recover the damages from the grower, the company, or both.

In a recent **Alabama** case, a company and farmer had entered into a contract for the farmer to raise hogs owned by the company.<sup>306</sup> As is true of most poultry contracts, the contract described the hog producer as an “independent contractor.” Neighbors complained that odor and wastes associated with the hog operation were causing a nuisance on their property. The Alabama Supreme Court concluded that it was reasonable for the jury to find that the farmer was acting as the company’s agent. Because the farmer was found liable for nuisance, the fact that he was the company’s agent meant that the neighbor could attempt to recover the damages from the farmer or from the company.

#### *h. Breach of Warranty of Merchantability*

A warranty of merchantability is a promise that a product or service is reasonably fit for the purposes for which things of that kind are generally used. Such a warranty is said to be “implied” when the seller does not actually make such a promise but the warranty is automatically included in the transaction because the state law requires it. Virtually all states have enacted (with some revisions) provisions of the Uniform Commercial Code (UCC), which provides for an implied warranty of merchantability in certain sales transactions.<sup>307</sup> It is likely, therefore, that most states’ laws include some implied warranty of merchantability that may cover a grower’s *purchase* of chicks, feed, or other inputs.<sup>308</sup>

In one **Arkansas** case, turkey growers who purchased poult from a company that later repurchased the grown birds were allowed to bring a claim of breach of implied warranty of merchantability for poor poult quality, but the jury found that the company had not breached the warranty.<sup>309</sup>

It is doubtful whether an implied warranty of merchantability would apply in contract poultry production if the company supplies, but does not sell, the chicks, medicine, and feed to growers. However, if a clause in the contract

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<sup>306</sup> *Tyson Foods, Inc., v. Stevens*, 783 So. 2d 804 (Ala. 2000).

<sup>307</sup> An implied warranty of merchantability is found in section 314 of Article 2 of the Uniform Commercial Code.

<sup>308</sup> See, for example, Md. Code Ann., Com. Law § 2-314. This statute provides that a merchant who sells covered goods, simply by virtue of selling the goods, indicates that the goods, “pass without objection in the trade under the contract description” and are “of fair average quality within the description.” Md. Code Ann., Com. Law § 2-314(2).

<sup>309</sup> *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

represents that the chicks and other inputs will be of a certain quality, a grower could argue that the company has made an express warranty of quality that can be enforced.

*i. Product Liability*

Product liability claims are claims that a product is defective in some way that made it unreasonably dangerous and in fact caused injury to a person or property.<sup>310</sup> Growers who actually purchase inputs such as feed and who suffer injury to themselves or their property due to defects in the inputs may be able to bring a product liability claim.<sup>311</sup> In theory, it may be possible for a contract grower to maintain a product liability claim against a company, despite the absence of a sales transaction, if the state statutory language regulates “manufacturers” of products as well as “sellers.”<sup>312</sup>

*j. Promissory Estoppel*

Promissory estoppel is a legal claim that allows a party to enforce another’s promises in certain circumstances.<sup>313</sup> The party claiming promissory estoppel must have been harmed by his or her reasonable reliance on the promise, for example, by spending money in preparation for a job that was later canceled. If the promissory estoppel claim is successful, the party who made the promise can be prevented—also called “estopped”—from acting in a way inconsistent with its promise. An example for the poultry industry would be an argument that, if a poultry company promises a grower that the relationship will continue for a certain period in order to convince the grower to sign a growout contract, once the grower has signed the contract the company should not be able to argue that the promise of a long-term relationship was not binding.

Promissory estoppel may be a difficult claim to raise in a contract poultry growing context, however, because the contracts often include clauses stating that the entire agreement between the parties is in the written contract and no other promises are binding. Anyone who has signed a contract with such a clause—often called a “merger clause” or “entirety clause”—is understood to have read the contract and agreed that all terms of the agreement between the parties are written in the contract; any promises either party may have made outside the contract are therefore considered unenforceable.

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<sup>310</sup> See, for example, Miss. Code Ann. § 11-1-63.

<sup>311</sup> See *McMillen Feeds, Inc. of Texas v. Harlow*, 405 S.W.2d 123 (Tex. App. 1966).

<sup>312</sup> See Miss. Code Ann. § 11-1-63.

<sup>313</sup> See *Lee v. Paragon Group Contractors, Inc.*, 337 S.E.2d 132, 135 (N.C. App. 1985). However, promissory estoppel is not recognized as a legal claim in some jurisdictions. See *W.J. Schafer Assoc., Inc. v. Cordant, Inc.*, 493 S.E.2d 512 (Va. 1997).

Because of the regular use of merger clauses in poultry production contracts, it is important for all parties to those contracts to make sure that all promises between them are written into the contract.

In an **Arkansas** case involving a contract to produce eggs, the court held that the written contract represented the full agreement between the growers and the company and refused to allow the growers to submit evidence of oral statements that were made before the written contract was entered into.<sup>314</sup> The court rejected the growers' argument that they should be allowed to enforce the oral promises under a claim of promissory estoppel. The court held that promissory estoppel—a claim generally made when there is no contract—would not apply to this case where there was a written contract.

*k. State Business Opportunity Sales Act*

In general, a business opportunity sale takes place when the parties to a contract agree that the seller shall provide to the buyer any product, equipment, supplies, or services enabling the purchaser to start a business and the seller makes representations about the opportunities awaiting the buyer. Some states have laws that prohibit a business opportunity seller from using any untrue or misleading statement in the sale of a business opportunity, failing to give any disclosures required by law, or failing to deliver the products or services necessary to begin substantial operation of the business opportunity.<sup>315</sup> These laws may require a written disclosure statement to be provided a certain number of days before the buyer of the business opportunity makes a commitment to the contract.<sup>316</sup> The laws may also prohibit business opportunity sellers from making any claims related to the income or earning potential of the business unless they have documented data to support those claims.<sup>317</sup>

The unique nature of poultry growing arrangements makes it difficult to determine whether this type of law applies. Because poultry companies generally do not sell or lease the flocks, feed, or other supplies to growers, contract poultry production does not fit neatly under these laws' requirements. Growers might argue that the company inputs such as feed are effectively sold to them, because the growers “buy” these inputs through the calculation of their final payment. However, a federal district court that considered this issue concluded that **North**

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<sup>314</sup> *Cogburn v. ConAgra Poultry Co.*, 1997 Ark. App. LEXIS 174 (Ark. App. 1997).

<sup>315</sup> See, for example, N.C. Gen. Stat. §§ 66-94 through 66-100; Tex. Bus. & Com. Code Ann. §§ 41.002-41.303.

<sup>316</sup> See, for example, N.C. Gen. Stat. § 66-95; Tex. Bus. & Com. Code Ann. §§ 41.151-41.163.

<sup>317</sup> See, for example, N.C. Gen. Stat. § 66-98(1); Tex. Bus. & Com. Code Ann. § 41.301(3).

**Carolina's** business opportunity sales act does not apply to poultry growing arrangements if there is no sale of the poultry.<sup>318</sup>

### **III. Applying the Law to Grower Concerns Identified in the Broiler Grower Survey**

This section examines how existing law may address areas of concern about the relationships between broiler growers and poultry companies that were identified in the Broiler Grower Survey. The analysis focuses upon statutes, rules, and court decisions that directly apply to issues raised. A decision not to discuss the application of a legal theory or claim with respect to any particular problem area represents a judgment that the application of the theory is simply not known under the current state of the law. Note that court decisions are binding authority only upon the court that issued it and the courts below it, but the reasoning in the opinion may be persuasive to other courts.

#### **A. Use of the Ranking System to Determine Grower Compensation**

Most broiler growing contracts use a ranking system to calculate the amount that the grower will be paid. Generally, in a ranking system the feed and other input costs for all growers whose birds are settled during the same week are averaged. These costs are compared with the total bird weight and used to figure the average base price. An individual grower who has lower than average input cost per pound is generally paid a premium over the average base price. An individual grower who has higher than average input costs per pound may have a deduction taken from the average base price. The exact method used for ranking growers varies among poultry companies.

The Broiler Grower Survey described in Chapter Two of this report asked growers if they agreed that “the ranking method provides a good incentive to work hard.” The responses to the survey regarding the ranking system were mixed. Forty-eight percent of those surveyed disagreed with the statement that the ranking method provides a good incentive to work hard, while 45 percent agreed. More striking, 78 percent of growers agreed (with 44 percent in “complete agreement”) that their pay depends more on the quality of chicks and feed supplied by the company than on the quality of their work. These results suggest many growers believe that the ranking system does not provide a good incentive for them to work hard because the factors determining the level of the grower’s payment are controlled by the company.

Another practice related to the ranking system that growers indicated dissatisfaction with in the Broiler Grower Survey is the practice of including company employees in the same ranking group as non-employees. This practice sometimes means that employee-growers may be responsible for delivering inputs to their competitors within a ranking group. Given the percentage of growers in the survey who indicated that input quality is a key determinant of their pay, the control of inputs by employee-growers is likely one point of concern. Seventy percent of the growers responding to the survey agreed that “broiler

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<sup>318</sup> *Bunting v. Perdue, Inc.*, 611 F. Supp. 682 (E.D.N.C. 1985).

growers who are also company employees should not be included in the same growout group as others.” Despite this large majority of growers believing that employee-growers should not be included, 23 percent reported that employees are always included in their growout groups and only 18 percent of growers surveyed reported that company employees are never included in their growout groups.

*1. Packers & Stockyards Act*

The federal P&S Act and its implementing regulations address some aspects of the ranking systems in broiler contracts.

*a. P&S Act Regulations*

As discussed earlier, under P&S Act regulations, poultry companies must supply growers with a true written copy of the contract, which clearly specifies the factors used in calculating the grower’s payment.<sup>319</sup> The regulations require that, when applicable, the contract must clearly specify the factors to be used when grouping or ranking poultry growers.

By requiring that the factors used to rank growers be clearly spelled out in the contract, this regulation increases the chances that a grower would have a legal remedy if those factors were not properly applied in calculating the grower’s pay. Failure to follow the ranking procedures set forth in the contract would likely be a violation of the P&S Act, as well as a breach of the contract.

The P&S Act regulations also require that the company provide the grower with important information about how he or she was actually ranked. If payment to a grower is based upon a ranking with other growers, at the time of settlement the company must give the grower a copy of the ranking sheet with the actual figures upon which the ranking is based.<sup>320</sup> The names of other growers are not required, but the ranking sheet must show the grower’s precise rank for that period. The ranking sheet should help growers evaluate whether the company’s payment is in accordance with the contract.

These rules do not address growers’ concern about having company employees included in the ranking groups along with the non-employee growers.

*b. P&S Act—Unfair Practices*

Some growers have asked whether the ranking system could be considered an unfair or deceptive practice or undue preference and thus be considered a violation of the P&S Act.<sup>321</sup> Neither the language of the Act itself nor the regulations addresses whether the ranking system is inherently unfair, deceptive, or unjustly discriminatory under the Act. It may be argued that by requiring

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<sup>319</sup> 9 C.F.R. § 201.100(a) (2001).

<sup>320</sup> 9 C.F.R. § 201.100(d) (2001).

<sup>321</sup> 7 U.S.C. § 192(a) and (b).

disclosure of the factors used in ranking growers the regulation discussed above implicitly accepts ranking systems as permissible under the P&S Act, but this is not conclusive. The regulatory language would not necessarily preclude a grower from bringing a legal challenge to a specific form of ranking system as a violation of the Act. Research for this report uncovered no court decisions considering a P&S Act challenge to a ranking system.

## 2. State Unfair and Deceptive Trade Practice Laws

As discussed at pages 41 to 42 of this chapter, many states have broad prohibitions on unfair and deceptive practices in trade and commerce.<sup>322</sup> Actions prohibited may include: engaging in any “unconscionable, false, misleading, or deceptive” act in the conduct of trade or commerce, failing to comply with the terms of a production contract, or failing to make settlement with a producer within the required time.

It may be difficult to demonstrate a violation of these state acts simply through a ranking of growers against other growers for purposes of calculating payment under the contracts. A challenge to the ranking system under such acts is more likely to be successful if there were evidence demonstrating that a company used the ranking system to treat growers differently, for example, through funneling higher quality inputs that affected costs per pound of production. At least one court has determined that contract poultry growers may pursue a lawsuit under the **North Carolina** unfair and deceptive trade practices act, though the case did not involve a challenge to the use of a ranking system for calculating the grower’s pay.<sup>323</sup>

Other poultry producing states whose unfair and deceptive trade practices laws may be applicable are **Alabama**,<sup>324</sup> **Arkansas**,<sup>325</sup> **Georgia**,<sup>326</sup> **Texas**,<sup>327</sup> **Minnesota**,<sup>328</sup> and **Wisconsin**.<sup>329</sup> Some states, including **California** and **Minnesota**, regulate unfair and deceptive trade practices related to a grower’s membership in a producer association.<sup>330</sup> Discrimination in the ranking system due to the grower’s membership

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<sup>322</sup> See, for example, Ala. Code § 8-19-5(26); Ark. Code Ann. § 4-88-107(a)(10); Ga. Code Ann. § 10-1-393(a); N.C. Gen. Stat. § 75-1.1.

<sup>323</sup> N.C. Gen. Stat. § 75-1.1; *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D.N.C. 1996), aff’d in relevant part sub nom. *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998). The court disavowed the holding of an earlier poultry case, *Bunting v. Perdue*, 611 F. Supp. 682 (E.D.N.C. 1985), that had held that only consumers were able to bring an action under North Carolina’s unfair and deceptive trade practices law.

<sup>324</sup> Ala. Code §§ 8-19-1 through 8-19-15.

<sup>325</sup> Ark. Code Ann. §§ 4-88-101 through 4-88-115.

<sup>326</sup> Ga. Code Ann. §§ 10-1-390 through 10-1-407.

<sup>327</sup> Tex. Bus. & Com. Code Ann. §§ 17.41-17.63.

<sup>328</sup> Minn. Stat. § 27.19, subd. 1; Minn. R. 1500.1401, 1572.0045.

<sup>329</sup> Wis. Stat. § 100.02 appears to apply to poultry growing contract arrangements.

<sup>330</sup> Cal. Food and Agric. Code § 54431; Minn. Stat. § 17.696.

in a producer association would likely be a violation of these acts, as well as the federal Agricultural Fair Practices Act.<sup>331</sup>

### 3. State Risk Disclosure Laws

In **Minnesota**, agricultural contracts entered or substantively modified after January 1, 2001, must come with a cover sheet to help the grower understand the terms of the contract.<sup>332</sup> The cover sheet must describe the material risks the grower would face if he or she entered into the contract.<sup>333</sup> For companies using a ranking system, this law would presumably require some explanation of the risks inherent in that system.

## **B. Grower Concerns About the Quality of Chicks and Other Inputs Supplied by the Company**

As noted above, 78 percent of growers in the survey agreed that their pay depends more on the quality of chicks and feed supplied by the company than on the quality of the growers' work. Considering the importance these growers place on the quality of chicks, a key item in the survey is how growers responded to the statement: "Good chicks are delivered to my farm." Growers were split on this item, with 43 percent indicating "always" or "usually," 44 percent indicating "sometimes," and 12 percent saying "rarely" or "never." Sixty-five percent of growers responded that the quality of the feed the company delivers is "always" or "usually" of good quality. However, over a quarter of the growers were much more skeptical about the quality of feed they received from the companies.

### 1. Contract Provisions

As discussed in Chapter Three of this report, poultry production contracts rarely address issues of chick or feed quality, instead leaving those matters wholly to the company's discretion. However, some broiler growing contracts include provisions that attempt to limit warranties for the quality of inputs not supplied by the company. To the extent this is done, it may suggest that a grower could claim that inputs that *are* supplied by the company are subject to warranty and, if the company-supplied inputs are not of reasonable quality, that such warranty has been breached.

### 2. P&S Act

The P&S Act and its implementing regulations do not explicitly address the issue of chick and feed quality. P&S Act regulations provide that growers are entitled to receive a written contract that clearly specifies "all terms relating to the payment to be made to the poultry grower."<sup>334</sup> However, there is no requirement that the contract address the quality of inputs to be provided.

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<sup>331</sup> 7 U.S.C. § 2303.

<sup>332</sup> Minn. Stat. §§ 17.91, subd. 2, 17.942.

<sup>333</sup> Minn. Stat. § 17.942.

<sup>334</sup> 9 C.F.R. § 201.100(a)(2) (2001).

Some variation in the quality of inputs delivered to poultry growers is unavoidable. However, under the P&S Act, a company may not in any respect subject growers to any “undue or unreasonable preference or advantage” or any “undue or unreasonable prejudice or disadvantage.”<sup>335</sup> Thus, any company practice that resulted in a grower receiving a disproportionate share of lower quality chicks or feed might present a claim that this provision of the P&S Act has been violated.<sup>336</sup> Courts have allowed contract turkey growers to bring claims that companies violated the P&S Act by providing low-quality poults in order to discourage growers from voicing their grievances.<sup>337</sup>

As discussed in Chapter Three, some broiler growing contracts seek to address concerns about manipulation of input quality by stating that chicks provided by the company will be distributed “randomly.” Even in situations with no such contract provision, a reasonable argument could be made that “random” distribution is required by the P&S Act, because any other distribution pattern would be “unjustly discriminatory” or would constitute an act of “undue or unreasonable preference or advantage.”<sup>338</sup>

### 3. State Commercial Feed Laws

As discussed at pages 23 to 25 of this chapter, many states have laws regulating the distribution of commercial feed to growers and requiring licensing, registration, or labeling before a company is allowed to manufacture, sell, or distribute commercial feed in the state. Some commercial feed laws also forbid misbranding (false or misleading labeling) and adulteration (adding poisonous or harmful substances). Growers who believe their feed is not what it is represented to be may have a claim based on a violation of such a state commercial feed law. A company with serious problems with its feed would likely take the risk of losing its registration or its license very seriously.

States vary in the consequences they impose for violation of their commercial feed laws. One of the most comprehensive enforcement schemes is in **Texas**, where the state may direct its actions toward the feed itself by imposing an order to stop its sale,

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<sup>335</sup> 7 U.S.C. § 192(b).

<sup>336</sup> For example, in *Bunting v. Perdue, Inc.*, a grower complained that he was given the wrong feed mixture and otherwise discriminated against. 611 F. Supp. 682 (E.D.N.C. 1985). However, the court ruled that the poultry company was not covered by the P&S Act. The P&S Act was later amended in 1987 to clearly apply to poultry growing arrangements.

<sup>337</sup> *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D.N.C. 1996), aff'd in relevant part sub nom. *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998). See also *Pavlik v. Cargill, Inc.*, 9 F.3d 710 (8th Cir. 1993). In each case the judge ruled against the growers on their low-quality poults claim.

<sup>338</sup> 7 U.S.C. § 192(a) and (b).

warn persons not to distribute it, or condemn it.<sup>339</sup> The state may also take legal action against persons who violate the commercial feed law through written warnings, injunctions, and prosecution for misdemeanors.<sup>340</sup>

Labeling requirements under some state commercial feed laws may help improve the communication between the company and the grower, and the grower's understanding of the feed he or she is being supplied with.<sup>341</sup> These labeling requirements do not address the quality of the feed so much as its composition, ranging from a simple requirement that the label disclose the weight of the feed to requirements that the label include a guaranteed analysis, including minimum percentages of crude protein, crude fat, and crude fiber.

#### 4. *Fraud*

To the extent that a company makes factual claims about the quality of inputs it supplies growers—whether they are chicks, feed, or medicine—the company may be liable for fraud if the company knew the claims were untrue or did not know whether the claims were true. In one early **Minnesota** case, a company told potential growers that disease was a minor problem and would be detected and controlled by company personnel, though disease was a serious problem in other regions and there had been recent outbreaks in the new growers' area. When the growers' flocks were hit by disease that the company was unable to control, a grower successfully sued the company for fraud.<sup>342</sup>

#### 5. *Implied Warranty of Merchantability*

In the relatively few instances where a broiler grower actually buys inputs, such as chicks, feed, or medicine an implied warranty of merchantability may apply pursuant to the state's version of the Uniform Commercial Code.<sup>343</sup> If growers are sold poor quality inputs they may be able to sue the seller for a breach of this implied warranty of merchantability.

In one **Arkansas** case, turkey growers recovered on an implied warranty of merchantability claim for diseased poults.<sup>344</sup> The evidence showed that the growers had repeatedly complained about the poult quality, the company knew its flocks were diseased, and the company had improperly vaccinated the poults.

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<sup>339</sup> Tex. Agric. Code Ann. §§ 141.121, 141.122.

<sup>340</sup> Tex. Agric. Code Ann. §§ 141.123-141.149.

<sup>341</sup> See, for example, Ala. Code § 2-21-20(3); Md. Code Ann., Agric. § 6-110; Miss. Code Ann. § 74-45-161; Va. Code Ann. § 3.1-828.5; Tex. Agric. Code Ann. § 141.051. See also Del. Code Ann. tit. 3, § 1705, but note that § 1705(b) refers to giving the label to the "purchaser" of feed in bulk, which makes the requirement somewhat less certain for contract growers.

<sup>342</sup> *Hollerman v. F.H. Peavey & Co.*, 130 N.W.2d 534 (Minn. 1964).

<sup>343</sup> Uniform Commercial Code, Article 2, § 314.

<sup>344</sup> *Renfro v. Swift Eckrich, Inc.*, 53 F.3d 1460 (8th Cir. 1995).

## 6. Breach of Contract

Even where there has been no sale and the contract is otherwise silent, some courts may be willing to read a minimal commitment of quality into poultry contracts. In one case, a **Georgia** court allowed an egg producer to recover lost profits from the hatchery that supplied the producer with breeder chickens, feed, medication, and sanitation products.<sup>345</sup> The court found it enough that the hatchery had entered into a written contract to compensate the producer based on the number of eggs produced and to provide feed. The court reasoned that the quality of feed given to chickens has a “patent correlation” to the number of eggs produced and therefore the poor quality feed provided by the hatchery was a breach of contract that the jury could reasonably find caused the grower’s lost profits.

In a recent **Georgia** case heard in federal court, an egg producer was awarded damages of almost \$17,000 under his claim that the company had breached the contract by supplying chicks infected with cholera.<sup>346</sup> The company argued that it had not breached any provision of the contract and therefore could not be liable for a breach of good faith. The court rejected these arguments and upheld the jury’s verdict and award, holding that the jury could have concluded that by providing the cholera-infected chicks the company breached its contractual duty to “advocate the best management” program known to it. The court also held that the jury could have found that the company breached its implied duty of good faith and fair dealing under the contract.<sup>347</sup> In the same case, the jury found for the company on the grower’s breach of contract claim for receiving bad or adulterated feed.<sup>348</sup>

## 7. Negligence

Negligence could be a claim a grower might raise if a poultry company supplied the grower with unhealthy chicks or poor quality feed as a result of carelessness. Some states may limit or bar recovery if any carelessness on the part of the grower contributed to the problem. For example, one **Georgia** court ruled that an egg producer who had arranged to buy feed in several shipments could not escape paying

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<sup>345</sup> *Glennville Hatchery, Inc. v. Thompson*, 298 S.E.2d 521 (Ga. App. 1982).

<sup>346</sup> *Burger v. Cagle’s Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 2 (N.D. Ga. Oct. 11, 2000) (order denying defendant’s motion for judgment as a matter of law), aff’d without opinion by 260 F.3d 627 (11th Cir. 2001).

<sup>347</sup> *Burger v. Cagle’s Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 20-21 (N.D. Ga. Oct. 11, 2000) (order denying defendant’s motion for judgment as a matter of law), aff’d without opinion by 260 F.3d 627 (11th Cir. 2001).

<sup>348</sup> *Burger v. Cagle’s Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 2 (N.D. Ga. Oct. 11, 2000) (order denying defendant’s motion for judgment as a matter of law), aff’d without opinion by 260 F.3d 627 (11th Cir. 2001).

for the low-quality feed, because he negligently failed to halt the deliveries once the quality problems were discovered.<sup>349</sup>

As discussed in Chapter Three, broiler growout contracts generally prohibit growers from using any feed, medicines, or chemicals that are not supplied by the company. Payment under broiler production contracts also is generally not arranged to enable growers to purchase needed inputs, even if that were allowed by the contract. Broiler growers, therefore, are not able to refuse the company's inputs and substitute higher-quality products if they believe the company-supplied inputs are defective. Broiler growers similarly are not able to "substitute" better quality chicks. The **Georgia** case does suggest, however, that courts may expect growers to promptly raise concerns about the quality of inputs with companies.

#### *8. Product Liability*

Poultry growers who buy inputs such as feed or even chicks might have a claim against a company that manufactured or sold those inputs if the inputs had a defect that caused injury to the grower or the grower's property. A group of **Texas** turkey growers successfully sued a feed mill for defective feed they purchased from it under a product liability claim.<sup>350</sup> Evidence in the case showed that the feed had caused the growers' turkeys to become ill.

#### *9. Disclosure of Risks*

In states that require disclosure of risks in agricultural production contracts, an argument could be made that the risk of variable-quality inputs should be disclosed. **Minnesota** appears to be the only state with such a law protecting poultry growers at present.<sup>351</sup> If the company's failure to disclose the risk of variable quality inputs causes the grower harm, the grower may seek to recover damages. No cases have yet considered this provision.

#### *10. Poultry Improvement Plans*

Delivery of diseased chicks may be governed by a company's participation in a poultry improvement plan. As discussed at pages 19 to 20 of this chapter, the National Poultry Improvement Plan is a cooperative program of the federal government, participating state governments, and participating members of the industry aimed at preventing the transmission of disease by breeding flocks, as well as the spread of disease by hatcheries.<sup>352</sup> As also noted earlier, some states mandate that companies

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<sup>349</sup> *Brooks v. Ralston Purina Co.*, 270 S.E.2d 347 (Ga. App. 1980).

<sup>350</sup> *McMillen Feeds, Inc. of Texas v. Harlow*, 405 S.W.2d 123 (Tex. App. 1966).

<sup>351</sup> Minn. Stat. §§ 17.91, subd. 2, 17.942.

<sup>352</sup> 9 C.F.R. pt. 145 (2001).

meet Plan requirements,<sup>353</sup> and several leading poultry producing states treat violations of Plan as misdemeanors, including levying fines for violations.<sup>354</sup>

### **C. Confusion About Settlement Sheets**

It is important for growers to understand their settlement sheets because these sheets explain in detail how a grower's pay was calculated. Unfortunately, the responses to the Broiler Grower Survey show that nearly a third of the growers surveyed do not understand the calculations on their settlement sheets.

The only law reviewed in this chapter that appears to be applicable to growout settlement sheets is a provision of the P&S Act regulations. As discussed earlier in this chapter, P&S Act regulations have detailed requirements for poultry settlement sheets.<sup>355</sup> The settlement sheet should set forth calculations using the figures, factors, and methods agreed to in the contract. The settlement sheet must contain all information necessary to calculate the payment due to the poultry grower.<sup>356</sup>

### **D. Condemnation Rates High and Explanations Unsatisfactory**

Under many poultry growing agreements, the number and weight of condemned whole birds and parts also affect the amount of payment growers receive. The responses to the Broiler Grower Survey show that some growers have concerns about condemnation rates. About two-thirds of the respondents agreed that the condemnation rate on their birds is higher than they expect at least some of the time. Only 44 percent of respondents agree the company "always" or "usually" gives a satisfactory explanation when they ask about condemnation rates. A related issue in the survey concerned the growers' beliefs regarding the handling their birds receive from company employees. Because condemnations may result from injuries birds receive during catching and loading, growers' responses to a question about handling may be related to concerns over condemnation rates. Over a third of growers believed that catching crews only "sometimes" or "rarely" did a good job.

As discussed at pages 7 to 8 of this chapter, P&S Act regulations do address condemnations. If USDA condemnations or grades affect grower pay, the grower has a right to receive an official USDA condemnation or grading certificate, or both, at the time of settlement. The P&S Act regulations also require poultry companies to use reasonable care when loading, transporting, holding, yarding, feeding, watering, weighing, or otherwise handling live poultry.<sup>357</sup> If birds suffer excessive deaths and injuries because they

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<sup>353</sup> See, for example, Ala. Code § 2-16-4 (only applies to chick sales); N.C. Gen. Stat. § 106-543 (only applies to chick sales); Tex. Agric. Code Ann. § 168.002.

<sup>354</sup> See, for example, Ala. Code § 2-16-9; Ga. Code Ann. § 4-7-8; N.C. Gen. Stat. §§ 106-549, 106-549.01.

<sup>355</sup> 9 C.F.R. § 201.100(b) (2001).

<sup>356</sup> 9 C.F.R. § 201.100(b) (2001).

<sup>357</sup> 9 C.F.R. § 201.82(a) (2001).

are handled roughly by the company, a grower may have a claim against the company for violating the P&S Act regulations.<sup>358</sup>

In two related cases concerning contract turkey production in **Arkansas**, a federal appeals court found that a company's practice of estimating the weight of condemned birds and knowingly miscalculating condemnation deductions would support claims for both P&S Act violations and breach of contract.<sup>359</sup> In a case arising in **North Carolina**, a federal district court held that mishandling of birds could also be the basis of a negligence claim, since the P&S Act regulations impose a duty on companies to use reasonable care when handling poultry.<sup>360</sup>

### **E. Contract Dispute Resolution Procedures**

The terms of a poultry production contract often determine when, where, and by what rules a dispute between a grower and company must be resolved. As discussed in Chapter Three of this report, growout contracts typically include provisions setting out the dispute resolution process that must be used, at least initially, to resolve disputes arising under the contract between the grower and the company. These provisions are often quite detailed and complicated. If the contract provides for binding arbitration, as is true of more than half of the contracts reviewed in Chapter Three, the parties are essentially waiving their rights to have disputes considered by any court.

Responses to the Broiler Grower Survey, discussed in Chapter Two of this report, indicate that many growers (38 percent) are not familiar with the dispute resolution provisions in their contracts. (As discussed in Chapter Three, the comparison of grower statements about their contract terms with the analysis of sample contract language suggests that the number of growers who do not understand their contracts may actually be higher.) Very few growers who responded to the survey (4 percent) have used the dispute resolution procedure provided for in their contract. Those who have not used the contract dispute resolution procedure indicated expense (13 percent), fear of retaliation (33 percent), and no expectation of beneficial outcome (29 percent) as reasons for not initiating the procedure.

#### *1. Contract Provisions*

A growout contract may say that a dispute resolution process must take place in a certain location or under certain rules. Many contracts requiring arbitration invoke the rules developed by the American Arbitration Association. Other contracts say simply that any dispute will be subject to arbitration and do not reference specific arbitration

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<sup>358</sup> *Renfro v. Swift Eckrich, Inc.*, 53 F.3d 1460 (8th Cir. 1995); *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995); *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D.N.C. 1996), aff'd in relevant part sub nom. *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998).

<sup>359</sup> *Renfro v. Swift-Eckrich, Inc.*, 53 F.3d 1460 (8th Cir. 1995); *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

<sup>360</sup> *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D.N.C. 1996), aff'd in relevant part sub nom. *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998).

rules. Other arbitration clauses may be more limited and apply only to payment disputes.

Some contracts have very short deadlines for seeking resolution under the dispute resolution provisions included in the contract. In one **Louisiana** case, the contract provided that “either party may demand arbitration in writing within 10 days after the alleged claim was known or reasonably should have been known.”<sup>361</sup> The grower in that case argued that the use of the word “may” meant that the contract did not mandate filing within 10 days. The court found that the question of whether a grower who did not request arbitration within a 10-day period had waived the right to arbitration was an issue arising under the contract and was therefore subject to arbitration, not decision by a court. A dissenting judge urged that the issue was more than a matter of interpreting a contract and suggested that recognizing a 10-day limitation to bar claims would be unreasonable.

## 2. Federal Arbitration Act

As discussed at pages 16 to 17 of this chapter, the Federal Arbitration Act (FAA) provides that written agreements to arbitrate disputes that may arise during the course of the contract are valid and enforceable, if the contract involves interstate commerce.<sup>362</sup> Because poultry raised under most broiler contracts is likely to cross states lines once processed, broiler grower contracts will generally be considered contracts involving interstate commerce. Arbitration provisions in those contracts, therefore, will most likely be enforceable.

In rare cases, the agreement to arbitrate may be invalid if there is some fundamental problem, such as fraud, mutual mistake, or other grounds that would justify the revocation of any contract.<sup>363</sup> In one **Maryland** case brought by a poultry grower, the poultry company sought a stay of proceedings from the court in an attempt to enforce a contractual arbitration provision.<sup>364</sup> In response, the grower alleged that the company had forged his signature on an agreement to grow poultry. The grower argued that as a result of the forgery, the company could not rely on the arbitration clause contained in the agreement. The court agreed to decide the forgery question prior to making a decision on the company’s request for a stay of proceedings pending arbitration. The court explained that issues going to the “making” of a contract are for the court to decide. By claiming forgery, the grower effectively claimed that he never entered into a contract containing an arbitration clause in the first place. The court contrasted this claim with a case where the grower alleges fraudulent inducement to contract. In such cases, the court explained, the grower

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<sup>361</sup> *ConAgra Poultry Co. v. Collingsworth*, 705 So. 2d 1280 (La. App. 1998).

<sup>362</sup> 9 U.S.C. § 2.

<sup>363</sup> 9 U.S.C. § 2.

<sup>364</sup> *Monk v. Perdue Farms, Inc.*, 12 F. Supp. 2d 508 (Md. 1998).

admits signing the agreement, but argues that it cannot be enforced against him or her. In that case, the dispute over enforceability is for the arbitrator to decide.

### 3. *State Laws*

As discussed at pages 27 to 31 of this chapter, state laws may require that parties to agricultural contracts attempt to resolve disputes through ADR, though such laws have not been adopted by the major poultry producing states. State law may also provide procedural rules for arbitration or other forms of ADR.

## **F. Value of Company-Recommended Improvements and Pressure to Adopt Them**

One issue that may affect grower income from broiler operations is whether growers may be required to install new equipment or make improvements to their chicken houses at the company's request. Growers responding to the survey reported that 67 percent of broiler houses have had at least one improvement costing more than \$3,000 in the previous five years. Some 33 percent of survey respondents indicated a belief that company-recommended improvements have not made them better off, while 50 percent indicated that their contracts would not be renewed unless they followed their companies' recommendations about building new houses or making major improvements to their old houses.

### 1. *Fraud*

In some cases, false statements by a poultry company regarding improvements, which the company intended for the grower to rely upon, could be the basis for a successful fraud claim, provided the grower relied upon the representations to his or her detriment.

In one **Alabama** poultry case, a poultry company was held liable for fraud related to improvements.<sup>365</sup> The company had entered into an agreement with a grower, promising to continue to supply the grower with chickens if he made certain improvements. The improvements were made but the company stopped delivering flocks shortly thereafter. The court found that the company intended to deceive the grower because it knew that it was leaving the grower's area before it entered the agreement requiring improvements. The grower was allowed to recover damages against the company for fraud.

In another **Alabama** case, a group of growers alleged that their company initially told them that tunnel ventilation would not be required but later terminated their contracts when they refused to install tunnel ventilation systems.<sup>366</sup> The court found that one of the growers, who had not agreed to go to arbitration on the issue, could maintain an action for fraud in court.

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<sup>365</sup> *Marshall Durbin Farms, Inc. v. Landers*, 470 So. 2d 1098 (Ala. 1985).

<sup>366</sup> *Continental Grain Co., Inc. v. Beasley*, 628 So. 2d 319 (Ala. 1993).

## 2. Breach of Contract

In a 1980 **North Carolina** case, a grower brought a breach of contract claim against a company, arguing that the company had violated an agreement to supply flocks for six growout houses with a guaranteed net income of \$10,000 per house per year after the grower completed renovations of the houses.<sup>367</sup> The court denied the grower's claim because it found that the only binding contract between the parties was a single-flock contract for one house. The court held that the other promises between the parties were not a binding a contract because they had not agreed on the specifics, including the number of birds the grower would have, the times for flock delivery or pickup, or the payment the grower would receive.

As discussed in Chapter Three, many poultry companies reserve the right to require improvements in their written contracts. Some broiler contracts do not explicitly use the terms "equipment" or "improvements" when addressing the growers' commitment to make improvements at the company's request. Instead some contracts state that growers are obligated to provide "proper housing" as determined by the company. Since many broiler contracts are for only one flock, poultry companies may also require that growers adopt new standards for equipment and make improvements by making it a condition of obtaining a new contract for a future flock.

At the same time, many growers are wary of making an open-ended commitment to make costly improvements. Some growers have alleged that they were given oral promises that costly improvements would not be required, but later the company required improvements. In one **Georgia** case, an egg producer had a written contract with a clause stating that, "This agreement, and the attached schedule, are separate from any other agreement made or to be made between the parties and represent the complete agreement."<sup>368</sup> The court, however, ruled that an oral agreement was enforceable that no improvements to the chicken house would be required until the producer had recouped his investment and made a profit. The court stated that the language quoted above clearly recognized the possibility of other, separate agreements between the parties. Had that language not been in the contract, the court would likely have reached a different result.

## 3. Breach of Implied Promise of Good Faith

At least one state, **Minnesota**, imposes an implied promise of good faith and fair dealing upon poultry companies who enter contracts with growers.<sup>369</sup> An implied promise of good faith for poultry growing contracts has been recognized in **North Carolina** and **Georgia** in federal court opinions, rather than in statutes.<sup>370</sup> If a company

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<sup>367</sup> *Gregory v. Perdue, Inc.*, 267 S.E.2d 584 (N.C. App. 1980).

<sup>368</sup> *Glennville Hatchery, Inc. v. Thompson*, 298 S.E.2d 512 (Ga. App. 1982).

<sup>369</sup> Minn. Stat. §§ 17.94, 336.1-201(9).

<sup>370</sup> See *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D.N.C. 1996), aff'd in relevant part sub nom. *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998); *Burger v.*

made representations regarding the investment that would be needed to enter into and continue a poultry growing arrangement but then later required the grower to make additional investments, it is possible that the grower could claim that the company breached its promise of good faith and fair dealing. No cases raising such a claim were uncovered in the research for this report.

#### *4. Recapture of Capital Investment*

As discussed at page 34 of this chapter, **Minnesota** law related to recapture of capital investment prohibits a poultry company from terminating or canceling a written contract that requires a grower to make a capital investment of \$100,000 or more in buildings or equipment with a useful life of five years or more unless certain conditions are met.<sup>371</sup> Minnesota's recapture rule does not apply, however, if the term of the contract simply runs out, or expires, and the company chooses not to renew it.<sup>372</sup>

### **G. Prompt and Accurate Weighing of Chicks**

In most poultry growing arrangements, the weight of birds when delivered to the plant for processing is a key factor in determining the amount the grower will be paid. Birds can lose a significant amount of weight if there is a lengthy delay in weighing them after they are picked up from the grower's operation. Such weight loss would reduce grower pay under most broiler growing agreements. Responses to the Broiler Grower Survey suggest that there are delays in the weighing of birds (only 50 percent of growers indicated that birds are at least "usually" weighed promptly). Almost half of the growers (42 percent) answered "other" when asked whether their birds are weighed promptly. One possible explanation for this relatively high percentage of "other" responses is that growers do not know what to believe about whether their birds are weighed promptly.

The poultry industry has seen a number of successful lawsuits brought by poultry growers alleging that inaccurate or delayed weighing by poultry companies resulted in incorrect payments in violation of the P&S Act. These cases are discussed below. Oftentimes, growers alleging inaccurate weighing bring claims under the P&S Act in combination with state law claims such as fraud and breach of contract.

#### *1. P&S Act*

As discussed at pages 3 to 5 of this chapter, there are extensive regulations under the P&S Act that set out proper weighing procedures,<sup>373</sup> care of scales,<sup>374</sup> and the

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*Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 20-21 (N.D. Ga. Oct. 11, 2000) (order denying defendant's motion for judgment as a matter of law), aff'd without opinion by 260 F.3d 627 (11th Cir. 2001).

<sup>371</sup> Minn. Stat. § 17.92.

<sup>372</sup> Minn. R. 1572.0030, subpt. 1.

<sup>373</sup> 9 C.F.R. § 201.108-1 (2001).

<sup>374</sup> 9 C.F.R. § 201.72 (2001).

information that must be included on scale tickets.<sup>375</sup> The P&S Act regulations require that poultry companies use reasonable care and promptness with respect to weighing birds to prevent shrinkage, injury, death or other avoidable loss.<sup>376</sup> Live poultry obtained under a poultry growing arrangement must be transported promptly after being loaded.<sup>377</sup> The gross weight for grower-payment purposes must be determined immediately upon arrival at the processing plant, holding yard, or other scale normally used for such purposes.<sup>378</sup>

Poultry growers may complain to their regional GIPSA office about weighing problems. They also may file suit in federal district court.<sup>379</sup> If the claim is successful, the company would be liable for the full amount of damages proven to have been suffered by the grower as a result of the violation.

In the context of contract broiler production, a claim based on delayed or inaccurate weighing is essentially a claim that the grower was paid less than he or she was entitled to under the contract. While the P&S Act is clear with regard to *complete* nonpayment, it is not as clear whether the statutory trust provisions of the P&S Act (discussed at pages 10 to 12 of this chapter) can also be used for a partial nonpayment claim.<sup>380</sup>

In a **North Carolina** case from 1996, turkey growers recovered \$5,000 from their company for its admitted violation of P&S Act weighing regulations.<sup>381</sup>

In an **Arkansas** case, turkey growers sued a company for failure to use proper weighing practices, including failure to comply with P&S Act weighing regulations, failure to record the identification numbers of the trucks birds were weighed in, mishandling of birds that increased condemnations, and overestimating the weight of condemned birds.<sup>382</sup> The growers were awarded \$50,000 for their claims based on violation of P&S Act regulations.

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<sup>375</sup> 9 C.F.R. § 201.49(b) (2001).

<sup>376</sup> 9 C.F.R. § 201.82(a) (2001).

<sup>377</sup> 9 C.F.R. § 201.82(b) (2001).

<sup>378</sup> 9 C.F.R. § 201.82(b) (2001).

<sup>379</sup> 7 U.S.C. § 209(b)(2). Although administrative enforcement can be used by poultry growers to ensure prompt payment, allegations of general P&S Act violations and claims for damages can only be heard by a federal court. See *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452, 1457 (8th Cir. 1995).

<sup>380</sup> 7 U.S.C. § 197(b) (trust is for the benefit of “unpaid” growers, to continue until “full payment” is received). See also 7 U.S.C. § 197(d) (establishing deadlines for payment and filing of claims against the trust only in circumstances where “a payment instrument has not been received” or where the payment instrument is dishonored).

<sup>381</sup> *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998).

<sup>382</sup> *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

Misweighing claims were so successful against one company that a bankruptcy court in **Arkansas** rejected a proposed settlement of a grower's claim against that company for \$50,000, holding that settling for so little was a potential waste of the estate's asset.<sup>383</sup> Another **Arkansas** turkey grower's misweighing claim under the P&S Act was unpersuasive to the jury—along with his other claims against the company, including breach of contract and fraud—but the court of appeals decision does not shed any light on why the claim failed.<sup>384</sup>

## 2. Fraud

The poultry industry has seen a number of successful lawsuits brought by poultry growers alleging that poultry companies fraudulently reported inaccurate weights, which resulted in incorrect payments. Some of these claims are still being litigated, years after the alleged misweighing took place.<sup>385</sup> If growers are successful with a fraud claim, this may also support the award of punitive damages.<sup>386</sup>

In an **Alabama** case, broiler growers sued their company for breach of contract and fraud, claiming that the company had purposefully misweighed birds over an eight-year period in order to reduce payment to growers.<sup>387</sup> The jury awarded the growers almost \$4.4 million in compensatory damages and more than \$9 million in punitive damages. The federal appeals court that reviewed the case held that company employees' manipulation of trucks and scales to create artificially low gross weights and high tare weights supported the fraud verdict.

In one **Arkansas** case, a federal appeals court held that turkey growers who had been awarded damages on their fraud claims related to weighing and payment were entitled to seek punitive damages against their company because of the company's "reckless disregard" for accurate weighing.<sup>388</sup> The court found that the company had engaged in activities that "could not possibly yield accurate measurements"—including failing to maintain tare weight tickets—and therefore the growers' settlement sheets were necessarily "fraught with errors."<sup>389</sup>

In another **Arkansas** case, mentioned in the P&S Act discussion above, turkey growers were awarded damages for a company's failure to use proper weighing

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<sup>383</sup> *In re Burgess*, 188 B.R. 404 (E.D. Ark. 1995) (upholding debtors' objection to proposed Compromise and Settlement Agreement with Swift Eckrich, Inc.).

<sup>384</sup> *Pavlik v. Cargill, Inc.*, 9 F.3d 710 (8th Cir. 1993).

<sup>385</sup> See *Adams v. Wolf*, 2001 Ark. App. LEXIS 336 (Ark. App. 2001).

<sup>386</sup> See, for example, *Braswell v. ConAgra, Inc.*, 936 F.2d 1169 (11th Cir. 1991); *Renfro v. Swift Eckrich, Inc.*, 53 F.3d 1460 (8th Cir. 1995).

<sup>387</sup> *Braswell v. ConAgra, Inc.*, 936 F.2d 1169 (11th Cir. 1991).

<sup>388</sup> *Renfro v. Swift Eckrich, Inc.*, 53 F.3d 1460 (8th Cir. 1995).

<sup>389</sup> *Renfro v. Swift Eckrich, Inc.*, 53 F.3d 1460, 1465-66 (8th Cir. 1995).

practices.<sup>390</sup> The growers were awarded \$40,000 for their fraud and breach of contract claims.

In May 2001, an **Arkansas** appeals court issued a decision allowing turkey growers to pursue a fraud claim against their company for delayed weighing, misweighing, and improper condemnations.<sup>391</sup> Although the events occurred outside the limitations period—allegedly beginning in the 1980s and continuing into the mid-1990s—the court held that the growers had presented a factual question of whether the company had fraudulently concealed its misweighing procedures and whether the growers could reasonably have recognized the false weights sooner than they had. The court remanded the case to the trial court for further proceedings, but nothing further was known about the case when this report was written.

### 3. *Breach of Contract*

If a poultry company's contract with the grower sets out the methods the company will use to weigh the birds or even if the contract simply states that payment will be based on the weight of birds, a grower might have a claim breach of contract if the company failed to use those methods or failed to accurately determine bird weight.

In the **Alabama** case discussed above in the fraud section, the broiler growers' \$13 million plus award was based both on fraud and on breach of contract by the company through purposefully misweighing birds and paying growers based on the false weights.<sup>392</sup> The company had admitted that it breached the growout contracts by calculating grower pay based on false weights, but it disputed the length of time that the misweighing had occurred. The jury ultimately agreed with the growers and found that the misweighing had occurred over an eight-year period.

As discussed in previous sections, **Arkansas** turkey growers were awarded damages for a company's failure to use proper weighing practices.<sup>393</sup> The growers were awarded \$40,000 for their fraud and breach of contract claims.

In another **Arkansas** case, a federal appeals court upheld a jury verdict for turkey growers on their breach of contract claims, rejecting the company's arguments that the growers continued to grow for the company and therefore waived their claims.<sup>394</sup> The court held that the growers had shown that they were unaware of the delayed weighing and the company's other mishandling practices and, therefore, the growers could not have knowingly abandoned their contractual rights to be paid based on the actual weight of the birds delivered.

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<sup>390</sup> *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

<sup>391</sup> *Adams v. Wolf*, 2001 Ark. App. LEXIS 336 (Ark. App. 2001).

<sup>392</sup> *Braswell v. ConAgra, Inc.*, 936 F.2d 1169 (11th Cir. 1991).

<sup>393</sup> *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995).

<sup>394</sup> *Renfro v. Swift Eckrich, Inc.*, 53 F.3d 1460 (8th Cir. 1995).

Furthermore, at least one court has held that lack of good faith with respect to weighing birds may be a breach of contract. In a **North Carolina** case, a federal district court held that even compliance with all express terms of a turkey contract would not bar a breach of contract claim if the growers could show that the company had violated the implied obligation of good faith in performing the agreement.<sup>395</sup>

#### 4. Negligence

Poultry growers might bring a lawsuit charging a poultry company with negligence if the company, or one of its employees, was careless or negligent in keeping scales in good repair, keeping accurate records, or weighing birds promptly. In a **North Carolina** case involving such a claim, the court held that the P&S Act regulation requiring companies to use “care and promptness” in weighing and handling live poultry established a duty that would support a negligence claim.<sup>396</sup> The grower in that case was ultimately unsuccessful in his negligence claim.

#### 5. State Unfair and Deceptive Trade Practices Acts

Misweighing of poultry that leads to underpayment of growers could be a violation of a state unfair and deceptive trade practices act. In one **North Carolina** case, the grower recovered under the state unfair and deceptive trade practices act for damages resulting from the company’s failure to follow P&S Act weighing regulations.<sup>397</sup>

### H. Prompt and Accurate Weighing of Feed

In most poultry growing arrangements, accurate feed weight measurement is a critical factor in determining a grower’s payment. While grower responses to the Broiler Grower Survey indicate fewer concerns about feed weighing than bird weighing, a notable percentage (19 percent) of growers believed that they were at least sometimes charged for more feed than delivered. Nearly a third of the growers seem to not know what to believe about whether they are charged for more feed than is delivered.

#### 1. P&S Act

As discussed at pages 5 to 7 of this chapter, new P&S Act regulations that took effect on May 5, 2000, require companies to weigh feed whenever the weight of feed is a factor in determining payment for a poultry grower under a poultry growing arrangement.<sup>398</sup> When feed weight is a factor in calculating payment owed to the grower the payment must be based on the actual weight of the feed as shown on a

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<sup>395</sup> *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D.N.C. 1996), *aff’d* in relevant part sub nom. *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998).

<sup>396</sup> *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D.N.C. 1996), *aff’d* in relevant part sub nom. *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998).

<sup>397</sup> *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998).

<sup>398</sup> 65 Fed. Reg. 17,758 (2000) (codified at 9 C.F.R. pt. 201).

scale ticket.<sup>399</sup> Many of the feed weighing rules are the same as or similar to those for weighing live poultry.

Few reported cases involve allegations regarding feed weight. It may be that the new P&S Act regulations will lead to increased litigation. In one **Arkansas** case the grower alleged, among other things, that he was shorted on feed deliveries, but the jury ruled for the company.<sup>400</sup>

## 2. Commercial Feed Laws

As discussed at pages 23 to 25 of this chapter, a number of states have laws regulating the distribution of commercial feed to growers and requiring that the label, delivery slip, or invoice state the net weight (or other quantity term) of the feed, or of each commercial feed or feed ingredient that is part of the mixture.

States vary in the consequences they impose for violation of their commercial feed laws. Under the laws of several states, companies that violate the labeling requirements may be prosecuted.<sup>401</sup> Most states with such provisions treat violations as misdemeanors or explicitly state that prosecution of minor violations is not required.<sup>402</sup>

In general, states do not provide remedies for growers who have been harmed by violations of commercial feed laws. However, claims may nonetheless be available if the state recognizes a statutory violation as negligence per se or if the violation is the basis for another claim, such as fraud.

## I. Compliance with Environmental Regulations

As discussed earlier, the potential for water pollution from poultry operations is receiving increasing attention from federal and state environmental regulatory agencies and legislatures. In the Broiler Grower Survey, 78 percent of growers responding agreed that the company provides no assistance with proper disposal of litter or dead birds. The analysis of contracts found in Chapter Three of this report shows an even greater concentration of responsibility on growers, with none of the contracts studied providing for company assistance with disposal.

### 1. Federal Regulations Under the Clean Water Act

The Clean Water Act addresses water pollution from concentrated animal feeding operations (CAFOs).<sup>403</sup> Regulations issued under the Clean Water Act currently

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<sup>399</sup> 9 C.F.R. § 201.55(a) (2001).

<sup>400</sup> *Pavlik v. Cargill, Inc.*, 9 F.3d 710 (8th Cir. 1993).

<sup>401</sup> For example, Del. Code Ann. tit. 3, § 1712; Md. Code Ann., Agric. § 6-115(a); Miss. Code Ann. § 75-45-185; Tex. Agric. Code Ann. § 141.143; Va. Code Ann. § 3.1-828.13(B).

<sup>402</sup> See, for example, Del. Code Ann. tit. 3, § 1712(b); Md. Code Ann., Agric. § 6-115(b); Miss. Code Ann. § 75-45-183; Va. Code Ann. § 3.1-828.13(C).

<sup>403</sup> 33 U.S.C. § 1362(14).

prohibit CAFOs from discharging potential pollutants, such as animal wastes, into waters of the United States except in a 25-year, 24-hour storm event.<sup>404</sup> As mentioned earlier, these regulations do not apply to most broiler operations currently, but would apply if proposed changes are adopted.<sup>405</sup>

In the only Clean Water Act case related to poultry that research for this report uncovered, a poultry company proposed to settle a complaint against it for alleged Clean Water Act violations at its **Maryland** poultry processing plant by agreeing, among other things, to pay for personnel and equipment to help contract growers prepare and implement written, site-specific nutrient management plans.<sup>406</sup>

## 2. State Environmental Laws

As discussed at pages 35 to 38 of this chapter many of the leading poultry producing states are beginning to enact statutes and regulations that establish what is required and who is responsible for the proper disposal of poultry litter and dead birds when poultry is raised by independent contractors. The states take a variety of approaches to the subject. Requirements concerning dead bird disposal generally apply to poultry *owners*, but may also apply to those who “care for” poultry grown under contract; requirements concerning litter disposal are more often tracked to the owner or operator of the poultry operation.<sup>407</sup> Each state’s statutory and regulatory scheme must be studied to determine whether a company and grower could agree between themselves through contract which party would be responsible for waste disposal. In some states, it is possible that the state would initiate enforcement actions against both parties regardless of the contractual provisions. In such states, the contract between the parties would therefore not limit the state’s enforcement options, but might give one party a claim for breach of contract and indemnification against the other.

As discussed earlier, **Virginia** recently adopted rules for a poultry management program.<sup>408</sup> The primary burden of these rules falls upon the grower, but the law does require poultry companies to file a plan with the state explaining how it will assist growers, including providing technical assistance, education programs, advertising support, facilitating efforts to transport poultry waste, and research.<sup>409</sup>

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<sup>404</sup> 40 C.F.R. pt. 122, Appendix B (2001). For CAFO non-discharge regulations generally, see 40 C.F.R. pt. 412 (2001).

<sup>405</sup> 66 Fed. Reg. 2974 (2001).

<sup>406</sup> *United States v. Hudson Foods, Inc.*, 63 Fed. Reg. 29,753 (1998) (proposed consent decree subject to public comment and court approval). No further record of the case was found.

<sup>407</sup> See, for example, Va. Code Ann. § 62.1-44.17:1.1; Ga. Code Ann. § 4-5-3(a); Ky. Rev. Stat. Ann. § 257.160; Md. Code Ann., Agric. § 3-109.

<sup>408</sup> 17 Va. Regs. Reg. 398 (Oct. 23, 2000) (codified at 9 Va. Admin. Code §§ 25-630-10 through 25-630-60). The program was required by Va. Code Ann. § 62.1-44.17:1.1.

<sup>409</sup> Va. Code Ann. § 62.1-44.17:1.1(G).

**Georgia** law requires “any person who owns or is caring for” poultry that has died to dispose of it within 12 hours after death or discovery of the carcass.<sup>410</sup> Under most growout arrangements, poultry companies would fall within the reach of this law, because they own the birds. The regulations quarantine the land of people who grow poultry for themselves or others, unless they use a method of disposal of dead poultry carcasses approved by the Commissioner of Agriculture.<sup>411</sup> This rule would appear to create a greater incentive for growers to comply than for companies.

**Kentucky** law also imposes poultry carcass disposal requirements on the bird owner.<sup>412</sup> **Alabama** imposes the burden for poultry waste and carcass disposal on growers and provides for a quarantine of operations not having adequate disposal facilities.<sup>413</sup>

As discussed earlier, **Maryland** is phasing in new requirements for agricultural nutrient management plans.<sup>414</sup> The state uses Poultry Processor Discharge Permits to require poultry companies to ensure that their contract growers have nutrient management plans.<sup>415</sup> The permits require companies to assist growers with the use and disposition of excess manure and prohibit companies from placing additional chickens at a grower’s farm if water quality violations have occurred and are not corrected.<sup>416</sup>

**Maryland** law also requires that contract chicken feed contain enzymes to reduce phosphorus in poultry waste.<sup>417</sup> It is possible that a grower who faces liability for environmental violations related to excess phosphorus could have a claim against a company or other supplier if the required enzymes were not added.

As discussed earlier, **Delaware’s** environmental regulation of poultry operations primarily affects growers.<sup>418</sup> However, the major poultry companies operating in Delaware have also committed themselves to assist growers with nutrient

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<sup>410</sup> Ga. Code Ann. § 4-5-5.

<sup>411</sup> Ga. Comp. R. & Regs. 40-16-2-06(1).

<sup>412</sup> Ky. Rev. Stat. Ann. § 257.160.

<sup>413</sup> Ala. Code §§ 2-16-41, 2-16-42.

<sup>414</sup> Md. Code Ann., Agric. §§ 8-801 through 8-807.

<sup>415</sup> “MDE Announces Final Determination in Poultry Industry Integrator Permit,” Maryland Dep’t of the Environment News Release 039-01 (July 18, 2001), available at [www.mde.state.md.us/press/nr\\_mde-010718.html](http://www.mde.state.md.us/press/nr_mde-010718.html).

<sup>416</sup> See [www.mde.state.md.us/wma/poultry/intelang.PDF](http://www.mde.state.md.us/wma/poultry/intelang.PDF), part IV.E.6.f, pages 5-6.

<sup>417</sup> Md. Code Ann., Agric. § 6-107.1.

<sup>418</sup> Del. Code Ann. tit. 3, §§ 2201-2290.

management, litter and manure disposal, and obtaining certification under the state nutrient management program.<sup>419</sup>

Research for this report uncovered no cases considering liability for litter or carcass disposal under state environmental laws.

### 3. Nuisance

Large poultry growing operations may have an effect upon neighboring property owners. Neighbors may complain of smells, fears of damage to water quality, and a general lowering in their quality of life. These neighbors might bring a lawsuit claiming that the poultry operation is a nuisance. As discussed above, one issue that may be addressed in nuisance lawsuits is whether the poultry company can be held liable for a nuisance caused by a contract grower's facility.

One fairly recent case seem to suggest how courts in **Alabama** will consider the allocation of environmental costs under production contracts, including those in the poultry industry. In the case, a company and farmer had entered into a contract for the farmer to raise hogs owned by the company.<sup>420</sup> This contract was similar in many respects to those used in the poultry industry, including describing the farmer as an "independent contractor." Neighbors filed a lawsuit against the farmer and the company, complaining that odor and wastes associated with the hog operation were causing a nuisance on their property. The company said that it should not be liable, because the farmer was an independent contractor. The Alabama Supreme Court held that the legal relationship between the farmer and the company was determined by the facts rather than the words used in the contract to describe their relationship. Based on the facts in this case, the state Supreme Court concluded it was reasonable for the jury to find that the farmer was acting as the company's agent and therefore the company could be liable for damages.

## J. Risk Disclosures and Projections of Expected Returns

The responses to the Broiler Grower Survey suggest many growers perceive that they are not receiving the level of income under their contracts that they were led to expect by the company and that more work is required than expected.

One difficulty for growers in bringing a claim related to the income that they were led to expect from the business is that most broiler growing contracts include a "merger clause." As discussed above, a merger clause states that the signed contract includes all of the terms of the contract the parties have agreed to. If the contract includes the entire agreement, then anything not written in the contract is considered not an essential part of the

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<sup>419</sup> Del. Dep't of Natural Resources and Environmental Control News, Jan. 12, 2001, p. 4. The newsletter can be found on the Internet at [www.dnrec.state.de.us/dnrec2000/admin/news/01-12/0112news.htm](http://www.dnrec.state.de.us/dnrec2000/admin/news/01-12/0112news.htm).

<sup>420</sup> *Tyson Foods, Inc. v. Stevens*, 783 So. 2d 804 (Ala. 2000).

agreement. Thus, income projections in promotional brochures are generally not considered part of the contract.

Another difficulty for a grower related to income projections may arise if the grower by contract agreed to follow the company's management suggestions, but then failed to do so; in such a case, the grower may have to prove that the failure to follow the company's suggestions was not the cause of the lower income.

### 1. *P&S Act*

The P&S Act regulations provide that companies are barred from knowingly making or circulating any false or misleading reports, records, or misrepresentations concerning the market conditions or the prices for live poultry.<sup>421</sup> If the company's representations to the grower regarding expectations of income from the broiler contract involved false or misleading statements about broiler market or broiler contract market conditions or prices of live poultry, such representations may violate the P&S Act regulations. Also, if a company provided a grower with deceptive information regarding expectation of income under the broiler contract there may be a basis for raising a claim that the company violated the provisions of the P&S Act that prohibit companies from engaging in any deceptive trade practice.<sup>422</sup>

### 2. *Fraud*

One type of fraud claim that may be brought in situations involving unrealistic profit projections is fraudulent inducement to contract. The gist of this claim would be that the company used information it knew was inaccurate or untrue—or that it had no evidence to believe was accurate—for the purpose of persuading a grower to sign a contract, and the grower relied on that information to make the decision to sign. In a **Minnesota** case dating back to the 1960s, a grower was able to recover for fraud at least partly on the basis of highly optimistic statements about projected profits in a recruiting brochure, where the court found that the company's assurances of profit, taken together, constituted a misrepresentation of fact. While such claims may be harder to raise now, any representation of fact by a company—for example, that other growers had earned a certain amount—to induce a grower to sign a contract or incur costs could still support a fraud claim if the statement was within the company's area of expertise and was false.<sup>423</sup>

### 3. *Risk Disclosure*

**Minnesota's** new risk disclosure law, discussed at pages 39 to 40 of this chapter, requires that agricultural contracts come with a cover sheet to help the grower understand the risks under the contract.<sup>424</sup> The cover sheet must describe the material

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<sup>421</sup> 9 C.F.R. § 201.53 (2001).

<sup>422</sup> 7 U.S.C. § 192(a).

<sup>423</sup> *Hollerman v. F.H. Peavey & Co.*, 130 N.W.2d 534 (Minn. 1964).

<sup>424</sup> Minn. Stat. §§ 17.91, subd. 2, 17.942.

risks the grower would face if he or she entered into the contract.<sup>425</sup> An argument could be made that if the company provides growers with information about projected income from the contract, the risk that income may be lower than projected—due, for example, to higher than projected grower expenses, bird mortality rates, or condemnation rates—would be a material risk that must be disclosed under the statute. If such risks are included in the contract cover sheet growers may be more aware of the dangers of relying on the income projection representations made by the company at the time the contract is signed.

### K. Timing and Frequency of Flocks

The timing and frequency of flock deliveries to growers has a significant impact on the level of income growers can make from their operations. The Broiler Grower Survey responses indicate that the majority of growers responding believed that they were “rarely” or “never” left without flocks long enough to hurt them financially. However, over a third of growers responding believe that they are at least “sometimes” left without birds long enough to hurt them financially.

#### 1. Breach of Implied Promise of Good Faith

At least one state, **Minnesota**, imposes an implied promise of good faith and fair dealing upon poultry companies who enter contracts with growers.<sup>426</sup> If a company made representations to a grower regarding the timing and frequency of flocks, and later the grower is hurt financially by unreasonable delays in the delivery of new flocks, the grower might be able to bring a claim that the company breached its promise of good faith and fair dealing under this state law. An implied promise of good faith has been endorsed for poultry growing contracts in **North Carolina** and **Georgia** in federal court opinions, rather than in statutes.<sup>427</sup>

#### 2. Breach of Contract

According to the broiler grower contract analysis discussed in Chapter Three of this report, most broiler growing arrangements grant the company sole power to make decisions relating to the timing, size, type, and frequency of flocks. Some contracts make it clear that there is no commitment from the company to deliver more than one flock. If, however, a poultry growing contract did contain commitments on these subjects, and a company failed to meet those commitments, a grower would likely have a claim for breach of contract.

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<sup>425</sup> Minn. Stat. § 17.942.

<sup>426</sup> Minn. Stat. §§ 17.94, 336.1-201(9).

<sup>427</sup> *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D.N.C. 1996), aff'd in relevant part sub nom. *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998); *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 20-21 (N.D. Ga. Oct. 11, 2000) (order denying defendant's motion for judgment as a matter of law), aff'd without opinion by 260 F.3d 627 (11th Cir. 2001).

One surprising (and rather old) **Arkansas** breach of contract case involves a one-year contract between a cooperative and a grower.<sup>428</sup> In the contract, the cooperative reserved the right to terminate the contract in the event conditions in the industry changed. Ordinarily, this type of clause might be interpreted as granting the cooperative almost unlimited discretion to terminate the contract as long as it could argue that changes in the industry had occurred. However, the court in this case—in a one-page opinion—found that the cooperative had breached the contract when it failed to provide the grower with another flock and terminated a contract. This was true despite evidence presented by the cooperative that there had been changes in the industry and despite the absence of any commitment in the contract that the cooperative would provide a certain number of flocks.

### 3. Disclosure of Risks

If state law requires disclosure of risks in agricultural production contracts, an argument could be made that the risk of delays between flocks should be disclosed. **Minnesota** appears to be the only state with such a law at present.<sup>429</sup>

## IV. Court Decisions in Poultry Cases Addressing Issues Not Identified As Concerns in the Broiler Grower Survey

Courts have also issued decisions in poultry-related cases that address issues important to broiler growers that were not addressed by the Broiler Grower Survey. Following is a discussion of some of these cases.

### A. Broken Promises of Long-Term Contracts

Courts have considered whether companies' oral promises of a long-term relationship between the company and the grower can be enforced when the company refuses to be bound by these promises. Cases addressing this issue have been brought under several theories including fraud, promissory estoppel, and breach of contract.

#### 1. Fraud

One type of fraud claim that may be brought in cases where a promised long-term relationship is not realized is fraudulent inducement to contract. As discussed earlier, fraudulent inducement to contract means making false statements in order to persuade someone to sign a contract. If the company, or one of its employees, made a promise, such as stating that the contract would continue “as long as things went well,” when it knew that it was likely that the contract would not be continued, and the prospective grower relied on that information to make the decision to become a grower, it might be a fraudulent inducement to contract.

A court's decision in a fraudulent inducement case tends to turn on whether the grower can establish that the company had no intention of meeting its pre-contract

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<sup>428</sup> *Farmers Cooperative Assn., Inc. v. Phillips*, 422 S.W.2d 418 (Ark. 1968).

<sup>429</sup> Minn. Stat. §§ 17.91, subd. 2, 17.942.

promises and intended to deceive the grower by those promises into signing the contract. In cases where there is no evidence that the company intended to deceive the grower at the time it entered into the contract, the grower generally will not recover for fraudulent inducement against the company.<sup>430</sup> This was true in one **Alabama** case even though a company representative had allegedly told the growers that the written contract was only a “working contract” and that it did not affect the oral promise.<sup>431</sup> In another **Alabama** case, however, egg producers were able to recover \$30,000 in damages for fraud and breach of contract for a company’s violation of an agreement to continue placing birds with the producers if they made certain improvements and had a record that was at least average.<sup>432</sup> Evidence in that case showed that the company intended to pull out of the growers’ area all along.

### 2. *Promissory Estoppel*

If, as is usually the case, a company’s representations about a long-term relationship are not included in the written contract, they may present a claim of promissory estoppel. As discussed earlier, however, promissory estoppel is a very difficult claim to win in most poultry growing situations because courts will first look to the terms of the written contract between the parties, and these contracts often either expressly allow the company to terminate the relationship or contain a provision—the merger or “entirety” clause discussed earlier—that nullifies any agreements outside the written contract itself. In one representative case from **Arkansas** involving egg producers, the producers sued the company under a promissory estoppel claim, arguing that the company’s termination of the relationship broke a promise to continue with the producers and allow them to pay their egg production facilities debts.<sup>433</sup> The court rejected the producers’ claim, holding that the plain terms of the contract allowed the company to terminate the relationship and the contract’s entirety clause prevented the producers from arguing that any outside agreements had been made.

### 3. *Breach of Contract*

The circumstances under which growers will be successful in breach of contract claims related to non-renewal of contracts appear to be limited. In general, growout contracts give companies a great deal of leeway, not only in terminating contracts, but also in timing and frequency of flock placement. If the contract states when and how the contract may be terminated or how many flocks will be placed with the grower,

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<sup>430</sup> See, for example, *Starling v. Valmac Industries, Inc.*, 589 F.2d 382 (8th Cir. 1979); *Shelton v. Valmac Industries, Inc.*, 539 F. Supp. 328 (W.D. Ark. 1982).

<sup>431</sup> *Hinkle v. Cargill, Inc.*, 613 So. 2d 1216 (Ala. 1992).

<sup>432</sup> *Marshall Durbin Farms, Inc. v. Landers*, 470 So. 2d 1098 (Ala. 1985).

<sup>433</sup> *Cogburn v. ConAgra Poultry Co.*, 1997 Ark. App. LEXIS 174 (Ark. App. 1997).

and the company follows those steps, the grower is unlikely to succeed on a breach of contract claim if the company stops delivering birds.<sup>434</sup>

In an **Arkansas** court decision issued more than 30 years ago, the court allowed a grower to recover lost profits when the company canceled his contract, despite the fact that the company had expressly reserved the right to cancel in the contract and had not committed itself to a deliver a certain number of flocks.<sup>435</sup> More recent case law may make it difficult to succeed in such circumstances in the future.

The first requirement for a successful breach of contract claim is an enforceable contract. If a grower takes steps—such as building chicken houses—in expectation of receiving a contract but without a signed contract in place, the grower will generally not have a claim for breach of contract if the company decides not to enter into a contract with the grower.<sup>436</sup> Courts vary in how strict they are in requiring all terms to be agreed to before finding that a contract has been entered into. In one **Alabama** case, the court found that the parties had entered into a contract because the company had provided a written memo saying that if the growers made certain improvements and their rank was at least average, the company would provide birds one batch at a time.<sup>437</sup> In cases where no contract has been entered into but the grower has made substantial expenditures based on the company’s direction and in an expectation of a contract, the grower may have more success with a promissory estoppel claim, discussed above.

One important requirement of an enforceable contract may be that it be in writing. The “Statute of Frauds” requires contracts to be in writing in certain circumstances. One of these circumstances is if the promises in the contract cannot be completed in one year. In an **Alabama** case, the court held that a company’s alleged oral promise to continue to deal with growers until they had paid off their debts was not enforceable because it could not be completed in one year and there was no written agreement.<sup>438</sup> The court held that the oral promise was not enforceable in court, and the grower could not recover for breach of contract.

In an earlier **Georgia** case, however, a court allowed enforcement of an oral agreement that no improvements to a chicken house would be required until the egg producer had recouped his investment and made a profit.<sup>439</sup> The court held that language in the written contract between the parties clearly recognized that the

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<sup>435</sup> *Farmers Cooperative Assn., Inc. v. Phillips*, 422 S.W.2d 418 (Ark. 1968).

<sup>436</sup> *Gregory v. Perdue, Inc.*, 267 S.E.2d 584 (N.C. App. 1980).

<sup>437</sup> *Marshall Durbin Farms, Inc. v. Landers*, 470 So. 2d 1098 (Ala. 1985).

<sup>438</sup> *Hinkle v. Cargill, Inc.*, 613 So. 2d 1216 (Ala. 1992).

<sup>439</sup> *Glennville Hatchery, Inc. v. Thompson*, 298 S.E.2d 512 (Ga. App. 1982).

producer and company might have other agreements related to the egg production relationship and therefore evidence of the oral agreement was accepted.

## **B. Retaliation for Organizing or Complaining**

Courts have also addressed growers' attempts to obtain relief for harm caused by poultry company actions that the growers alleged were in retaliation for the growers' membership in a grower association or for complaining about company practices.

### *1. Agricultural Fair Practices Act*

Growers whose growing arrangements are terminated or whose payment or treatment is altered as a result of attempting to organize with other growers likely have a claim under the federal Agricultural Fair Practices Act (AFPA). As discussed at pages 12 to 15 of this chapter, the AFPA prohibits handlers from knowingly taking a variety of actions against individual producers because of their decision to join or not to join an association of producers.<sup>440</sup> It is important to keep in mind, however, that a poultry company, grower, or grower association is not required to deal with a particular party under the AFPA, so long as the reason for the decision not to do so does not violate the specific provisions of that Act.

In one **Florida** case, the company's failure to come up with a legitimate explanation for terminating a relationship with a grower that had endured nearly 20 years was deemed evidence of an unlawful motivation under the AFPA.<sup>441</sup> The court concluded that terminating a poultry growing contract without apparent economic justification might be evidence of discrimination or knowing refusal to deal with someone due to membership in a grower association.

In a recent **Georgia** case, an egg producer was awarded damages and attorney fees for a company's violations of the AFPA.<sup>442</sup> The producer had presented evidence that the company and its employees expressed disapproval of an association and treated producers "whom it suspected were involved in the association" differently.<sup>443</sup> The company had attempted to obtain information about the association's activities and attempted to identify producers who attended an association meeting. There was also evidence that the company attempted to intimidate producers who joined or were interested in the association, that the company refused to allow an association

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<sup>440</sup> 7 U.S.C. § 2303.

<sup>441</sup> *Baldree v. Cargill, Inc.*, 758 F. Supp. 704 (M.D. Fla. 1990), aff'd without opinion by 925 F.2d 1474 (11th Cir. 1991).

<sup>442</sup> *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM (N.D. Ga. Oct. 11, 2000) (order denying defendant's motion for judgment as a matter of law), aff'd without opinion by 260 F.3d 627 (11th Cir. 2001); *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM (N.D. Ga. Oct. 11, 2000) (order awarding attorneys' fees and expenses).

<sup>443</sup> *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 11 (N.D. Ga. Oct. 11, 2000) (order denying defendant's motion for judgment as a matter of law), aff'd without opinion by 260 F.3d 627 (11th Cir. 2001).

representative to attend a meeting between the producer and the company, that the plaintiff-producer received a short flock after he began to organize the association, and that the plaintiff-producer was ultimately terminated.

The company argued that the producer's termination was based on poor production and poor facilities. The court held that the jury could reasonably have rejected this justification, noting that the producer had presented evidence contradicting the company's allegations along with evidence that the company had failed to follow its normal procedures when terminating the producer's contract, had failed to document alleged problems at the producer's farm, and had not terminated other producers with similar problems. Given this evidence, along with the evidence demonstrating the company's resistance to the association, the court held that the jury could reasonably have disbelieved the company's justification and concluded that the producer was terminated due to his membership in an association.<sup>444</sup>

The jury awarded the producer \$250,000 in lost equity and \$80,500 in lost profits for his AFPA claims.<sup>445</sup> The court also awarded the grower more than \$190,000 in attorney fees and expenses.<sup>446</sup> In the attorney fee decision, the court stated that this is the first case in which an individual producer was awarded damages under the AFPA.<sup>447</sup> The awards were affirmed without opinion in May 2001 by the Eleventh Circuit Court of Appeals.<sup>448</sup>

## 2. Packers & Stockyards Act

Because the right to join or not join a producer association is protected by law, one could make a strong argument that an attempt to punish a grower for the exercise of that right is an unfair and deceptive trade practice forbidden under the P&S Act. However, the grower must provide enough evidence to convince a jury or judge that he or she was retaliated against in order to have a successful P&S Act claim.

In one **Arkansas** case, a turkey grower alleged that he was retaliated against by his company in a number of ways, including short-counting and under-weighting birds, shorting feed deliveries, culling birds without good cause, and giving him low quality

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<sup>444</sup> *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 14-15 (N.D. Ga. Oct. 11, 2000) (order denying defendant's motion for judgment as a matter of law), aff'd without opinion by 260 F.3d 627 (11th Cir. 2001).

<sup>445</sup> *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 2 (N.D. Ga. Oct. 11, 2000) (order denying defendant's motion for judgment as a matter of law), aff'd without opinion by 260 F.3d 627 (11th Cir. 2001).

<sup>446</sup> *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 20 (N.D. Ga. Oct. 11, 2000) (order awarding attorneys' fees and expenses).

<sup>447</sup> *Burger v. Cagle's Farms, Inc.*, No. 4:98-CV-0246-HLM, slip op. at 18 (N.D. Ga. Oct. 11, 2000) (order awarding attorneys' fees and expenses). The court also noted that there have been no published cases awarding attorney fees under the AFPA. Slip. op. at 3.

<sup>448</sup> 260 F.3d 627 (11th Cir. 2001).

poults as a means of retaliation for his complaints and attempts to associate with other growers.<sup>449</sup> The grower was allowed to bring the retaliation claims under the P&S Act, but he was unable to convince the jury of these claims.

As this case shows, being allowed to bring a claim under the P&S Act is just the first hurdle for growers who believe that they are being retaliated against for their complaints or organizing activities. In another case, brought in **North Carolina**, the court determined that providing low-quality inputs in order to discourage growers from voicing their grievances about a company could be a violation of the P&S Act, as could terminating the contract as a form of retaliation.<sup>450</sup> The appellate court noted, however, that there is no legal authority for a finding that termination of a grower's contract without economic justification is a P&S Act violation as a matter of law.<sup>451</sup> Instead, growers must go to trial and attempt to persuade a jury that the actions they allege—such as being provided inferior poults—in fact occurred and were in fact unfair. Evidence that the company lacked a legitimate economic reason for its behavior is one piece of the puzzle, but it would not necessarily be considered conclusive.

### 3. *Racketeer Influenced and Corrupt Organizations Act*

One **Florida** case in which a grower claimed that the company had terminated his contract because of his membership in a producer association involved claims under the federal Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>452</sup> The grower successfully secured a preliminary injunction against the company, but because the case involved several different legal theories, it is hard to tell which was responsible for the ruling in the grower's favor.

In general, to prove a RICO violation there must be proof that there has been a “pattern of racketeering activity.”<sup>453</sup> In an **Arkansas** case, a grower's RICO claim was denied as a matter of law because the court found that he had failed to prove that the company's alleged violations were related and continuing.<sup>454</sup>

### 4. *State Unfair and Deceptive Trade Practices Acts*

Retaliation in a business relationship may also be a violation of state unfair and deceptive trade practices acts. In one case, growers were able to bring a claim under

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<sup>449</sup> *Pavlik v. Cargill, Inc.*, 9 F.3d 710 (8th Cir. 1993).

<sup>450</sup> *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D.N.C. 1996), aff'd in relevant part sub nom. *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998).

<sup>451</sup> *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998).

<sup>452</sup> *Baldree v. Cargill, Inc.*, 758 F. Supp. 704 (M.D. Fla. 1990), aff'd without opinion by 925 F.2d 1474 (11th Cir. 1991). RICO can be found at 18 U.S.C. §§ 1961-1968.

<sup>453</sup> 18 U.S.C. § 1962. See also, *Pavlik v. Cargill, Inc.*, 9 F.3d 710, 715 (8th Cir. 1993) (stating that to prove RICO claim, the activities complained of must be related and continuing).

<sup>454</sup> *Pavlik v. Cargill, Inc.*, 9 F.3d 710 (8th Cir. 1993).

the **North Carolina** act based on allegations of unjust termination that they also claimed were violations of the P&S Act.<sup>455</sup>

## **V. Recommendations for Voluntary Measures and Public Policy Reforms to Address Concerns Identified in the Broiler Grower Survey**

### **A. Description of Proposed Legislation Affecting Grower Relations with Poultry Processors**

Any discussion of public policy reforms affecting broiler growers' relationships with their poultry processing companies must include a discussion of three proposed pieces of legislation that have received much attention and debate over the last year. This proposed legislation includes: (1) the model Producer Protection Act endorsed by 17 state Attorneys General, (2) proposed amendments to the federal Packers and Stockyards Act, and (3) a bill providing for creation of a federal unfair and deceptive trade practices act for agricultural contracts and making amendments to the federal Agricultural Fair Practices Act. It is important to discuss these proposed pieces of legislation here because they address in part many of the grower concerns identified in the Broiler Grower Survey. Additional reforms would be needed to fully address grower concerns.

Following is a brief description of this proposed legislation.

#### *1. Model Producer Protection Act*

The model Producer Protection Act, found in Appendix 4-A of this report, was developed by the Iowa Attorney General's Office and has been endorsed by 17 state Attorneys General. Over the last year there has been much public debate over the provisions of this model Act.<sup>456</sup> Some or all of the provisions in this model Act have been considered by many state legislatures including Georgia, Indiana, Illinois, Iowa, Kansas, Kentucky, Mississippi, Nebraska, and North Carolina. Much of this model Act has been included in bills introduced in Congress.<sup>457</sup> At the time of printing there was also an effort by a coalition of organizations to include the model Act's provisions in the 2002 Farm Bill.

The model Producer Protection Act applies both to production contracts of the type that dominate the broiler industry and to marketing contracts. Key provisions of the model Act include:

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<sup>455</sup> *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D.N.C. 1996), aff'd in relevant part sub nom. *Philson v. Goldsboro Milling Co.*, 1998 U.S. App. LEXIS 24630 (4th Cir. 1998).

<sup>456</sup> See, for example, Michael Boehlje, et al., "The Producer Protection Act – will it protect producers?" *Agricultural Law Update*, Vol. 18, No. 2 (Jan. 2001) and Neil E. Harl, et al., "The Producer Protection Act – will It protect producers? A rejoinder," *Agricultural Law Update*, Vol. 18, No. 3 (Feb. 2001).

<sup>457</sup> See, for example, S. 20, 107th Cong., 1st Sess. (2001).

**Good Faith:** Incorporates the obligation of parties to the contract to deal in good faith.<sup>458</sup>

**Contract Readability and Risk Disclosure:** Requires that contracts be in plain language and include a cover page that contains an index of major contract provisions and discloses material risks faced by a producer who enters the contract. The cover page must also disclose: (a) the producer's right to review and cancel contract within three days of signing, (b) the duration of the contract, (b) methods for contract termination, (c) standards for renegotiation, (d) responsibility for environmental damage, (e) all factors used in determining producer payment, (f) responsibility for obtaining and complying with all government permits, and (g) any contract term which the Act's administering official determines appropriate.<sup>459</sup>

**Three-day Review and Cancellation:** Provides contract producers with a contract review period that allows for cancellation up to three business days after execution of the contract.<sup>460</sup>

**Confidentiality Provisions Void:** Makes void and unenforceable any oral or written contract provision that requires the terms of the contract to be held confidential.<sup>461</sup>

**Producer Lien to Secure Payment Under Contract:** Provides contract producers with a first-priority lien on the agricultural commodity (including poultry) they produced, the proceeds from the sale of that commodity, or the property of the contractor to ensure payments to producers due under the contract.<sup>462</sup> In the case of poultry, to preserve the lien the producer must file a lien statement providing specified information with the Secretary of State within 45 days of the date the poultry first arrives at the producer's facility.<sup>463</sup>

**Producer Capital Investment Recapture:** Provides that a contractor may not terminate, cancel, or fail to renew a production contract until specified notice provisions are satisfied and compensation for damages is made, if all of the production contracts between the producer and the contractor taken together require the producer to make capital investments of \$100,000 or more.<sup>464</sup>

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<sup>458</sup> Model Producer Protection Act, § 3.

<sup>459</sup> Model Producer Protection Act, § 4.

<sup>460</sup> Model Producer Protection Act, § 5.

<sup>461</sup> Model Producer Protection Act, § 6.

<sup>462</sup> Model Producer Protection Act, § 7.

<sup>463</sup> Model Producer Protection Act, § 7(c).

<sup>464</sup> Model Producer Protection Act, § 8.

If this provision is violated, the contractor must pay the producer the value of the remaining useful life of the structures, machinery, or equipment involved.<sup>465</sup> Exceptions to this rule are made for situations where the producer has voluntarily abandoned the contractual relationship or been convicted of fraud or theft committed against the contractor.<sup>466</sup>

Notice to the producer and an opportunity to remedy are required if termination, cancellation, or failure to renew the contract is because of the producer's breach.<sup>467</sup>

**Specified Unfair Trade Practices Prohibited:** Prohibits a contractor from taking unfair actions including: (a) knowingly taking retaliatory action for a producer's exercise of or attempt to exercise a producer right; (b) providing false information to a producer; (c) refusing to give a producer information or data used to determine compensation under the production contract; (d) refusing to allow a producer to observe weighing and weights and measures used to determine compensation; (e) using the performance of any other producer to determine compensation of a producer or as basis for termination [prohibits compensation based on the ranking system prevalent in broiler contracts]; (f) requiring producers to make additional capital investments in connection with or to retain a production contract if the investments are beyond the requirements for such contract, unless the cost of the investment is offset by compensation or modifications to the contract that the producer agrees to in writing; and (g) executing a contract in violation of other provisions of the model Act or requiring a producer to waive rights under those provisions.<sup>468</sup>

**Use of Other State's Laws in Contract Dispute Prohibited:** Makes void and unenforceable any contract provision requiring application of another state's law to resolve a dispute.<sup>469</sup>

**Mediation of Contract Disputes:** Requires that all agricultural contracts provide for attempted resolution of contract disputes through mediation before the dispute can be heard by a court.<sup>470</sup>

**Penalties and Enforcement Provisions:** Establishes both civil and criminal penalties for violations of the model Act and authorizes the state Attorney

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<sup>465</sup> Model Producer Protection Act, § 8(e).

<sup>466</sup> Model Producer Protection Act, § 8(d).

<sup>467</sup> Model Producer Protection Act, § 8(c).

<sup>468</sup> Model Producer Protection Act, § 9.

<sup>469</sup> Model Producer Protection Act, § 11.

<sup>470</sup> Model Producer Protection Act, § 12.

General and producers to bring cases in court for violations.<sup>471</sup> Authorizes reasonable attorney fees for producers who prevail in enforcement actions.

## *2. Proposed Packers and Stockyards Act Amendment*

An amendment to the federal Packers and Stockyards Act has been introduced in Congress that would affect enforcement of the Act as to live poultry dealers, including processing companies that contract with broiler growers.<sup>472</sup> This bill would give the Secretary of Agriculture the authority to bring the same type of administrative enforcement actions against live poultry dealers that the Secretary can now bring against meat packers for violations of the Act's provisions. This authority includes filing administrative complaints against a live poultry dealer for violations of any provision of the P&S Act, requiring them to attend a hearing on the complaint, and seeking enforcement of administrative orders through action in court.

## *3. Proposed Federal Unfair and Deceptive Trade Practices Act for Agricultural Contracts*

Another bill introduced in Congress would resemble the Packers and Stockyards Act, but serve as a federal unfair and deceptive trade practices act for all agricultural production and marketing contracts.<sup>473</sup> In addition to the basic P&S Act prohibitions on unfair and deceptive practices and giving undue advantage or disadvantage to particular individuals, this bill would prohibit contractors from making any false or misleading statement in connection with a transaction involving any production contract and would prohibit retaliation against whistle-blowers.<sup>474</sup> The bill would require contractors to maintain records for a period of not less than five years.<sup>475</sup> The bill would also grant the Secretary of Agriculture enforcement authority over violations, including the power to assess civil penalties of up to \$100,000 for each violation.<sup>476</sup>

## *4. Proposed Agricultural Fair Practices Act Amendment*

Amendments to the federal Agricultural Fair Practices Act (AFPA) have also been introduced in Congress, which may affect poultry processor and broiler grower relations.<sup>477</sup> These proposed amendments are intended to provide a greater balance of power between processors and producers in negotiating production and marketing

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<sup>471</sup> Model Producer Protection Act, § 13.

<sup>472</sup> H.R. 231, 107th Cong., 1st Sess. (2001); S. 1076, § 8, 107th Cong., 1st Sess. (2001).

<sup>473</sup> S. 20, Title I, Subtitle B, 107th Cong., 1st Sess. (2001).

<sup>474</sup> S. 20, Title I, § 111(a)(3), (4), 107th Cong., 1st Sess. (2001).

<sup>475</sup> S. 20, Title I, § 111(b)(5), 107th Cong., 1st Sess. (2001).

<sup>476</sup> S. 20, Title I, § 111(b), 107th Cong., 1st Sess. (2001). In § 114, the bill also includes dedicated funding for enforcement staff.

<sup>477</sup> S. 20, Title I, Subtitle D, 107th Cong., 1st Sess. (2001); S. 3243, Title II, 106th Cong., 2nd Sess. (2000).

contracts in agriculture. As it relates to broiler grower and poultry processing company relations, the proposed amendments provide:

**Good Faith Bargaining:** Processors and accredited grower associations have a mutual obligation to bargain in good faith. They must meet at reasonable times and for reasonable periods for the purpose of negotiation of price, terms of sale, compensation for products produced or services rendered under contracts, or other provisions relating to products marketed or services rendered by the accredited association's members. The proposed amendments make it unlawful for a processor to fail to bargain in good faith with an accredited association.

**Agriculture Secretary Authorized to Issue Accreditation:** Provides procedures for grower associations to petition the Secretary of Agriculture for accreditation for purposes of bargaining with designated processors or handlers. The procedures provide standards for when an association may be accredited and allow processors an opportunity to respond to the association petition. There is provision for both informal proceedings and formal hearings on the accreditation petitions. Notice of an accreditation order is required. Procedures including an administrative hearing are provided for situations where the Secretary believes that an association should lose its accredited status.

**Administrative and Judicial Enforcement:** The Secretary of Agriculture may investigate complaints of violations of the provisions and bring administrative enforcement actions. The proposed amendments to the AFPA also provide authority for individuals to seek relief from a violation of the provisions or to prevent a future violation.

#### **B. Context in Which Policy Decisions Must Be Made.**

In making decisions regarding which policy reforms should be implemented to address the grower concerns identified in the Broiler Grower Survey, policy makers will hear much debate reflecting the disparate interests of growers and companies. The relationship between growers and processing companies is one of mutual dependence and benefit: growers rely on the company to provide the birds necessary to produce income from their poultry facilities and companies benefit from lower production costs and capital investment associated with contract production as opposed to direct ownership and operation of all production facilities. Broiler growers' investment in facilities is roughly equal to the companies' investment in the rest of the production and processing complex. Contract growers likely provide lower labor costs than company employees through higher productivity as a result of growers' perceived greater control over their work and the avoidance of employee fringe benefit expenses. For this contract system of broiler production to survive, the grower-company relationship must work to the mutual benefit of both parties.

Even recognizing that the grower-company relationship is one of mutual dependence and benefit, policy makers must keep in mind that there is a significant imbalance of power between the processing companies and individual growers, with the power weighted

heavily in the companies' favor. Where the loss of an individual grower is a minor problem to the company, losing a contract with the company is likely a disaster for the grower. In this imbalance of power the companies' interest in keeping costs of producing broilers low competes against the growers' interest in obtaining sufficient returns to maintain financially viable operations.

It is within this context that policy reforms must be considered. Such reforms should ensure a more equal balance of power within the grower-company relationship, but cannot be so costly to the companies that they will have economic incentives to terminate their relationships with contract broiler growers and move into direct ownership and operation of all broiler production facilities.

### **C. Recommendations for Policy Reforms to Address Concerns Identified in Broiler Grower Survey**

This section includes recommendations for policy reforms to address grower concerns that have not yet been resolved by the state and federal laws discussed above. Because the best policy reforms often come from voluntary changes in the relationship between the parties involved, in addition to providing recommendations for reform through law, this section will also discuss measures that companies and growers could undertake to improve their relations.

#### *1. Encourage collective bargaining between growers and processing companies.*

One goal of any public or private policy reform should be to reduce the imbalance of power between broiler growers and processing companies. Reducing the imbalance in power—which now heavily favors companies over growers—will likely improve the growers' overall perception of their relationship with the companies. If done effectively, it could also provide a mechanism for growers to address all of the 10 concerns identified through the Broiler Grower Survey.

**Voluntary Measures:** One way to reduce the power imbalance would be for companies to meet, discuss, and bargain with growers as a group rather than individuals to address key aspects of the growers' relationship with the company.

Companies could implement a policy by which they regularly invite growers as a group in to discuss key aspects of their relationship, including contract terms, issues related to inputs such as chicks and feed, recommended equipment changes or improvements, and other factors related to the calculation of growers' payments under the contract. To effectively change the balance of power at these meetings companies would have to demonstrate a marked willingness to consider and adjust policy based on recommendations made by growers. To ensure that growers have the opportunity to participate in setting the confines of the core aspect of their relationship with the company—the growout contract—such meetings and bargaining sessions would have to take place before new contracts are drafted. Companies could also notify growers of a method by

which they as a group could request and obtain meetings with company officials to discuss and attempt to resolve issues as they arise.

**Public Policy Reforms:** Another way to move toward reducing the imbalance of power between broiler growers and processing companies is by implementing laws that require companies to participate in collective bargaining efforts made by growers. The proposed amendment to the Agricultural Fair Practices Act, for example, specifies that failure to offer to accredited associations the same terms made available to individual growers would be a violation of good faith bargaining requirements.<sup>478</sup> An advantage of implementing such policy through law is that it assures that all companies are required to participate on the same footing. It also ensures that all growers are given the opportunity to organize to collectively bargain. Such assurance cannot be obtained through voluntary measures alone. Enactment of the amendments to the Agricultural Fair Practices Act, discussed above, would make huge strides in reducing the imbalance of power between the companies and the growers. Those amendments also provide protections for companies to ensure that they are not required to bargain with associations that do not represent a significant number of the companies' growers.

*2. Ensure that growers are given complete and understandable information about key aspects of their growout arrangements.*

One of the best ways to help reduce the imbalance of bargaining power between companies and growers is to equalize their access to information about key aspects of their business relationship. Improving growers' access to information about such things as feed volume, content, and quality; vigor and age of breeder flocks from which chicks are drawn; methods and standards for condemnations; and methods for calculation of grower pay would address in part several of the grower concerns identified in the Broiler Grower Survey. There are many policy reform measures that may be taken to meet this goal of equalizing access to key information.

**Voluntary Measures:** Companies and growers could develop a program to better document feed quality and quantity. Some elements of such a program could include: (a) establishing standards for quality and sampling and analyzing the feed quality for each delivery to growers; (b) giving growers a copy of the feed analysis upon delivery; (c) giving growers copies of feed weight documentation upon delivery; (d) establishing a method whereby the volume of feed can be checked through measurement of the bins immediately upon delivery to growers' facilities; and (e) establishing a procedure for refereeing disputes between growers and companies over the quality of feed, which might include sharing the of the cost of an additional quality analysis.

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<sup>478</sup> S. 20, Title I, § 5(b), 107th Cong., 1st Sess. (2001).

Programs to improve growers' access to information about other factors that affect the level of grower pay could also be developed. These information programs might include such things as: (a) providing growers with information about the historical performance of birds drawn from the each of the various breeder flocks and identifying at time of delivery the flock from which the chicks were drawn; (b) adjusting growers' performance rating used in calculation of pay to account for different historical performance standards of chicks from the various breeder flocks; (c) developing methods to ensure that chicks from the various breeder flocks are distributed randomly and providing growers with information to demonstrate this; (d) providing growers with a document that sets out the standards and methods for making condemnation decisions at the processing plant, which growers may use if they choose to view their birds being processed; (e) conducting educational sessions for growers in which all of the factors used in the settlement sheet to calculate pay are explained in detail; and (f) establishing procedures for growers to use to review with the company the figures on specific settlement sheets that they do not understand or believe may be incorrect.

The Packers and Stockyards Act and its implementing regulations provide specific protections for growers with regard to feed weighing, prompt weighing of birds upon arrival at a plant or holding station, contents of settlement sheets, and access to the statutory trust to ensure payment. By having companies give growers a written statement of their rights upon signing a contract and at regular intervals throughout the contract relationship, growers' access to information about their legal rights in their growout relationship will be significantly improved.

**Public Policy Reforms:** Some important public policy reforms currently being debated also would assist in meeting the goal of equalizing the companies' and growers' access to information about key aspects of their business relationship. Enactment of provisions of the model Producer Protection Act that require growout contracts to be in plain language understandable to growers and to disclose in a cover sheet the material risks associated with the contract would not only help growers understand the often technical provisions of the contract, but would also ensure that they are better able to evaluate their risks before signing. In cases where grower pay is affected by (a) the quality of feed, chicks, and medications supplied by the company; (b) condemnations that may result from handling of the birds by company employees or agents; and (c) other factors outside the growers' control, a discussion of these circumstances should be included in the statement of material risks. It is not obvious from the model Act's requirements for disclosure of risks that such a disclosure would be required. Thus, some amendment to the model Act may be necessary to cover this issue.

Enactment of the proposed federal unfair and deceptive trade practices act for agricultural contracts—the provision of Senate Bill 20 that prohibits companies from giving out misleading information—also furthers the goal of equalizing

access to information by ensuring that companies make only accurate information available.<sup>479</sup> By giving growers a legal remedy against a company that provides false or misleading information, this provision could greatly improve companies' incentives to ensure that their employees and agents are providing accurate information to growers. Currently, many growers who rely on false or misleading information from company employees are often unable to even present evidence of misinformation to a court, due to the operation of entirety clauses in the contracts.

*3. Ensure effective enforcement of laws currently on the books.*

Information presented in this chapter demonstrates that there are many laws currently on the books that at least in part address grower concerns identified in the Broiler Grower Survey. One of the best ways to make these current laws more effective in resolving growers' concerns is to ensure that there are effective methods to enforce those provisions. Strong enforcement methods are important, not only because they authorize direct actions to enforce the laws' provisions, but also because they provide a strong incentive for parties covered by the law to self-regulate by ensuring their own compliance in order to avoid the costs and penalties associated with enforcement actions.

As discussed above, the federal Packers and Stockyards Act and its implementing regulations address many of the concerns identified in the Broiler Grower Survey. However, GIPSA—the agency in charge of administering those provisions—does not have the full panoply of enforcement authorities available to it to address violations of the Act in the poultry sector that it has to address such violations in the red meat sector. Enactment of the proposed amendments to the Packers and Stockyards Act described above will provide the agency with the same kind of enforcement powers in the poultry industry and the red meat industry.<sup>480</sup>

The Packers and Stockyards Act authorizes those who are injured by a violation of the Act to bring lawsuits to collect damages. However, because of the high cost of litigation, an individual grower injured by a company's violation of the Act is not likely to be able to maintain a lawsuit against the vast resources of the company. Amending the Act to allow growers to collect attorney fees from the company if the grower succeeds in proving a violation in court would further strengthen the grower protections included in the Act.

*4. Reform the use of the ranking system to determine grower pay.*

The first two grower concerns identified in the Broiler Grower Survey are related. A substantial percentage of growers said that they believe that the ranking system—whereby one grower's production performance is ranked against that of other

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<sup>479</sup> S. 20, Title I, § 111(a)(3), 107th Cong., 1st Sess. (2001).

<sup>480</sup> H.R. 231, 107th Cong., 1st Sess. (2001); S. 1076, § 8, 107th Cong., 1st Sess. (2001).

growers—does not provide a good incentive for them to work hard. Over three-quarters of the growers also believe that their pay depends more on the quality of inputs supplied by the company than on the quality of the grower's work.

There are several policy reforms that might be implemented to give growers more of an incentive and to ensure them that their pay is not being unfairly lowered by factors outside their control.

**Voluntary Measures:** Growout contracts could be rewritten to adopt a method for calculating grower pay that is not based on ranking growers against each other. Such a method could be more closely tied to the services the grower is providing. It could set a minimum base payment that is guaranteed to growers. One such method, already used in some contracts, might be to pay growers based on the square footage of the broiler houses that the grower provides. To this base guaranteed payment could be added premiums that reflect other services the grower provides, including labor. Other premiums might be at a fixed rate, such as one paid to all growers for each bird delivered to the plant, with the level of such payment adjusted according to market conditions.

Even companies maintaining a ranking system for calculating pay can take actions that will help ensure that growers do not feel disadvantaged by this system. One such action would be to ensure that company employees who also grow broilers for the company—particularly those that have a role in delivering inputs to growers—are not ranked against non-employee growers. This should help reduce grower concerns that there might be favoritism or the ability to manipulate which grower receives the better quality inputs. Another such action would be to incorporate provisions in the contract that set out methods used to ensure that inputs such as feed and chicks are delivered to growers in the ranking group randomly.

**Public Policy Reform:** Growers' concerns about the ranking system method of determining their pay could also be addressed through enactment of a statute that prohibits the use of the performance of one grower to determine the pay of another grower. The model Producer Protection Act, discussed above, includes such a provision.<sup>481</sup> Enactment of this provision on a federal level, rather than at the state level, would ensure that all broiler companies are required to eliminate this method for calculating pay at the same time and would ensure that companies and growers in one state are not pitted against those in another. The model Act's provisions do not address what type of payment calculation method might replace the ranking system. This would be left to companies and growers to negotiate.

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<sup>481</sup> Model Producer Protection Act, § 9.

GIPSA could also issue regulations under the Packers and Stockyards Act to address the growers' concern that their level of pay is dependent more on the quality of inputs supplied by the company than their own efforts. Such regulations could establish that a pattern or practice by the company, or any of its agents, of delivering inferior chicks, feed, or other inputs to any particular grower constitutes unjust discrimination and subjects a grower to an unfair disadvantage in violation of the Act. GIPSA regulations could require random distribution of chicks and feed to growers, describing how randomness will be assessed by the agency.

*5. Make the statutory trust securing grower payment available to address disputes over inaccurate payment calculations.*

The Broiler Grower Survey identified grower concerns about the accuracy of feed weights and the accuracy and promptness of weighing birds upon delivery to a plant for processing. As discussed above, under the Packers and Stockyards Act GIPSA has authority to ensure that growers receive payment by requiring the companies to hold the birds, proceeds from the sale of the birds, and other company assets in trust until growers are paid.

**Public Policy Reform:** Because misweighing or delays in weighing will often lead to a company failing to make full payment for the birds produced by a grower, GIPSA could adopt regulations explicitly making the statutory trust procedures available to growers who allege that they were underpaid due to misweighing or delayed weighing.

*6. Increase grower awareness of dispute resolution processes and reform those processes to address grower concerns.*

The Broiler Grower Survey revealed a lack of awareness among growers about contract provisions relating to dispute resolution, and a reluctance among those growers who were aware of them to use the mediation, peer review, and arbitration mechanisms provided for.

Policy reforms could be implemented to improve growers' knowledge of and satisfaction with dispute resolution methods under production contracts.

**Voluntary Measures:** One means to address grower confusion about dispute resolution would be for those companies that require some form of mediation, peer review, or arbitration to clearly and prominently set out in the contract the rules that would be followed when resolving disputes and, if necessary, to make available to growers the rules of any ADR organization, such as the American Arbitration Association, whose rules would be used.

Contract provisions requiring growers to use ADR in case of dispute with the company should also set forth reasonable deadlines for starting the ADR process. A reasonable time after the dispute arises must be allowed in order to have a meaningful resolution process, so that the grower has time to gather information

and make a decision about whether to seek legal advice. This time also allows for the company and grower to engage in informal negotiations and discussions without the pressure of needing to immediately commence a formal ADR process.

**Public Policy Reform:** Federal statutory changes could be enacted that would permit growout contracts to require resolution of contract disputes through binding arbitration only if the parties agree to pursue arbitration after the dispute arises or if the arbitration provision itself was the subject of collective bargaining between the company and growers.

*7. Reduce growers' risk with respect to company-mandated capital improvements.*

The Broiler Grower Survey revealed grower concerns about the expense and effectiveness of improvements required by the companies. The survey revealed that some growers feel that they must agree to implement improvements or risk losing their contracts.

**Voluntary Measures:** Companies should make certain that all contracts spell out an agreement with respect to improvement requirements. The contract provisions could, for example, ensure that the equitable costs of required improvements will be covered through increased compensation and set out any limitations on the dollar-value or experimental nature of improvements that may be required. Resistance to company-required improvements may be minimized among growers if companies are contractually obligated to share in the costs of those improvements.

A growout contract could also establish a process for resolving disputes relating to the reasonableness of required improvements. The process should recognize the right of representatives of grower associations, as well as individual growers, to negotiate with the company. If the company makes a distinction in company and grower obligations between replacement of items lost through normal wear and tear and upgrades in the quality or sophistication of equipment, this should be clearly stated.

**Public Policy Reform:** The model Producer Protection Act, discussed above, includes a provision that addresses growers' expressed concerns about company-mandated improvements.<sup>482</sup> This Act would impose a duty on companies to compensate growers for the value of the remaining useful life of buildings, machinery, equipment, and other capital investment items if a company terminates or fails to renew a production contract without good cause. Companies' interests are also reflected in the model Act through provisions addressing a grower's breach or abandonment of the contract or fraud or theft against the company.

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<sup>482</sup> Model Producer Protection Act, § 8.

