

Approved: 2-11-00
Date

MINUTES OF THE SENATE COMMITTEE ON AGRICULTURE.

The meeting was called to order by Chairperson Steve Morris at 10:00 a.m. on February 10, 2000, in Room 423-S of the Capitol.

All members were present except:

Committee staff present: Raney Gilliland, Legislative Research Department
 Jill Wolters, Revisor of Statutes
 Nancy Kippes, Committee Secretary

Conferees appearing before the committee:

Ivan Wyatt, President Kansas Farmers Union
Representative Bruce Larkin
Ron Hein, Kansas Restaurant and Hospitality Association
Tom Tunnell, Kansas Grain and Feed Association
Mary Jane Stattelman, Assistant Secretary, Department of Agriculture
Ron Gaches, Farm Credit Associations of Kansas
Ken Bull, Vice President, Cattle Procurement, Excel Corporation of Wichita
Mike Jensen, Kansas Pork Producers Council
Leslie Kaufman, Assistant Director, Public Policy Division, Kansas Farm Bureau
Chuck Stones, Kansas Bankers Association
Rich McKee, Kansas Livestock Association

Others attending: (See Attached)

Senator Corbin made a motion to approve the minutes of the February 9, 2000 meeting as submitted. Senator Umbarger seconded. The motion carried.

Hearing on: **SB 565 - concerning agriculture; enacting the Kansas agricultural production contract fair practices act; prescribing penalties for violations thereof.**

Ivan Wyatt, President Kansas Farmers Union, testified in support of **SB 565** (Attachment 1).

Representative Bruce Larkin testified in support of **SB 565**, the agricultural production contract fair practice act (Attachment 2). Representative Larkin stated the key provisions of this bill are to establish a mechanism for termination of a contract by an integrator; to imply good faith and right to refuse animals in less than normal condition; to require that the integrator and producer share equally in violations of state or federal laws regarding environmental standards; and resolution of contract disputes.

Mike Schultz, Kansas Cattlemen's Association, provided written testimony in support of **SB 565** (Attachment 3).

Ron Hein, Kansas Restaurant and Hospitality Association, appeared before the committee with concerns about **SB 565** and how it might impact their members who provide food service at retail (Attachment 4).

Tom Tunnell, Kansas Grain and Feed Association, expressed concerns with **SB 565** in respect to whether there has been a serious problem in Kansas with producer contracts; how an integrator can be held legally responsible for half the cost of compliance with environmental standards of the producer by state law; and the fact that Kansas is a "central filing" state requiring liens of this type to be filed in the office of the Secretary of State. He indicated that the provision of **SB 565** dealing with liens could be a conflict with current state law (Attachment 5).

Mary Jane Stattelman, Assistant Secretary, Department of Agriculture, testified before the committee with

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON AGRICULTURE, Room 423-S of the Capitol, 10:00 a.m., on February 10, 2000.

concerns the Kansas Department of Agriculture has with the responsibilities **SB 565** places with the agency. She stated these responsibilities require specialized knowledge in mediation and arbitration and the Capper-Volstead Act. The Department would like the flexibility to contract for the services if necessary (Attachment 6).

Ron Gaches, Farm Credit Associations of Kansas, provided written testimony to express concern strictly from the viewpoint of a lender with the workability difficulties that will result if **SB 565** is adopted in its current form (Attachment 7).

Ken Bull, Vice President, Cattle Procurement, Excel Corporation of Wichita, testified in opposition to **SB 565**, stating enactment would cause tremendous harm to the farmers and ranchers of Kansas by discouraging contracting for agricultural goods in Kansas (Attachment 8).

Mike Jensen, Kansas Pork Producers Council, testified in opposition to **SB 565** because it creates more government intrusion and oversight (Attachment 9).

Leslie Kaufman, Assistant Director, Public Policy Division, Kansas Farm Bureau, testified that although members of her organization realize there are situations where legislation may be necessary to ensure that business practices are not abusive and thus legitimate, her members believe **SB 565** attempts to address this situation much too broadly (Attachment 10).

Chuck Stones, Kansas Bankers Association, testified as to his organization's concerns about **SB 565** and that it establishes a super priority lien on behalf of producers who are unpaid for the product they have produced and delivered to sale to an integrator (Attachment 11).

Rich McKee, Kansas Livestock Association, spoke in opposition to **SB 565**, stating that the bill is extremely broad and the effect would be to deny Kansas producers the freedom to utilize forward contracts, alliances and other partnerships in Kansas (Attachment 12).

The hearing on **SB 565** was closed.

The next meeting will be February 11, 2000.

SENATE AGRICULTURE COMMITTEE GUEST LIST

DATE: 2-10-00

NAME	REPRESENTING
Joe Lieber	KS Co-op Council
Jim Allen	Sea board
Mike Jensen	KS Park Council
Ken Bull	EXCEL corp.
Rich McKee	KLA
Mary Jane Stattelmen	KS Dept Ag
Greg Krissick	KS Dept Ag
John Garlinger	KS Dept Ag
Eric Cartman	South Park, CO
Dag Wareham	KS Grain & Feed Assn KS Fert & Chem Assn.
Ivan Wyatt	KS Farmers Union
Roger S. Butler	Farmer
Mary Fund	KS Rural Center
Paul Reynolds	Kansas Cattlemen Assn.
Chuck Stokes	KBA
Kathy Oken	KBA
Tom Bruno	Allend Assoc.
Renea Battron	Farm Bureau
Chuck Dempewolf	Farm Bureau

Statement
of
Ivan W. Wyatt, Pres. Kansas Farmers Union
on
SB 565
(Production Contract Fair Practices Act)
Before the Senate Agricultural Committee
on
Feb. 10, 2000

Mr. Chairman, Members of the Committee:

I guess we could call this bill, "shall not" legislation for production agriculture, much like the biblical "shall nots", of thou shall not steal, thou shall not covet etc.

In the past, agriculture contracts were more of a symbol of agreement between honorable individuals. Too often today agriculture production contracts have become the unscrupulous tools of monopolistic power, whereas to achieve absolute control over independent producers, and to eliminate the keystone of competitive capitalism, replacing it with monopolistic control of the "free world's" food production from the top down, not that much unlike the failed system of the former Soviet Union.

The need for this legislation relates to just one of the symptom's of the growing concentrated corporate control of this nation's production on through to the food supply of the consuming public, thereby eliminating competition, limited only by the consumers ability to pay.

In most every other types of contractual or non-contractual actions related to corporations, there has been recognized the need for "fair practice legislation". Guidelines or rules of what is, or is not a fair act.

We in the Farmers Union see this legislation as just that, fair rules of the business of Ag-Production Contracts.

In other states where there has not been this type of legislation, there are unnumbered stories going back decades, of producer intimidation, coercion, retaliation etc. Utilizing the refusal to allow producers the right to study contracts, observe weights, measures of input goods, or finished products sales, etc. The results of this in many cases has been the loss of family farms, savings and financial ruin.

This issue unattended to can have a major negative effect on the economic well being of rural Kansas communities and the state as a whole.

If the citizens of Kansas are allowed a fair return for their efforts, that money will enrich the Kansas community.

If citizens are snared in a trap that makes them little more than that of a third world peasant. The community also loses those misplaced earnings that end up in a corporate coffer anywhere in the world.

In conclusion, if a majority of the legislature opposes this type of legislation, then let them be up front about it, and pass legislation that states, in Kansas corporations shall be allowed the unfettered right to intimidate, coerce and to retaliate for the use of the rights set forth in the constitution of speech, association and information.

Thank You!

Senate Agriculture
2-10-00
Attachment 1

BRUCE F. LARKIN
 REPRESENTATIVE, DISTRICT SIXTY-THREE
 R.R. 1
 BAILEYVILLE, KANSAS 66404



TOPEKA
 HOUSE OF
 REPRESENTATIVES

COMMITTEE ASSIGNMENTS
 RANKING MINORITY MEMBER: TRANSPORTATION
 MEMBER: FINANCIAL INSTITUTIONS

Testimony Before the Agriculture Committee
 February 10, 2000

SB 565 is titled the Agricultural Production Contract Fair Practice Act. Personally I prefer the Contract Growers Bill of Rights. As many on this Committee are aware, there is a growing movement toward contract production in this state. With an increase in contract production will come an increase in problems and complaints. Let me say that I hope there are no unscrupulous integrators in the state which would then mean that there should be little or no opposition to this proposal that attempt to put independent producers on a level playing field with integrators.

SB 565 addresses a number of problems that have been identified in states where vertical integration is commonplace. Many of these have occurred in the totally vertically integrated poultry industry, however, as these trends occur in hogs, cattle and grain farming, it is important to address these concerns now. An ounce of prevention is worth a pound of cure.

The escalation of production contracting in the livestock sector in recent years has accelerated the loss of farmers' independence. Contract poultry growers in particular have been subject to increasingly strict demands and unfair practices by processing firms, including early contract termination, company requirements for building improvements at the grower's expense, underweighing of birds and feed, and other heavy-handed tactics. After a class-action lawsuit by producers against processor ConAgra, the firm wrote a provision into contracts that forbids producers from taking companies to court with grievances.

This is where SB 565 comes into play by guaranteeing basic fundamental rights of independent producers. Key provisions of this bill are as follows:

1. Section 4, establish a mechanism for termination of a contract by an integrator;
2. Section 5, implies good faith and right to refuse animals in less than normal condition;
3. Section 9, requires that the integrator and producer share equally in violations of state or federal laws regarding environmental standards;
4. Section 10, resolution for contract disputes.

Senate Agriculture
2-10-00
Attachment 2

The bill goes on to establish both criminal and civil penalties for violations, provides for a priority lien for the fair market value of the agricultural product, and establishes an arbitration process for producer associations.

Mr. Self has put together this bill using the concerns raised from the Wake Forrest law revision and legislation or model legislation from a number of states. This proposal or something similar to it has been requested for introduction in Oklahoma, Nebraska, South Dakota, Minnesota, Iowa, Missouri and Mississippi.

Mr. Chairman, and members of the Committee, SB 565 could be described as a work in progress. I cannot claim that every I has been dotted and every T crossed. I have already identified a couple of necessary corrections. I look forward to suggestion on how to make this a better bill.

I feel that this bill is necessary to guarantee independent producers their constitutional rights. Just as it is unlawful to rustle cattle or alter brands, it should be unlawful to steal an independent producer's product just because he signs a contract. Those of us who have worked on this proposal appreciate this hearing and look forward to constructive suggestions.

Wake Forest Law Review
Winter 1998

Comment

***1125 FAIRNESS FOR MODERN FARMERS: RECONSIDERING THE NEED FOR
LEGISLATION
GOVERNING PRODUCTION CONTRACTS**

Edward P. Lord [FNa1]

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Introduction

Over the past several decades, the industrialization of agriculture has dramatically changed farming in America. [FN1] These changes are particularly apparent in the poultry industry. In the 1920s and '30s, farmers raised poultry and then shipped it live to urban centers. [FN2] Vendors sold live birds or birds with only the blood and feathers removed. [FN3] Today, corporate poultry processors slaughter, clean, and package birds close to the farm and send the final product, ready to cook, to groceries and supermarkets throughout the nation. [FN4]

New techniques for raising poultry have accompanied these marketing changes. One noteworthy development has been the increase in the number of birds grown on each farm and the significant decrease in the number of farms raising birds. From 1959 to 1982, the number of farms producing chickens in the United States dropped from 42,000 to 30,100, a decline of 28%. [FN5] At the same time, the number of chickens raised on each farm grew from 34,000 to 117,000, an increase of more than 340%. [FN6]

The decline in the number of poultry farms and the increase in birds produced on each farm have given rise to many issues. Among those are environmental concerns [FN7] and concerns about the loss of the family farm. [FN8] This comment, however, focuses on a separate issue: the relationships between the farmers who raise the poultry *1126 and the corporations that process the birds and bring them to market. [FN9]

While labor issues arising from the industrialization of agriculture affect farmers raising most crops, they are dramatically apparent in the poultry industry because large corporations control most poultry production. [FN10] In 1990, three companies processed nearly 40% of all chickens raised in this country. [FN11] The five largest poultry processors now process more than 226 million pounds of poultry each week. [FN12] These processors are sometimes referred to as integrators because they bring together all aspects of poultry production. [FN13] Integrators own the birds, control the farming techniques used to raise them, process the birds, and put the final product on the market. [FN14] Farmers who work with integrators care for and feed the companies' birds for a short period of time under a contractual arrangement called a production contract. [FN15] There are estimates that integrators produce 99% of the poultry in America [FN16] and that 86% of the total value of poultry production is grown under a production contract. [FN17] Some integrators have names familiar to many Americans, including Tyson, Perdue, and Hudson Foods. [FN18]

Issues that affect the poultry industry have particular importance in North Carolina. North Carolina ranks first in the nation in turkey production and fourth in broiler production, raising nearly 60 million turkeys each year and more than 681 million broilers. [FN19] The turkey and broiler industries combined bring in nearly \$2 billion *1127 in cash receipts annually, almost 30% of

(Cite as: 33 Wake Forest L. Rev. 1125, *1127)

the state's total agricultural cash receipts. [FN20]

This comment considers the problems that confront farmers who have entered into production contracts with integrators and suggests legislative solutions to those problems. Part I defines production contracts and explains some of the problems that they create for farmers. Part II outlines the strengths and weaknesses of statutory and common law remedies that contract farmers have used in litigation surrounding production contracts. Part III examines state statutory schemes aimed directly at regulating production contracts. Part IV suggests possible legislative approaches to improve the position of contract farmers.

I. Relationships Between Integrators and Contract Farmers

A. Production Contracts

As agriculture has industrialized and integrators have assumed an increasingly important role in producing agricultural commodities, the relationships between the farmer and the integrator have changed. Today, instead of processors buying products from independent farmers, integrators will often own the livestock and contract with farmers for the labor and services necessary to raise the livestock. [FN21] While integrators and farmers can use production contracts to govern the relationships involved in raising any crop or animal, this comment focuses on the use of production contracts in the poultry industry. [FN22]

In a typical poultry production contract, the integrator places birds with a farmer, sometimes referred to as a producer or grower. [FN23] The integrator provides the crop, feed, medicine, and management, while the farmer provides the land, buildings, utilities, *1128 equipment, and labor. [FN24] The farmer never owns the poultry; instead, the relationship with the integrator is like that of a bailor and bailee. [FN25] In a poultry production contract, pay is usually determined based on the weight of the birds and the amount of feed the processor supplied to the farmer to support the birds--also known as the bird's feed conversion efficiency. [FN26] Farmers are not paid for birds that die or are damaged. [FN27] One author defined a production contract as

a legally binding agreement of a fixed term, entered before production begins, under which a producer either agrees to sell or deliver all of a specifically designated crop raised on identified acres in a manner set in the agreement to the contractor and is paid according to a price or payment method, and at a time, determined in advance, or agrees to feed and care for livestock or poultry owned by the contractor until such time as the animals are removed, in exchange for a payment based on a formula using the performance of the animals. [FN28]

The growth of industrialized agriculture and the use of production contracts have some positive aspects for both integrators and farmers. Integrators receive steady supplies, greater control over the cost of production, access to markets, reduced transaction costs, and the advantage of not having to invest their own capital in *1129 farms, buildings, and equipment necessary to raise the birds. [FN29] Contract farmers gain access to new technologies to help them grow bigger birds more quickly and receive an opportunity to participate in new markets. [FN30]

Perhaps most importantly, production contracts offer farmers risk management in the form of guaranteed price and payment for birds. [FN31] A farmer who competes on the open market bears the risk that the price for birds will be low when the farmer is ready to sell. [FN32] Production contracts provide an assured price for the commodity grown. [FN33] The integrators bear the risk of, and have the opportunity to gain from, the fluctuating market. [FN34] The National Broiler Council, an organization that represents the interests of integrators, [FN35] estimates that "integrators lost approximately \$300 million overall due to unfavorable market conditions" in 1997. [FN36] However, farmers' representatives point out that although farmers receive a guaranteed payment, in

unfavorable market conditions integrators are more likely to terminate contracts with farmers than decrease production by reducing the density of flocks grown on all contract farms. [FN37]

B. Problems with Production Contracts

1. Low pay

A fundamental problem with production contracts is the low income that they provide most poultry farmers. [FN38] One study suggests that the average contract poultry farmer will earn only \$12,000 each year, before paying himself for labor. [FN39] Contract farmers face *1130 two distinct problems. During the first years of their contract, fixed costs, primarily mortgage expenses, absorb a significant portion of their income. [FN40] Later, maintenance and repairs become significant expenses. [FN41] In need of money, farmers frequently take on additional farm-work or off-farm jobs. [FN42]

Farmers are often surprised and disappointed by their low earnings and sometimes accuse integrators of luring them into the poultry industry with false promises of high income. [FN43] For instance, integrators might highlight the gross income the farmer may receive. [FN44] Gross income does not take into account the costs that farmers bear and makes the business appear much more lucrative than does net income. [FN45] Integrators sometimes also distribute pamphlets that present overly optimistic predictions for farmers' success. [FN46]

2. Large capital investment required for a short term contract

Poultry farming is an expensive business to enter. Two fully equipped poultry houses can cost more than \$230,000. [FN47] The contract farmer must make this investment before he or she signs a contract to grow poultry for an integrator. [FN48] The federal government helps finance contract farming ventures by guaranteeing up to 90% of the value of certain loans made to farmers. [FN49] These guarantees *1131 limit the risks to lenders and make it easier for farmers to obtain the loans necessary for building poultry houses. [FN50] These guarantees may also allow integrators to offer less favorable contracts to farmers, and make lenders more likely to extend credit when the farmers' likelihood of repaying a loan is uncertain. [FN51]

The costs of poultry farming are not limited to buying the poultry houses. Farmers must often make improvements and add new equipment to those houses upon demand by the integrator. [FN52] One production contract called for farmers to maintain housing that conformed to the written standards of the integrator and "to adopt new management practices and install new or additional equipment required by [the integrator]." [FN53] This open-ended requirement places a potentially heavy burden on the farmer. It also creates an opportunity for abuse by the integrator. Some farmers complain that integrators use these "update and repair" provisions to fund research and development activities. [FN54] Farmers make the capital investments necessary for the experimental equipment, while integrators risk only the flocks, feed, and medicine.

Farmers who do make the investments necessary to receive a production contract and accept the integrator's terms have no guarantee of an ongoing relationship with the integrator. [FN55] "Most contracts commit for one flock (about seven and one-half weeks), or, at most, for one year." [FN56] Farmers must live with the fear that their integrator will not renew their contract, leaving them with no income to repay their debts.

Longer contracts not only provide farmers with the opportunity to repay debts but also with hope for a higher net income. One study examined the cash flow of a broiler producer who had received a ten year loan to pay for the cost of a chicken house. [FN57] During the life of the loan, the study

showed that the farmer could expect a net *1132 income of no more than \$4720 annually. [FN58] However, in the first year after the farmer retired the debt, net income increased to \$10,903. [FN59] These figures illustrate the importance of long-term contracts to farmers.

The investments that contract farmers make to buy the equipment necessary to receive a contract are not only expensive, but also put farmers at a disadvantage in their dealings with integrators. A farmer with a large investment in a poultry house cannot afford to lose his or her contract or to refuse to accept a contract offered by a processor. [FN60] To do so would leave the farmer with significant debt in the poultry house and insufficient income to repay the loan. [FN61] If the farmer mortgaged the farm to secure the loan, the farm would be subject to foreclosure. [FN62] Rather than face such prospects, farmers are inclined to accept the terms and requirements of the integrators. [FN63]

3. Unequal bargaining power

An individual farmer who enters a production contract with an integrator is in a weak bargaining position. [FN64] Integrators draft most production contracts and offer them to farmers without any opportunity for effective negotiation. [FN65] One clear reason for the farmers' weak position is the necessity of having a contract. If the integrator will not put chickens in the houses, the farmer may lose the farm. [FN66] As a Florida farmer said, "Only when we as growers are able to sit down and negotiate these contracts, will we be a true partner in this business that we have so much invested--our lives, our homes, and at least one-half of the capital investment in the poultry industry." [FN67]

Economic data explain some of the difficulties farmers face in forcing integrators to negotiate. Processors are often "semi-monopolistic agribusiness *1133 corporations." [FN68] Where there is little competition among integrators for the services of farmers, payments can be twenty percent lower than in regions in which several integrators operate. [FN69] This suggests that competition among processors, not negotiations with individual producers, determines the terms of the final contract. The farmers' ties to the land worsen their bargaining power. A farmer has no opportunity to uproot and seek a better market for his services, especially after making the investment necessary to receive a production contract. [FN70]

The bargaining position of the processors is as strong as the farmers' is weak. Integrators may avoid regions with significant competition from other processors or where farmers have organized. [FN71] They may also look for economically depressed regions, where farmers are eager for the promised income of production contracts and are less likely to be wary of the integrator's bargaining advantage. [FN72] For example, integrators are beginning to deal increasingly with Kentucky's tobacco farmers, who are concerned about the future market for their crop. [FN73]

The ability to negotiate for favorable contract terms is critical to the farmer. The terms of a production contract establish not only the farmer's final pay, but also the way the birds are raised, how and when the birds will be shipped to market, what the birds will eat, what medication will be supplied, what equipment the farmer must have to receive the contract, and all other aspects involved in producing the poultry. [FN74] In short, the contract determines the way the farmer raises the poultry and the ultimate success of the farmer's efforts.

*1134 4. Bird and feed weights

Integrators pay contract farmers based on a formula that considers the weight of the birds raised and the amount of feed used to raise the birds. [FN75] Integrators often control the weighing facilities, creating the possibility that the integrator will deliberately underreport the weight of birds to decrease payouts. [FN76] One former employee of Cargill, a major integrator, stated in a deposition that Cargill's employees used a forklift to prevent the full weight of trucks loaded with

chickens from resting on the scales. [FN77]

Inaccurate feed weights also hurt farmers. [FN78] Farmers are paid in part based on their efficiency in raising birds. [FN79] The less feed the birds use, the better. [FN80] Therefore, it is important that farmers receive as much feed as the integrator claims to have delivered. A light delivery will make it appear the farmer has used more food to raise the poultry. [FN81] However, integrators' delivery methods for determining the amount of food each farmer received can be based on such arbitrary measures as the delivery driver's estimate. [FN82]

The performance of the birds also comes into play in grower rankings. [FN83] An integrator will often judge the performance of farmers by comparing the performance of all the flocks the integrator picks up each week. [FN84] Farmers who receive favorable rankings based on feed conversion efficiency receive a higher price for their birds. [FN85] Integrators argue that the rankings provide incentives for farmers to "employ good husbandry practices." [FN86] Farmers often object to these rankings, arguing that the process is unfair, can be *1135 manipulated to punish disfavored growers, produces inexplicable results, and is shrouded in secrecy. [FN87]

5. Low quality birds and feed

Although contract farmers are paid according to the weight of the birds at the end of the grow-out period, they rely on the integrator to supply birds and feed. [FN88] The quality of the supplies will affect contract farmers' profitability. [FN89] Therefore, contract farmers are in a precarious position over which they have little control. A mistake in the feed mixture supplied by the integrator can have a marked effect on the final weight of the birds the farmer delivers. [FN90]

The farmers' dependence on the goods and services provided by the company can also be used to limit farmers' complaints against the integrator. [FN91] An integrator confronted by farmers can threaten to lower the farmers' profitability in order to reduce complaints. [FN92]

6. Other concerns

The concerns discussed above are only a sample of the potential problems associated with contract farming. Other concerns include: integrators' threats of retaliation against farmers who attempt to organize; [FN93] mishandling by integrators' "catch and haul" teams that take the birds to be weighed, which can result in dead or injured birds for which the farmer receives no pay; [FN94] and conspiracy among *1136 integrators to prevent contract growers who have complained about one integrator from receiving a contract with another. [FN95]

II. Traditional Remedies

A. Statutory Claims

1. Packers and Stockyards Act [FN96]

a. The statutes and accompanying regulations. The Packers and Stockyards Act ("PSA") provides some federal protection for farmers that raise poultry under production contracts. The PSA specifically applies to integrators and to farmers engaged in production contracts. [FN97] Under the PSA, a "live poultry dealer" is "any person engaged in the business of obtaining live poultry by purchase or under a poultry growing arrangement." [FN98] 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." [FN99] 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." [FN100] These terms respectively describe integrators, production contracts, and contract farmers.

The PSA provides several kinds of protection for farmers. First, it prohibits unfair practices and monopolistic activities by growers. [FN101] The Act states:

It shall be unlawful for . . . any live poultry dealer with respect to live poultry, to:

*1137 (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

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

. . . .

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce [FN102]

The PSA is remedial legislation and so "should be liberally construed to further its life and fully effectuate its public purpose." [FN103] The Secretary of Agriculture is empowered by the Act to deal with "every unjust, unreasonable, or discriminatory regulation or practice' involved in the marketing of livestock." [FN104]

The PSA also addresses specific problems that may confront the poultry grower. A poultry dealer must pay a poultry grower within fifteen days after the week in which the poultry raised by the grower was slaughtered. [FN105] Failure to make timely payments is deemed to be an unfair practice under the Act. [FN106] The Act also protects against processors using poultry raised by growers as collateral in other transactions. [FN107] Poultry raised in a grow-out contract is placed in a statutory trust for the benefit of the grower until the grower receives full payment. [FN108]

Regulations put forward by the Department of Agriculture further clarify the obligations of poultry dealers and the rights of farmers. These regulations establish what information must be included on scale tickets given to farmers when the processor weighs their poultry. Scale tickets must include, among other things, the gross weight, tare weight, and net weight of the poultry, the date and time the gross and tare weights were determined, the number of poultry weighed, and, if a vehicle is used, the license plate number of the truck and whether the driver was on or off the truck. [FN109] Scale figures are particularly important in determining farmers' pay. [FN110] Regulations also provide that poultry dealers must exercise reasonable care in handling live poultry "to prevent waste of feed, shrinkage, injury, death or other avoidable loss." [FN111] These provisions punish improper handling that results in death or injury of birds and decreased income for the farmer.

Evidence suggests that the PSA and regulations thereunder promote the goal of ensuring prompt and full payments to farmers. For example, sixty-four percent of Alabama poultry growers surveyed in 1996 indicated that they were satisfied that integrators paid in a timely manner. [FN112] Fifty-nine percent said that they believed the integrators paid promptly in accordance with federal regulations. [FN113]

b. Litigation. Because the terms of the PSA are so broad, [FN114] one can better understand its practical significance by seeing how it has been applied in cases dealing with poultry production contracts. In *Philson v. Cold Creek Farms, Inc.*, [FN115] the court denied the integrator's summary judgment motion and allowed growers to proceed on their claims that the integrator breached the PSA by failing to weigh their birds in a timely manner, providing low-quality poults, and engaging in retaliatory weighing and head calculation practices. [FN116] In *Philson*, the plaintiffs, who had entered growing contracts with Cold Creek Farms ("CCF"), claimed that CCF violated the PSA by failing to use the weighing and handling techniques required by federal regulations. [FN117] The

plaintiffs also claimed that when they brought their grievances to the attention of CCF, CCF and other suppliers responded by providing them with low-quality poults and eventually terminated their growing agreement. [FN118] The Philson court held that the PSA has the broad purpose of prohibiting "discriminatory or deceptive practices adversely affecting competition." [FN119] Therefore, plaintiff may bring a "cause of action . . . absent a specific regulation addressing the alleged activity, as long as such activity appears to affect competition adversely and appears to have been performed in an unfair, discriminatory or deceptive manner." [FN120] Specifically, the court found that providing low-quality *1139 poults in order to prevent growers from complaining about business practices could be an unfair practice in violation of the PSA. [FN121] A retaliatory termination of a grower's contract could be a violation of the PSA for the same reason. [FN122]

In *Baldree v. Cargill, Inc.*, [FN123] the court found substantial likelihood that the plaintiffs would succeed on their claims under the PSA and therefore granted a preliminary injunction requiring the defendant poultry processor to reinstate its growing contract with Arthur Gaskins. [FN124] Among other claims, plaintiffs alleged that Cargill terminated Gaskins' contract because of his work as the President of the Northeast Florida Broiler Grower's Association ("the Association"), a pro-farmer group. [FN125] The court found that terminating the contract to prevent growers from supporting the Association would be an unfair practice under the PSA. [FN126] The court also found that there was substantial likelihood that plaintiffs would succeed on their claim that Cargill had terminated their contracts to hinder growers' efforts to present grievances to the proper governmental authorities. [FN127] Such terminations would also violate the PSA. [FN128] Further, the court held that termination of a grower's contract without economic justification would be a violation of the PSA. [FN129]

The Baldree court found the injunction was necessary because the growers would be forced to sell their farms if their contracts were wrongfully terminated. [FN130] Further, the farmers needed income from their contracts in order to successfully pursue their case against Cargill. [FN131] If Cargill could terminate growers that sued the company, Cargill could effectively defeat growers by preventing their access to the courts. [FN132]

These cases make clear that growers do have powerful remedies under the PSA. Retaliatory terminations, terminations without economic justification, and terminations to prevent actions against processors are all unfair and deceptive practices prohibited by the *1140 Act. In addition, regulations that establish weighing and handling requirements protect growers against specific deceptive practices.

2. Agricultural Fair Practices Act [FN133]

a. The statute. The Agricultural Fair Practices Act ("AFPA") provides protection for farmers who seek to organize in order to protect their bargaining power with integrators. [FN134] The Act recognizes that "[b]ecause agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together." [FN135] The AFPA governs bargaining between "handlers," a term that includes integrators, [FN136] and producers--including farmers [FN137]--or associations of producers. [FN138] Under the AFPA, handlers cannot coerce producers to join or refrain from joining an association, discriminate against producers who do join an association, or reward producers who refuse to belong to an association. [FN139] While the AFPA is intended to limit unfair bargaining practices, its force is considerably lessened by the following disclaimer: "Nothing in [the AFPA] 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." [FN140] This provision so dilutes the bill that one party claimed it made the AFPA unconstitutionally vague. [FN141]

b. Litigation. Farmers have not raised the AFPA in many cases. [FN142] The one reported case that raises the issue in a poultry production contract situation is *Baldree v. Cargill, Inc.* [FN143] In granting the preliminary injunction in *Baldree*, the court held that Cargill's termination of the plaintiff's contract was a violation of the *1141 AFPA because it was without economic justification and was "a knowing refusal to deal with Gaskins because of his membership in the Association." [FN144] The AFPA provides narrow but important protection to contract growers who need to organize to increase their bargaining leverage with processors. [FN145]

3. North Carolina Deceptive Trade Practice Act [FN146]

a. The statute. In some cases, growers in North Carolina have a remedy under the North Carolina Deceptive Trade Practice Act. The Act prohibits the use of "unfair or deceptive acts or practices in or affecting commerce" [FN147] and so addresses many of the same problems addressed by the PSA. [FN148]

b. Litigation. In *Philson v. Cold Creek Farms, Inc.*, [FN149] farmers alleged that the integrator's delay in weighing turkeys upon delivery, failure to properly load and transport turkeys, delivery of low-quality poults, inaccurate calculation of the number of heads sold, and wrongful termination of the farmers' contracts were violations of both the PSA and the North Carolina Deceptive Trade Practices Act. [FN150] The court agreed, holding that the PSA was not the farmers' exclusive remedy. [FN151] This holding represented a change in construction of the North Carolina statute. A decade earlier, the same court held that the North Carolina Deceptive Trade Practice Act applied only in purchaser/consumer situations, and that the Act did not cover the relationship between a contract farmer and integrator. [FN152]

B. Common Law Claims [FN153]

Although there are several statutory remedies for farmers, these remedies are not broad enough to cover all of the farmers' concerns. For example, while the PSA prohibits termination of contracts without economic justification, [FN154] it offers no assistance to *1142 farmers who invest a great deal in capital improvements to win short-term contracts, but find themselves unable to secure the contract renewals necessary to repay their loans. To seek recourse for grievances not covered by statute, farmers often resort to claims for breach of contract and fraud. [FN155] However, as the cases discussed below demonstrate, these attempts at recovery suffer several difficulties.

1. Breach of contract

In *Smith v. Central Soya, Inc.*, [FN156] Smith alleged that agents of Central Soya promised that Central Soya would continue to provide Smith with chickens for twenty years. [FN157] In reliance on these representations, Smith constructed new poultry houses. [FN158] Although Smith believed Central Soya would supply chickens for twenty years, each contract that he entered into with Central Soya was for one flock of chickens only. [FN159] Smith acknowledged that he never asked Central Soya to extend his contract to cover the twenty-year term. [FN160] Nevertheless, Smith claimed that Central Soya breached an oral contract when it refused to supply chickens for twenty years as Smith had expected--and as the company representatives had allegedly promised. [FN161]

In reaching its decision that Smith failed to state a cause of action for breach of contract, the Smith court found that the contract's merger clause created a rebuttable presumption that the writing was a "complete and exclusive statement of the contract terms." [FN162] Smith failed to rebut that presumption when he could not show "fraud, bad faith, unconscionability, negligent omission or mistake in fact." [FN163] That the merger clause was non-negotiable did not convince the court that it was unfair because, according to the court, Smith was not under economic duress and did not

(Cite as: 33 Wake Forest L. Rev. 1125, *1143)

occupy an inferior *1143 bargaining position. [FN164] Therefore, the court would not admit evidence of alleged representations by Central Soya's agents that Central Soya would supply Smith with chickens for twenty years. [FN165]

Solve This problem

The Smith court concluded that the parties had equal bargaining power despite the fact that Smith invested considerable sums in chicken houses and relied on his continuing relationship with Central Soya to pay for the houses. [FN166] The court failed to consider that Smith brought his claim when his relationship was terminated after he refused to accept the terms Central Soya offered in a new contract. [FN167] Although the opinion does not explicitly set out the sequence of the parties' actions, it appears that Central Soya removed its chickens from Smith's chicken houses in response to Smith's attempt to negotiate for better contract terms. [FN168] The court's refusal to recognize the unequal bargaining power of the relationship is difficult to understand and certainly calls into question its holding that Central Soya did not occupy a superior bargaining position. The decision does, however, illustrate the difficulty a contract farmer may face in trying to establish a breach of contract claim based on an integrator's oral representations.

The Smith court also considered how it would have resolved the case if it had admitted the alleged representations by Central Soya that it would supply Smith with chickens for twenty years. [FN169] The court held that Central Soya's claims that it was "in the chicken business to stay" and that "the chicken houses will last for twenty years" were statements of belief or opinion and created no contractual obligation. [FN170] Notwithstanding the court's opinion that such statements created no contractual obligation, it is not difficult to see that unsophisticated farmers may be induced to rely on those promises to their detriment. This is especially so when farmers are accustomed to dealing with neighbors and local merchants on informal *1144 terms, where a written contract is not necessary to make a binding promise. [FN171]

The Eighth Circuit reached the same result as the Smith court in *Starling v. Valmac Industries*. [FN172] In *Starling*, when the farmer applied for a loan to build new chicken houses, the lender sought confirmation that the farmer would be able to raise chickens over the life of the loan. [FN173] The lender was concerned that the farmer's short-term contracts offered little guarantee of continuing income. [FN174] Valmac, the processor, represented to the Starlings that as long as they continued to perform satisfactorily, "there was no reason to believe that Valmac would not continue to supply them with baby chicks." [FN175] Despite this representation, Valmac discontinued its contract with the Starlings, claiming that it did so because the distance between the processing facility and the Starlings' farm was too great. [FN176] The court excluded evidence of the parties' oral agreement, holding that the written contract between the parties governed the case, and that Valmac had an unqualified right not to renew contractual relations with the Starlings. [FN177] The court also held that had the oral representation been admissible, the Starlings would not have a cause of action because the Starlings at most had "a reasonable expectation" that they could expect to receive chicks. [FN178] That representation, however, did not create a contract right. [FN179]

The court in *Hinkle v. Cargill, Inc.* [FN180] came to a similar result in a case in which a grower alleged a processor breached its oral promise to provide him with chickens until he was able to repay the loan on chicken houses that he would have to build to receive a contract. [FN181] In *Hinkle*, the farmer alleged that Cargill presented him with figures of estimated income from a chicken house with a capacity of 60,000 chickens. [FN182] When Hinkle sought a loan to finance the \$280,000 chicken house, Cargill's representative helped locate financing to cover a twenty-year period and allegedly promised to supply chickens until Hinkle repaid the construction loan. [FN183] Hinkle claimed that when he later expressed concern at Cargill's offer of a one year contract, Cargill's agent assured him that the contract was a working arrangement to cover one flock of chickens and that Cargill *1145 intended to provide chickens until the loan was repaid. [FN184] Eventually, Cargill sold its operations to another company, which did not continue to supply Hinkle with chickens.

(Cite as: 33 Wake Forest L. Rev. 1125, *1145)

[FN185] *Contract should spell out if contract is Transferable in case grower sells out or dies etc.*

Hinkle alleged breach of an oral contract. [FN186] However, the court concluded that, unless Hinkle could show that Cargill acted with intent to defraud, the Statute of Frauds barred his claim. [FN187] Thus, even though Cargill failed to provide Hinkle with chickens as it had promised, the court held that Cargill had no intent not to provide chickens for twenty years when it made that promise. [FN188] Therefore, Cargill's actions were not fraudulent and its oral promises were not enforceable contracts. [FN189]

A significantly different outcome resulted in *Braswell v. ConAgra, Inc.* [FN190] The plaintiffs in *Braswell* were a class of 268 farmers who raised chickens for ConAgra. [FN191] They sued for fraud and breach of contract, alleging that ConAgra purposefully misweighed chickens over an eight-year period. [FN192] The farmers eventually succeeded in their claims and received a jury award of \$4.55 million in compensatory damages and \$9.1 million in punitive damages. [FN193] The farmers in *Braswell* based their breach of contract claim on ConAgra's written promise to pay the farmers based on the weight of the chickens they raised. [FN194] The court held that ConAgra's failure to properly weigh the farmers' chickens was a breach of that promise. [FN195]

Braswell offers hope to farmers who can point to breaches of specific provisions of written production contracts. However, it provides little encouragement to farmers who have relied on the promises of processors, only to find themselves without a written contract covering a long term and without income from growing poultry. As *Smith*, *Starling*, and *Hinkle* all illustrate, because integrators generally offer contracts for short periods, it is not difficult for an integrator to abandon a relationship with a farmer without breaching a written contract. Integrators' oral representations of their intentions to do business with a farmer for several years are typically not enforceable in the face of written contracts and merger clauses. While the farmer may enter a relationship relying on the integrator's *1146 promise, the integrator will seldom incur a legal obligation to the farmer beyond the term of the written contract. Breach of contract claims offer farmers important remedies, but are successful only in limited situations.

2. Fraud and misrepresentation [FN196]

Farmers may bring fraud claims along with breach of contract claims against integrators. Like breach of contract claims, fraud claims are seldom successful. Often courts find that, although an integrator represented an intention to maintain a long-term relationship with a farmer, the farmer must prove that the integrator did not intend to maintain that relationship when it made the representation. [FN197] For example, in *Smith v. Central Soya, Inc.*, the court found that "[a]t most, plaintiffs have alleged a promissory representation by Central Soya of its intent to supply chickens in the future . . . and an opinion as to the expected productive period of the chicken houses." [FN198] Unless Central Soya had no intent to fulfill its promise when it was made, plaintiff's allegations of fraud would fail. [FN199]

*1147 Like breach of contract claims, some fraud claims are successful. Plaintiffs in *Braswell v. ConAgra, Inc.* [FN200] were successful not only on their breach of contract claim but also on their claim that ConAgra's misweighing of broilers constituted fraudulent misrepresentation. [FN201] The court noted that ConAgra employees misweighed broilers and represented to the growers that the weights were accurate. [FN202] The plaintiffs relied on the weights to their detriment, creating a cause of action for fraud. [FN203] Again, farmers have recourse against a processor when the processor's representation concerns a provision of the production contract. However, for farmers who rely on processors' statements of future intent, it is difficult to recover money lost on investments made in anticipation of future relations between the farmer and processor.

III. Legislative Responses to Agricultural Production Contracts

Existing statutory and common law remedies provide important but limited assistance to farmers who have production contracts. However, there is no protection for the farmer who, after one or several contracts, finds the integrator no longer interested in doing business, and is left with no other source of income to repay large investments in poultry houses and other improvements. In addition to the federal legislation discussed above, [FN204] the United States Congress and some states have taken legislative steps towards addressing the specific problems of contract farmers. [FN205]

A. Proposed Amendments to the AFPA: House Bill 2738 [FN206]

In October 1997, Congresswoman Kaptur of Ohio introduced House Bill 2738 to amend the AFPA. [FN207] The bill recognizes that the AFPA has not provided family farmers "full freedom of association or real liberty of contract." [FN208] Its terms strengthen the ability of producers to associate for the purpose of bargaining with integrators by clarifying that handlers must bargain in good faith with accredited associations of producers. [FN209] As part of the good faith obligation, *1148 the bill further provides, "If a designated handler purchases a product or service from producers under terms more favorable to such producers than the terms negotiated with an accredited association for the same type of product or services, the handler shall offer the same terms to the accredited association." [FN210] This provision would grant true equality and power to grower associations, and would limit integrators' ability to undercut grower organization efforts. The bill also adds procedures for filing complaints for violations of the AFPA [FN211] and grants the Secretary of Agriculture the investigative powers necessary to determine if a handler has violated the AFPA. [FN212] If passed, the bill will make the AFPA a significantly more powerful weapon for contract farmers.

B. State Statutes and Bills

1. The Minnesota statutes and administrative rules

a. The Minnesota statutes. Minnesota was the first state in the country to pass comprehensive legislation aimed at protecting farmers who have entered into production contracts. [FN213] The statutes provide several protections for farmers who "produce[] or cause[] to be produced an agricultural commodity in a quantity beyond the person's own family use and [are] able to transfer title to another or provide[] management, labor, machinery, facilities, or any other production input for the production of an agricultural commodity." [FN214] The statute also reaches integrators by defining "contractors" as those who "in the ordinary course of business buy [] agricultural commodities grown or raised in this state or who contract [] with a producer to grow or raise agricultural commodities." [FN215]

Minnesota's statutes have several important provisions. They require that all contracts provide for resolution of disputes through either mediation or arbitration. [FN216] They also provide that there is an implied promise of good faith between all parties in agricultural contracts. [FN217] Perhaps most striking, however, are the provisions that protect producers who have made capital investments required *1149 by an agricultural contract. [FN218] In situations in which a producer has made capital investments of \$100,000 or more in buildings or equipment that have a useful life of five or more years and that were necessary for a production contract, the statutes provide that the contractor must give 180 days written notice of the intention to terminate or cancel the production contract. [FN219] Further, upon termination or cancellation of a contract, the contractor must reimburse the producer for "damages incurred by an investment in buildings or equipment that was made for the purpose of meeting minimum requirements of the contract." [FN220] In case of a breach by the producer, the contractor must provide the producer notice of the breach and give the producer sixty

(Cite as: 33 Wake Forest L. Rev. 1125, *1149)

days to correct the breach. [FN221] No notice is required if the producer voluntarily abandons the contract or if the producer is convicted of an offense "directly related to the business conducted under the contract." [FN222]

The Minnesota scheme has served as a model for legislation either considered or passed in several other states. [FN223] Following enactment of the Minnesota legislation, Kansas enacted protection for contract swine farmers who have invested \$100,000 or more in improvements that have a useful life of five or more years. [FN224] Unlike Minnesota, Kansas chose to require that processors provide notice to growers of their intent to terminate a contract only in situations in which the grower fails to comply with the contract. [FN225] Kansas also requires contractors to allow producers the opportunity to correct noncompliance with the contract. [FN226] However, there is no provision in Kansas requiring contractors to pay producers for damages incurred through capital investment upon termination or cancellation of the contract by the producer. [FN227]

Change

b. The Minnesota administrative rules. While the Minnesota statutes appear to provide significant protection to growers, their interpretation under the state's administrative rules significantly lessens their impact. Most importantly, the rules make clear that the statutes provide no protection to farmers when a contractor refuses to renew a contract. [FN228] This provision means that the statutes *1150 are of little help to the typical farmer who enters a contract for one year or one flock. [FN229]

Contract

The protections also apply only when there is a written agreement requiring the farmer to make a capital investment. [FN230] As one author explained:

Correct

This means that when companies use oral statements to communicate to growers that they are required to make improvements, the growers are not protected by the law. Growers report that when companies impose such requirements, the company usually communicates the requirement orally, not in writing. Therefore, this rule makes the law inapplicable in most cases. [FN231]

Finally, the rules limit the damages that the farmer may recover. [FN232] The rules specifically indicate that damages "do not include payment for the reasonable useful life of an asset that extends beyond the term of the contract." [FN233] Thus, the grower may not be entitled to recover the value of his or her investment, but may be restricted to only the profits he or she could have made during the term of the contract. [FN234]

2. The North Carolina Poultry Producer Protection Act [FN235]

In 1993, the North Carolina legislature considered a bill that contained some provisions similar to those enacted in Minnesota. Entitled the "Poultry Producer Protection Act," the bill was referred to the Agriculture, Marine Resources, and Wildlife Committee, [FN236] but was never approved. Though never enacted, the bill suggested special additional strategies to aid growers. The "legislative intent and policy" of the Act made clear that the sponsoring legislators understood the precarious position of the contract farmer. [FN237] The bill states:

The General Assembly finds that vertical integration through production contracting in the poultry industry by persons engaged in processing [and related activities] . . . tends to create monopolies, to foster anticompetitive trade practices . . . and to result in unfair competition for the family farmer; and, further, *1151 the General Assembly declares that it is in the public interest that the family farm be preserved and that producers of poultry and poultry products on the family farm be protected from financial hardships caused by unfair, harmful, and unethical bargaining and trade practices of integrators. [FN238]

In keeping with this broad statement of policy, the Act would have provided several unique protections to farmers (referred to in the bill as "producers"). [FN239] First, unlike the Minnesota or Kansas statutes, the North Carolina bill included definitions of specific unfair trade practices.

(Cite as: 33 Wake Forest L. Rev. 1125, *1151)

[FN240] For example, the North Carolina bill would have made it an unfair trade practice for an integrator "to use coercion, intimidation, the threat of retaliation, or the threat of contract termination, cancellation, or nonrenewal to impose, demand, compel, or dictate the terms, payment or manner of payment, or the signing of a contract by a producer." [FN241] The bill would also have made it illegal for an integrator to use such tactics to "require the producer to make capital improvements such as buildings or equipment." [FN242] Furthermore, the bill would have made it an unfair trade practice for an integrator to cancel or terminate a contract without first complying with certain notice and repayment provisions "as long as the producer is financially obligated for an investment in buildings and equipment which was made to meet the minimum requirements of the contract." [FN243] Other unfair trade practices would have included refusing to allow the producer to observe the weighing of the birds, [FN244] interfering with the rights of growers to organize, [FN245] and engaging in acts prohibited by the Perishable Agricultural Commodities Act or the PSA. [FN246]

check out
The North Carolina bill also offered protection against early cancellation or termination of contracts. [FN247] However, unlike the Minnesota statutes which protect farmers who have made capital improvements against termination or cancellation of a production contract, [FN248] the North Carolina bill would have also protected farmers against the integrators' failure to renew contracts that required *1152 capital investments in excess of a certain amount. [FN249] Further, protection for farmers against early termination or cancellation would begin with their investment of \$25,000. [FN250] As an additional protection, an integrator who did not comply with provisions governing termination, cancellation, and nonrenewal of contracts that required capital investments would have had to assume the farmer's outstanding debt for the investment and would have had to pay the farmer for his or her equity. [FN251] The integrator would then have had to remove the equipment or buildings from the farmer's property within 90 days. [FN252]

The North Carolina bill also addressed contract formation, requiring good faith negotiations, [FN253] to be carried out "at a time and place mutually agreeable to the parties to discuss concerns of the producer." [FN254] Other provisions included a mediation and arbitration requirement [FN255] and a lien on the integrator's assets for the benefits of the farmer. [FN256]

The North Carolina bill would have protected contract farmers in ways not contemplated by the Minnesota statutes. Most important would have been the provisions protecting farmers in cases of nonrenewal of contracts and the provisions broadening the definition of unfair trade practices. Unfortunately for farmers, the North Carolina bill was never enacted. Although there is no official committee record explaining why the bill did not pass, one might reasonably conclude that legislators believed that the bill placed too great a burden on integrators. In particular, creating ongoing obligations to farmers would have made it difficult for integrators to adjust to changing market situations.

3. Other state bills

During 1993 and 1994, Mississippi, Louisiana, Florida, Alabama, and Oklahoma each considered bills designed to provide *1153 some protection for contract farmers. [FN257] Each of the bills would have allowed growers more bargaining power. [FN258] Each would have also limited an integrator's ability to coerce or threaten a grower to prevent the grower from joining a grower's association. [FN259] Mississippi would have prohibited integrators from using strong-arm tactics to force a grower to accept changes in contract terms or to improve houses or other equipment. [FN260]

In none of the states did a bill become law. [FN261] In Mississippi, the bill passed both the House and Senate only to be vetoed by the Governor. [FN262] In Louisiana, the bill's sponsor withdrew the bill after ConAgra agreed to meet some of the growers' concerns. [FN263] However, growers believe

(Cite as: 33 Wake Forest L. Rev. 1125, *1153)

that ConAgra never fulfilled its promises. [FN264] The growers in these states, like growers in most other states, received no protection from their legislatures.

IV. Analysis

Current laws provide limited but important assistance to contract farmers. Statutory prohibitions against unfair and deceptive trade practices and against contract termination without economic justification offer some protection. [FN265] Statutes also guarantee farmers the right to organize, increasing their bargaining power. [FN266] Similarly, common law claims can be successful in limited situations, primarily when the complaint alleges violations of a current contractual relationship. [FN267] Contract farmers should vigorously pursue their rights under these laws. Although litigation does not guarantee success, integrators threatened by possible legal action will be less likely to violate contract farmers' rights.

Even with these current remedies, however, contract farmers are in a precarious position when they sign a short-term poultry production contract. No matter how unfair it may seem, none of *1154 these laws prevent integrators from refusing to renew a one-flock production contract, even after a farmer has invested tens or hundreds of thousands of dollars in equipment and buildings necessary to perform the original contract. [FN268] Nor do current laws protect individual farmers whose only options are to accept contract terms offered by the integrator or face nonrenewal and possible foreclosure. [FN269] And, as the sponsors of the proposed amendment to the AFPA noted, although current laws require integrators to bargain with growers and growers' associations, these laws have not achieved their goals. [FN270]

Farmers need additional protection, but it is not clear what legislative strategy to pursue. North Carolina's Poultry Producer Protection Act would have given contract farmers substantial protection. However, the bill may ultimately have caused great harm to North Carolina growers. Some growers fear that strict legislation would drive the integrators away from production contracts and encourage integrators to grow their own poultry, removing the farmer from the process altogether. [FN271] Others fear that strict legislation could cause integrators to do business with contract farmers in states without strict regulations. [FN272] North Carolina, which benefits so much from the poultry industry, [FN273] cannot afford to drive processors from the state. And while contract farmers are in a difficult position in their current situation, the complete loss of production contracts could be devastating. Legislative remedies must protect the farmer without placing an unfair burden on the integrator. In addition, any legislation should be passed at the federal level to protect all growers and to eliminate the risk of encouraging integrators to skip from state to state to avoid restrictions. [FN274]

The experiences of Minnesota and North Carolina suggest that effective investment recapture legislation will be difficult to pass in any forum. [FN275] Requirements that integrators provide notice to growers before terminating or canceling their contracts are more likely. [FN276] *1155 At the very least, notice provisions of sufficient length ensure that the farmer can prepare for the loss of income from the production contract. Notice provisions also allow integrators to end or alter their relationship with farmers, which may be necessary to adjust to market conditions or changing corporate strategy.

In the end, legislation that allows growers to associate to increase their bargaining power without fear of coercion or threats from integrators may be the most effective and realistic option. [FN277] Empowering associations places few additional regulatory burdens on the industry. It also allows growers and integrators to exercise their rights to contract and to pursue their economic interests without undue government interference.

Legislation that facilitates negotiation would enable growers to negotiate for fundamental reforms of contract farming to further improve their lives. For example, growers and integrators might enter a lease arrangement in which integrators pay growers based on the number of square feet of the growers' chicken houses occupied by the integrators' chickens. [FN278] Farmers might also seek contracts based solely on the number of birds raised--guaranteeing a payment for each bird--or that pay based on the pounds of broiler meat raised by the farmer. [FN279] Such contracts would eliminate the difficulties in current production contracts that arise from questions concerning the comparison of production costs and the performance of the birds. [FN280]

- Conclusion

Current contractual relationships between poultry growers and integrators disadvantage growers. Growers make substantial capital investments--often putting up their farms as collateral--for a series of contracts that provide them a small return on their investment. Legislatures have been reluctant to pass laws that protect the growers' interests by placing burdens and obligations on integrators. Legislation that allows associations of growers to bargain free from fear of retaliation by integrators may enable growers to *1156 improve their position, without requiring increased government regulation of the poultry industry.

[FN1]. I would like to thank Mary E. Clouse and the Z. Smith Reynolds Foundation for introducing me to this issue through their efforts to assist contract farmers, Frank K. Lord III for his editorial advice, and Elizabeth Dempsey Lord for her support.

[FN1]. See Neil D. Hamilton, Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing Production System, 45 Drake L. Rev. 289, 289-90 (1997). For a general discussion of changes in American agriculture, see National Comm'n on Small Farms, U.S. Dep't of Agric., A Time to Act (1998) [hereinafter A Time to Act].

[FN2]. See Agriculture Comm., Poultry Producers Financial Protection Act of 1987, H.R. Rep. No. 100-397, at 6 (1987), reprinted in 1987 U.S.C.C.A.N. 855, 856.

[FN3]. See id.

[FN4]. See id.

[FN5]. See Robert V. Bishop & Lee A. Christensen, America's Poultry Industry, Nat'l Food Rev., Jan. 1, 1989, at 9, available in 1989 WL 2508094.

[FN6]. See id.

[FN7]. See Hamilton, supra note 1, at 290-91.

[FN8]. See id. at 301-03.

[FN9]. For further discussion of the effect of industrialization on the role of the farmer, see Christopher R. Kelley, Agricultural Production Contracts: Drafting Considerations, 18 Hamline L. Rev. 397, 399 (1995).

[FN10]. See Marj Charlier, Chicken Economics: The Broiler Business Consolidates and That Is Bad News to Farmers, Wall St. J., Jan. 4, 1990, at A1 (discussing the operations of the nation's largest chicken companies).

[FN11]. See *id.*

[FN12]. See Carole Morison, Contract Poultry Farming (visited Oct. 29, 1998) < http://www.web-span.com/pga/contracts/contract_farming.html >. This article appears on the web site of the National Contract Poultry Grower's Association (NCPGA), a national group that advocates for farmers who raise chickens under contract for corporate processors. See generally Arthur Gaskins, History (visited Oct. 29, 1998) < <http://www.web-span.com/pga/history/index.html> > (discussing the background of the NCPGA and describing its goals).

[FN13]. See Randi Ilyse Roth, Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers, 25 U. Mem. L. Rev. 1207, 1209 (1995) [hereinafter Roth, Redressing Unfairness].

[FN14]. See *id.* at 1209-10.

[FN15]. See *infra* notes 23-37 and accompanying text.

[FN16]. See *id.* at 1208.

[FN17]. See A Time to Act, *supra* note 1, at 61.

[FN18]. See Charlier, *supra* note 10, at A1.

[FN19]. See North Carolina Dep't of Agric. & Consumer Servs., North Carolina Agriculture Overview: Poultry and Eggs (visited Oct. 29, 1998) < <http://www.agr.state.nc.us/stats/general/poultry.htm> >.

[FN20]. See *id.*

[FN21]. See Neil D. Hamilton, State Regulation of Agricultural Production Contracts, 25 U. Mem. L. Rev. 1051, 1053-54 (1995) [hereinafter Hamilton, State Regulation]. "[T]here is no 'open market' in chicken" for individual farmers. Letter from Richard L. Lobb, Director of Communications, National Broiler Council, to the author 2 (June 12, 1998) (on file with the Wake Forest Law Review) [hereinafter Letter from Richard Lobb]. "The National Broiler Council represents vertically integrated broiler producer-processors." *Id.* at 1. Members of the National Broiler Council "account for over 95 percent of the chicken produced in the United States." National Broiler Council, About the Owners (visited Oct. 29, 1998) < http://www.eatchicken.com/about_owners/index.html >. Among other things, the Council engages in "government relations and public affairs" on behalf of the broiler industry. *Id.*

[FN22]. In addition to poultry, commodities produced under production contracts include "fruits and vegetables, ... hogs, beef, milk, popcorn, and genetically engineered plants and animals." H.R. 2738, 105th Cong. § 2(3) (1997).

[FN23]. See Kelley, *supra* note 9, at 397 & n.4.

[FN24]. See Roth, Redressing Unfairness, *supra* note 13, at 1209. For an example of a production contract, see Poultry Producer Agreement (visited Oct. 29, 1998) < <http://www.web-span.com/pga/contracts/perrev.html> >. This site, maintained by the National Contract Poultry Growers Association, sets out a poultry producer agreement provided by Perdue Farms. The contract provides, in part, that Perdue will provide the producer with chicks, feed, fuel, medications, vaccinations, and other supplies necessary to raise chicks. See *id.* The producer agrees to provide

(Cite as: 33 Wake Forest L. Rev. 1125, *1156)

"housing, equipment, supplies to maintain equipment and housing, utilities and labor to feed, water, care for, manage, and look after the chicks." *Id.*

[FN25]. See Roth, Redressing Unfairness, *supra* note 13, at 1210.

[FN26]. See *id.* For an example of a feed conversion term in a broiler contract, see Mountaire Farms, L.L.C. North Carolina Broiler Production Agreement (visited Oct. 29, 1998) <<http://www.web-span.com/pgs/contracts/ncmtair.html>> [[hereinafter Mountaire Production Contract]. This site, maintained by the National Contract Poultry Growers Association, sets out a Mountaire production contract, including a grower pay formula. See *id.* Payment for broilers is based on the weight of the bird and the amount of feed used by the farmer. See *id.* If the amount of feed used is less than that used by other farmers or if the birds weigh more on average than other farmers', the farmer will earn a bonus. See *id.* However, the converse is also true: if the farmer uses too much feed or produces underweight birds, the base pay promised by the contract will be reduced. See *id.*

[FN27]. See Keith D. Haroldson, Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts, 41 Drake L. Rev. 393, 415 (1992).

[FN28]. Hamilton, State Regulation, *supra* note 21, at 1057-58.

[FN29]. See Kelley, *supra* note 9, at 400-02.

[FN30]. See generally Hamilton, State Regulation, *supra* note 21, at 1055 (stating that access to technology and market development are factors related to the use of production contracts).

[FN31]. See *id.* (stating that increased farming costs and the potential for market fluctuations create a risk for agricultural producers).

[FN32]. See Letter from Richard Lobb, *supra* note 21, at 2. For a description of the activities of the National Broiler Council, see *supra* note 21.

[FN33]. See Letter from Richard Lobb, *supra* note 21, at 2.

[FN34]. See *id.*

[FN35]. See *id.* at 1.

[FN36]. *Id.* at 2.

[FN37]. Interview with Mary E. Clouse, Director of the Contract Agriculture/Poultry Project of the Rural Advancement Foundation International- USA ("RAFI-USA"), in Pittsboro, N.C. (June 29, 1998) [hereinafter Interview with Mary Clouse].

[FN38]. One survey indicated that 22.5% of growers strongly disagreed with the statement "[m]y average payment is adequate to handle my poultry expenses," while only 3.5% strongly agreed. Tom Ilvento & Angela Watson, Poultry Growers Speak Out!: A Survey of Delmarva Poultry Growers, U. Del. Cooperative Extension, Dec. 1997, app. at 12.

[FN39]. See A Time to Act, *supra* note 1, at 61; see also Broiler Contract Proposal (visited Oct. 29, 1998) <<http://www.rafiusa.org/poultry/scan.html>> (using 1997 figures taken from the Marva Farm Credit Bureau, Delmarva Peninsula, to predict that a contract farmer's income, based on two poultry houses, is slightly less than \$8000 per year).

[FN40]. See Dan L. Cunningham, Returns, Cash Flow to Broiler Growers: A 15- year Analysis, Poultry Digest, Jan. 1997, at 36, 38 tbl.3. Cunningham's figures show that a farmer's net income will increase from \$3054 in the first year of a contract to \$19,536 in year fifteen. Id. But see Ilvento & Watson, supra note 38, app. at 13 (showing that only 3.1% of growers strongly agree with the statement "[m]y cash flow from poultry has improved over time," while 29.4% TRONGLY DISAGREE).

[FN41]. See Randi Ilyse Roth, Contract Farming Breeds Big Problems for Growers, Farmers' Legal Action Rep., Winter 1992, at 12, 14 n.9 [hereinafter Roth, Contract Farming]. But see Cunningham, supra note 40, at 39 tbl.5 (suggesting that net income for contract farmers increases significantly over time and that operating costs remain nearly constant).

[FN42]. See Roth, Contract Farming, supra note 41, at 14.

[FN43]. See id.

[FN44]. See Charlier, supra note 10, at A1.

[FN45]. See id.

[FN46]. See Roth, Contract Farming, supra note 41, at 14.

[FN47]. See Broiler Contract Proposal, supra note 39; see also Hinkle v. Cargill, Inc., 613 So. 2d 1216, 1217 (Ala. 1992) (pointing out that the Hinkles invested \$280,000 to meet the specifications Cargill set for its contract egg producers); Roth, Contract Farming, supra note 41, at 13 (suggesting that an initial investment of \$200,000-\$400,000 is needed to purchase the necessary buildings and equipment for a poultry operation).

[FN48]. See Interview with Mary Clouse, supra note 37.

[FN49]. See 7 C.F.R. § 1980.20 (1998); Mark O'Connor, The Chicken Emperor Has No Clothes: What Sanderson Farms and Local Leaders Don't Want You to Know About the Poultry Business and Why It's Destined to Come to Town Anyway (visited Oct. 29, 1998) <<http://www.web-span.com/pgs/op-ed/sand.html>>.

[FN50]. See O'Connor, supra note 49.

[FN51]. See id. for a discussion of the incentives created by federally guaranteed loans.

[FN52]. See Roth, Redressing Unfairness, supra note 13, at 1211.

[FN53]. Continental Grain Co. v. Beasley, 628 So. 2d 319, 321 (Ala. 1993). In Beasley, plaintiffs alleged that the processor required them to install tunnel ventilation after initially representing that tunnel ventilation would not be required. Id. at 322. When the growers refused to install tunnel ventilation, the processor terminated their contracts. See id. at 321. For examples of other poultry contracts, see Chicken Feed from a Contract (visited Oct. 29, 1998) <<http://www.web-span.com/pgs/contracts/index.html>>, which contains links to production contracts offered by Perdue, Tyson, and other integrators.

[FN54]. See Roth, Contract Farming, supra note 41, at 13.

[FN55]. See id.

(Cite as: 33 Wake Forest L. Rev. 1125, *1156)

[FN56]. *Id.* One survey showed that, on average, growers felt their contracts should be guaranteed for 29.6 flocks (approximately 4.25 years). *Ivento & Watson*, *supra* note 38, app. at 13.

[FN57]. See *Cunningham*, *supra* note 40, at 38.

[FN58]. See *id.* at 38 tbl.3.

[FN59]. See *id.*

[FN60]. See *Morison*, *supra* note 12.

[FN61]. See *Roth*, *Redressing Unfairness*, *supra* note 13, at 1211.

[FN62]. See *Roth*, *Contract Farming*, *supra* note 41, at 13.

[FN63]. See *Roth*, *Redressing Unfairness*, *supra* note 13, at 1211-12.

[FN64]. See *Haroldson*, *supra* note 27, at 414.

[FN65]. See *id.*

[FN66]. For a discussion of the cost and investments needed to enter into the business of contract poultry farming, see *supra* notes 47-63 and accompanying text.

[FN67]. Michelle M. Jones, *Chick Quality Can Adversely Affect Grower's Bottom Line*, *Poultry Grower News*, Nov.-Dec. 1994, at 6, 7 (quoting Arthur Gaskins, President of the National Contract Poultry Growers Association). Mr. Gaskins' estimate that poultry farmers have invested more than one-half of the capital in the poultry industry is supported by the findings of a bill recently introduced in the United States House of Representatives. See H.R. 2738, 105th Cong. § 2(4) (1997). For a discussion of the bill, see *infra* notes 206-12 and accompanying text.

[FN68]. H.R. 2738 § 2(2).

[FN69]. See *Charlier*, *supra* note 10, at A1. Some studies suggest a grower in an area without competition can earn as little as \$579 per chicken house (growers often have two or more houses), although another study placed the figure at \$4000. See *id.* Even when that figure is raised to \$4000, a figure proposed by the Texas-based Pilgrim's Pride, farmers in those regions still earn up to \$6000 less than those in Delaware, Maryland, and Virginia, where there are several processors. See *id.*

[FN70]. See H.R. 2738 § 2(4)-(5).

[FN71]. See *id.*

[FN72]. See *Interview with Mary Clouse*, *supra* note 37.

[FN73]. See *id.* Kentucky's tobacco farmers may be particularly eager to enter into contracts with integrators. Typically they own small farms which are suitable for poultry houses but not many crops. See *id.* Many also have established significant equity in their land, making it easier for them to get the credit necessary to construct the poultry houses. See *id.* Integrators may also be attracted to Kentucky because it is close to the integrators' Midwestern sources of grain. See *id.*

[FN74]. See *Haroldson*, *supra* note 27, at 414-15.

[FN75]. See Roth, Contract Farming, supra note 41, at 13.

[FN76]. See, e.g., *Braswell v. ConAgra, Inc.*, 936 F.2d 1169, 1173 (11th Cir. 1991) (allowing breach of contract and fraud claims for the processor's intentional misweighing of birds).

[FN77]. See Charlier, supra note 10, at A1.

[FN78]. See Roth, Contract Farming, supra note 41, at 13 (stating that bad inputs result in low income for farmers).

[FN79]. See Roth, Redressing Unfairness, supra note 13, at 1210.

[FN80]. For a discussion of feed conversion efficiency, see supra note 26 and accompanying text.

[FN81]. See Roth, Redressing Unfairness, supra note 13, at 1213.

[FN82]. See *id.* at 1213 n.25. The problem is worse if, as is sometimes the case, the delivery driver is a fellow grower with an incentive to deliver more feed to his farm than to other growers' farms. See *id.* at 1213.

[FN83]. See Roth, Contract Farming, supra note 41, at 14.

[FN84]. See *id.*

[FN85]. See *id.* at 14-15.

[FN86]. George Watts, Thoughts on Proposed P&S Rulemaking, Broiler Industry, Nov. 1997, at 17, 17 (quoting the National Broiler Council's comments to the Packers and Stockyard Administration, opposing rules to do away with ranking growers based on performance). Mr. Watts points out that more than 60% of the comments addressing the proposed rules changes opposed additional regulations, *id.*, but his figures do not indicate whether these comments came from growers or processors.

[FN87]. See Roth, Contract Farming, supra note 41, at 15; Interview with Mary Clouse, supra note 37. RAFI-USA suggests that in order for ranking for pay to be accurate, the integrators would have to ensure that more than 45 criteria were consistent for all growers. See *An Uneven Playing Field: Broiler Grower Ranking for Pay* (visited Oct. 29, 1998) <[http:// www.rafiusa.org/poultry/uneven/html](http://www.rafiusa.org/poultry/uneven/html)>. Among the factors integrators would have to consider to ensure equality are the breed of the birds, the number of days the birds were on each farm, and the distance from the farm to the processing plant. See *id.* Integrators would also have to assure accurate counts of the birds taken from each farm, and accurate accounts of the feed delivered to each farm. See *id.*

[FN88]. See Roth, Contract Farming, supra note 41, at 12.

[FN89]. See *Glennville Hatchery, Inc. v. Thompson*, 298 S.E.2d 512, 517 (Ga. Ct. App. 1982).

[FN90]. See, e.g., *Bunting v. Perdue, Inc.*, 611 F. Supp. 682, 684 (E.D.N.C. 1985) ("[P]laintiff contends that he was given the wrong feed mixture by Perdue for one flock, and the weight of these chickens differed markedly from previous flocks.").

[FN91]. See generally Rosalind Resnick, *A Chicken Fight in North Florida*, Fla. Trend, Oct. 1990, at 30, available in LEXIS, Nexis Library, UMI File (describing a 1990 lawsuit brought against Cargill

(Cite as: 33 Wake Forest L. Rev. 1125, *1156)

by a group of growers in Florida).

[FN92]. See *id.*

[FN93]. See, e.g., *Pavlik v. Cargill, Inc.*, 9 F.3d 710, 712 (8th Cir. 1993); *Baldree v. Cargill, Inc.*, 758 F. Supp. 704, 706 (M.D. Fla. 1990), *aff'd mem.*, 925 F.2d 1474 (11th Cir. 1991).

[FN94]. See, e.g., *Renfro v. Swift Eckrich, Inc.*, 53 F.3d 1460, 1463 (8th Cir. 1995).

[FN95]. See, e.g., *Pavlik*, 9 F.3d at 712. Mary Clouse, a former contract poultry farmer who now works for RAFI-USA, lost her contract with Townsend Poultry after discussing the plight of contract farmers in a 1989 interview with the Institute for Southern Studies. See Michelle M. Jones, *Producer Advocate Recognized for Outstanding Work*, *Poultry Grower News*, Nov.-Dec. 1994, at 9, 9; see also *Interview with Mary Clouse*, *supra* note 37 (describing Mary Clouse's current work). When Clouse and her husband began to look for a new integrator with whom they could work, they found that they had been branded as troublemakers and were unable to secure a new contract. See Jones, *supra*, at 9; see also *Ivento & Watson*, *supra* note 38, app. at 10 (noting that most growers surveyed feared retaliation if they raised concerns with their integrators).

[FN96]. 7 U.S.C. §§ 181-231 (1994).

[FN97]. See *id.* § 192.

[FN98]. *Id.* § 182(10).

[FN99]. *Id.* § 182(9).

[FN100]. *Id.* § 182(8).

[FN101]. See *id.* § 192(a),(e).

[FN102]. *Id.* § 192.

[FN103]. *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1336 (8th Cir. 1971).

[FN104]. *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980) (quoting 7 U.S.C. § 208(a)).

[FN105]. See 7 U.S.C. § 228b-1(a).

[FN106]. *Id.* § 228b-1(b).

[FN107]. *Id.* § 197(b).

[FN108]. See *id.*

[FN109]. See 9 C.F.R. § 201.49(b)(6)-(8), (10)-(11) (1998).

[FN110]. See generally *Braswell v. ConAgra, Inc.* 936 F.2d 1169 (11th Cir. 1991) (discussing a class action lawsuit involving improper weighing by an integrated poultry processor). For a discussion of *Braswell*, see *infra* text accompanying notes 190-95. Weight of the birds will also affect the farmer's feed conversion efficiency. See *supra* note 26.

(Cite as: 33 Wake Forest L. Rev. 1125, *1156)

[FN111]. 9 C.F.R. § 201.82(a).

[FN112]. See Verne R. Kennedy, 1996 Alabama Poultry Grower Survey (visited Oct. 29, 1998) <<http://www.web-span.com/pgalibrary/survey.html>>.

[FN113]. See id.

[FN114]. For a discussion of the terms of the PSA, see *supra* text accompanying notes 96-113.

[FN115]. 947 F. Supp. 197 (E.D.N.C. 1996). -

[FN116]. Id. at 199, 202.

[FN117]. Id. at 199.

[FN118]. See id.

[FN119]. Id. at 200.

[FN120]. Id. at 201.

[FN121]. See id. at 202.

[FN122]. See id.

[FN123]. 758 F. Supp. 704 (M.D. Fla. 1990), *aff'd mem.*, 925 F.2d 1474 (11th Cir. 1991).

[FN124]. Id. at 706-07. Cargill later settled this suit, agreeing to a \$1,500,000 cash payment and \$825,000 in increased pay to its growers over five years. See Cargill Settles with Growers for \$2.6 Million, Poultry Grower News, Mar.-Apr. 1996, at 1, 1. Cargill also agreed not to terminate growers for other than legitimate business reasons. See id. at 2.

[FN125]. See Baldree, 758 F. Supp. at 705-06.

[FN126]. See id. at 706.

[FN127]. See id.

[FN128]. See id.

[FN129]. See id.

[FN130]. Id. at 706-07.

[FN131]. See id. at 707.

[FN132]. See id.

[FN133]. 7 U.S.C. §§ 2301-2306 (1994).

[FN134]. Id. § 2301.

(Cite as: 33 Wake Forest L. Rev. 1125, *1156)

[FN135]. Id.

[FN136]. The AFPA defines "handlers" to include "any person engaged in the business or practice of ... (3) contracting or negotiating contracts or other arrangements... with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product." Id. § 2302(a).

[FN137]. Id. § 2302(b).

[FN138]. Id. § 2302(c).

[FN139]. Id. § 2303.

[FN140]. Id. § 2304.

[FN141]. See *Butz v. Lawson Milk Co.*, 386 F. Supp. 227, 230 (N.D. Ohio 1974). The Butz court held that, although the Act's disclaimer does weaken the original purpose of the Act, it is not unconstitutionally vague. Id. at 238.

[FN142]. See Roth, *Redressing Unfairness*, supra note 13, at 1223 (stating that few cases address the AFPA).

[FN143]. 758 F. Supp. 704 (M.D. Fla. 1990), *aff'd mem.*, 925 F.2d 1474 (11th Cir. 1991). For a discussion of *Baldree*, see supra text accompanying notes 123-32.

[FN144]. *Baldree*, 758 F. Supp at 706-07.

[FN145]. See Hamilton, *State Regulation*, supra note 21, at 1094-95.

[FN146]. N.C. Gen. Stat. § 75-1.1 (1994).

[FN147]. Id.

[FN148]. For a discussion of the PSA, see supra notes 96-113 and accompanying text.

[FN149]. 947 F. Supp. 197 (E.D.N.C. 1996). For a full discussion of this case and the farmers' PSA claims, see supra text accompanying notes 115-22.

[FN150]. *Philson*, 947 F. Supp. at 200.

[FN151]. See *id.* at 202.

[FN152]. See *Bunting v. Perdue, Inc.*, 611 F. Supp. 682, 691-92 (E.D.N.C. 1985).

[FN153]. Cases discussed in this Subpart highlight common factual situations and the difficulties that those situations present to growers pursuing legal remedies. The cases do not describe the universe of claims or theories that growers have used in their attempts to recover for alleged wrongs by processors.

[FN154]. See supra note 129 and accompanying text.

[FN155]. See Roth, *Redressing Unfairness*, supra note 13, at 1224-28. Farmers may also pursue

other common law remedies including negligence, conversion, and breach of fiduciary duties. See *id.* at 1227-28.

[FN156]. 604 F. Supp. 518 (E.D.N.C. 1985).

[FN157]. *Id.* at 522.

[FN158]. See *id.* at 522-23.

[FN159]. See *id.* at 522.

[FN160]. See *id.* at 526.

[FN161]. See *id.* at 522-23.

[FN162]. *Id.* at 526. Less skillfully drafted merger clauses may pose problems for integrators who attempt to avoid obligations to growers based on oral promises made in addition to the written contract entered into by the parties. One court concluded that a merger clause, which provided that the written agreement was "separate from" any other agreement, "clearly recognized the possibility of other, separate agreements between the parties, notwithstanding the language that the written contract plus compensation schedule represented 'the complete contract.'" *Glennville Hatchery, Inc. v. Thompson*, 298 S.E.2d 512, 516 (Ga. Ct. App. 1982).

[FN163]. *Smith*, 604 F. Supp. at 526.

[FN164]. See *id.* at 527. In contrast, one court held that there was a material issue of fact presented by the question of whether a contract farmer could reasonably be considered to have waived his right to claim breach of contract by an integrator because he continued to receive the benefits of the contract after the alleged breach. See *Jackson v. Swift-Eckrich, Inc.*, 830 F. Supp. 486, 494-95 (W.D. Ark. 1993). The *Jackson* court took into account the farmer's argument that in a production contract, the grower depends on the processor for income and cannot reasonably be expected to refuse to perform the contract upon suspected breach. *Id.* at 494.

[FN165]. See *Smith*, 604 F. Supp. at 527.

[FN166]. *Id.*

[FN167]. See *id.* at 522.

[FN168]. See *id.* Although the record is not clear, it appears that the defendant offered new contract terms to *Smith* and *Smith* sought to retain the terms of his prior arrangements with *Central Soya*.

[FN169]. *Id.* at 527.

[FN170]. *Id.*

[FN171]. See *Haroldson*, *supra* note 27, at 414.

[FN172]. 589 F.2d 382 (8th Cir. 1979).

[FN173]. *Id.* at 385.

[FN174]. See id.

[FN175]. Id.

[FN176]. See id.

[FN177]. See id. at 387.

[FN178]. Id.

[FN179]. See id.

[FN180]. 613 So. 2d 1216 (Ala. 1992).

[FN181]. Id. at 1217.

[FN182]. Id.

[FN183]. See id.

[FN184]. See id. at 1218.

[FN185]. See id.

[FN186]. See id. at 1216.

[FN187]. See id. at 1220.

[FN188]. See id. at 1222.

[FN189]. See id.

[FN190]. 936 F.2d 1169 (11th Cir. 1991).

[FN191]. Id. at 1172.

[FN192]. See id.

[FN193]. See id. The district court later granted a remittitur of \$111,589.51 on the compensatory damages. See id.

[FN194]. Id. at 1173.

[FN195]. See id.

[FN196]. Fraud and misrepresentation arise in many of the same circumstances and involve many of the same considerations. See Roth, Redressing Unfairness, *supra* note 13, at 1226 n.107. For that reason, the two causes of action are discussed here in the same section.

[FN197]. See, e.g., *Smith v. Central Soya, Inc.*, 604 F. Supp. 518, 530 (E.D.N.C. 1985) (holding that a grower cannot maintain a fraud claim against an integrator in the absence of evidence of intent).

(Cite as: 33 Wake Forest L. Rev. 1125, *1156)

[FN198]. *Id.* For a discussion of the breach of contract claim in this case, see *supra* text accompanying notes 156-61.

[FN199]. See *Smith*, 604 F. Supp. at 530; see also *Starling v. Valmac Indus.*, 589 F.2d 382, 387 (8th Cir. 1979) (holding that the plaintiffs had failed to present evidence of fraud on the part of the integrator); *Hinkle v. Cargill, Inc.*, 613 So. 2d 1216, 1221 (Ala. 1992) (holding that an allegation of fraud requires evidence of intent). In *Starling*, the court did not fully discuss a fraud claim but wrote, "As to fraud, there is simply no evidence that would justify the submission of a fraud issue to the jury." *Starling*, 589 F.2d at 397. For a discussion of the facts of *Starling*, see *supra* text accompanying notes 172-79.

The *Hinkle* court discussed the fraud claim in more depth. Specifically, it stated:

[No] evidence in support of the fraud allegation shows that [Cargill's agent] had a present intent, at the time he made the alleged representation that Cargill would continue to keep the chickens in the chicken houses, not to perform that promise. There was ... evidence ... that [Cargill's agent] knew that Cargill would not bind itself to a 20-year commitment However, it does not show an intent not to continue providing chickens....

Hinkle, 613 So. 2d at 1221. The court also found the allegations of fraud not to be credible because the evidence showed that the plaintiffs entered into a series of one year contracts and should have known that Cargill did not intend to enter into a long term relationship. See *id.* For a discussion of the facts of *Hinkle*, see *supra* text accompanying notes 180-89.

[FN200]. 936 F.2d 1169 (11th Cir. 1991). For a discussion of the facts of *Braswell*, see *supra* notes 190-95 and accompanying text.

[FN201]. *Braswell*, 936 F.2d at 1174.

[FN202]. See *id.*

[FN203]. See *id.*

[FN204]. See *supra* notes 96-152 and accompanying text.

[FN205]. For a general discussion of state efforts to regulate agricultural production contracts, see *Hamilton, State Regulation*, *supra* note 21, at 1065- 71.

[FN206]. H.R. 2738, 105th Cong. (1997). This bill is also known as "The 1997 Family Farmer Cooperative Marketing Amendment to the Agricultural Fair Practices Act of 1967."

[FN207]. See *id.*

[FN208]. *Id.* § 2(2).

[FN209]. See *id.* § 5(a).

[FN210]. *Id.* § (5)(b). For an organization to receive accreditation, it must show, among other things, that it is owned and controlled by producers, empowered to negotiate on the behalf of its members, and has enough members to be an effective agent for producers. See *id.* § 6(c)(1)-(3).

[FN211]. *Id.* § 9(b).

[FN212]. *Id.* § 8(a).

(Cite as: 33 Wake Forest L. Rev. 1125, *1156)

[FN213]. See Hamilton, State Regulation, *supra* note 21, at 1074.

[FN214]. Minn. Stat. Ann. § 17.90(4) (West 1998).

[FN215]. *Id.* § 17.90(3).

[FN216]. See *id.* § 17.91.

[FN217]. See *id.* § 17.94. If the implied promise of good faith is breached, the complaining party may recover damages, court costs, and attorney fees. See *id.*

[FN218]. See *id.* § 17.92.

[FN219]. See *id.* § 17.92(1)(1).

[FN220]. *Id.* § 17.92(1)(2).

[FN221]. See *id.* § 17.92(2).

[FN222]. *Id.* § 17.92(3).

[FN223]. See Hamilton, State Regulation, *supra* note 21, at 1076.

[FN224]. See Kan. Stat. Ann. § 16-1502(a) (1995).

[FN225]. See *id.*

[FN226]. See *id.* § 16-1502(a)(2).

[FN227]. See *id.* § 16-1502.

[FN228]. See Minn. R. 1572.0030(1) (1997) (defining "termination" and "cancellation" to exclude expiration of the contract); see also Randi Ilyse Roth, *Breeding Change: Legislative Remedies for Contract Growers*, Farmers' Legal Action Rep., Autumn 1992, at 10, 12 (discussing the Minnesota rules) [[hereinafter Roth, *Breeding Change*].

[FN229]. For a discussion of the usual duration of a production contract, see *supra* note 56 and accompanying text.

[FN230]. See Minn. R. § 1572.0030(1).

[FN231]. Roth, *Breeding Change*, *supra* note 228, at 12.

[FN232]. See Minn. R. § 1572.0030(1).

[FN233]. Minn. R. § 1572.0030 subpt. 1.

[FN234]. See Roth, *Breeding Change*, *supra* note 228, at 12.

[FN235]. S. 476, Sess. 1993 (N.C.).

[FN236]. See *id.*

[FN237]. See id. § 106-549.102.

[FN238]. Id.

[FN239]. See id. § 106-549.103(11).

[FN240]. See Kan. Stat. Ann. §§ 16-1501 to -1506 (1995); Minn. Stat. Ann. §§ 17.90-.98 (West 1998). Minnesota's administrative rules, however, do define unfair trade practices to correspond roughly with federal unfair trade practices. See Minn. R. 1572.0045(1) (1997).

[FN241]. N.C. S. 476 § 106-549.104(a).

[FN242]. Id. § 106-549.104(b).

[FN243]. Id. § 106-549.104(d).

[FN244]. See id. § 106-549.104(f).

[FN245]. See id. § 106-549.104(c).

[FN246]. See id. § 106-549.104(h).

[FN247]. See id. § 106-549.105(f).

[FN248]. See Minn. Stat. Ann. § 17.92(1)(2) (West 1998).

[FN249]. N.C. S. 476 § 106-549.105(a). Production agreements may be drafted to be continuous until terminated by either party. See, e.g., Mountaire Production Contract, *supra* note 26. The Mountaire agreement states that "[a]s a matter of convenience...this contract shall be continuous until terminated." Id. Presumably this contract would fall within the protection of the Minnesota statute, which requires processors to reimburse growers for damages upon termination of any contract requiring the grower to make capital investments of \$100,000. Minn. Stat. Ann. § 17.92(1)(2). However, the processor could easily avoid the Minnesota provisions by requiring the grower to renew the contract annually.

[FN250]. N.C. S. 476 § 106.549.105(a).

[FN251]. See id. § 106-549.105(f).

[FN252]. See id.

[FN253]. See id. § 106-549.106(d).

[FN254]. Id. § 106-549.106(a).

[FN255]. See id. § 106-549.109.

[FN256]. See id. § 44-69.4.

[FN257]. See Alabama Agricultural Fair Practices Act (visited Oct. 29, 1998) < <http://www.web-span.com/pga/legislate/ala.html> >; Amendment to Chapter 583, Florida Statutes (visited Oct. 29, 1998) < <http://www.web-span.com/pga/legislate/fla.html> >; Louisiana Contract Poultry Growers Act

(visited Oct. 29, 1998) <<http://www.web-span.com/pga/legislate/la.html>>; Mississippi Poultry Growers Protection Act (visited Oct. 29, 1998) <<http://www.web-span.com/pga/legislate/miss.html>>; Oklahoma Contract Growers Fair Practices Act (visited Oct. 29, 1998) <<http://www.web-span.com/pga/legislate/ok.html>>.

[FN258]. See sources cited supra note 257.

[FN259]. See sources cited supra note 257.

[FN260]. See Mississippi Poultry Growers Protection Act, supra note 257.

[FN261]. See sources cited supra note 257.

[FN262]. See Mississippi Governor Skewers Poultry Farmers, Poultry Grower News, Mar.-Apr. 1996, at 1, 1.

[FN263]. See Victory in Louisiana!, Poultry Grower News, June 1993, at 1, 1.

[FN264]. See Interview with Mary Clouse, supra note 37.

[FN265]. See supra Part II.A.

[FN266]. See supra Part II.A.2.a.

[FN267]. See supra Parts II.B.1-2.

[FN268]. This conclusion assumes that the integrator did not make fraudulent statements to induce the grower to enter into the contract and that any representations about potential long-term relations between the two did not create binding contracts. As previously pointed out, growers are seldom successful in their fraud, misrepresentation, and breach of contract claims arising out of statements the processor made during pre-contract discussions. See supra Part II.B.1-2.

[FN269]. See supra Parts II.B.1-2.

[FN270]. See H.R. 2738, 105th Cong. § 2(1)-(2) (1997).

[FN271]. See Charlier, supra note 10, at A1.

[FN272]. See Hamilton, State Regulation, supra note 21, at 1103-04.

[FN273]. See supra notes 19-20 and accompanying text.

[FN274]. See Interview with Mary Clouse, supra note 37.

[FN275]. For a discussion of the Minnesota statutes and rules and the North Carolina bill, see supra Parts III.B.1-2.

[FN276]. For a discussion of the Minnesota notice provision, see supra note 219 and accompanying text.

[FN277]. For a discussion of proposed amendments to the AFPA, which are designed to enable grower associations and bargaining, see supra Part III.A. That the AFPA amendment is currently

(Cite as: 33 Wake Forest L. Rev. 1125, *1156)

under consideration in the House--and that the federal government has never considered an investment recapture provision-- indicates that the AFPA amendment may be the approach more likely to succeed.

[FN278]. See Interview with Mary Clouse, supra note 37.

[FN279]. See id.

[FN280]. See id. Integrators, however, worry that without the incentives created by the current system, growers' performance would deteriorate. See Watts, supra note 86, at 17 (quoting the National Broiler Council's comments to the Packers and Stockyard Administration, opposing rules to do away with ranking growers based on performance).

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ConAgra pays up for cheating growers

ConAgra agreed to a \$6.75 million settlement to a lawsuit filed by Georgia contract poultry growers. ConAgra denied the charges in the suit, but settled one day before trial. The counts in the case:

- Breach of contract (for shorting growers on the number and quality of chicks and other inputs);
- Conspiracy to defraud, fraud and deceit (for planning to cheat growers by mis-weighing of birds, feed, etc);
- Packers and Stockyards Act violations (for unfair, unjustly discriminatory, or deceptive practices, subjecting growers to unreasonable prejudice or disadvantage, and conspiring to do all of the above);
- Federal mail fraud (for mailing documents used in the above schemes through the U.S. mails); and Racketeering (for conspiring and agreeing to conduct its business so as to defraud the growers).

Senate Agriculture
2-10-00

PERDUE BEING INVESTIGATED BY USDA
"LIGHT" CHICKENS "HEAVY" TRUCKS

1/17/00

Frank Perdue, the man who has boasted that his company's chickens often live in better conditions than people do, is being investigated by the U.S. Department of Agriculture as whether **Perdue** is cheating farmers who grow those chickens.

If such an investigation finds that **Perdue**, based in Salisbury, Maryland., has violated federal law, the matter will be handed over to the U.S. Department of Justice for possible prosecution.

Carole Morison, a Pocomoke City, Maryland, family farmer with a contract to raise chickens for **Perdue**, one of the nation's five largest chicken producers and processors, said the complaints involve whether **Perdue** has been misrepresenting the weight of company tractor-trailers hauling chickens grown under contract.

By claiming the trucks weigh more than they do, the company could cheat farmers when the chickens and trucks are weighed together, she told the Associated Press. She claims the weight of some **Perdue** trucks have been overestimated by as much as 3,500 pounds.

"The tractor-trailers go on their scales with the chickens, and that's 3,500 pounds of meat that's not going to be counted. It's going to be counted as the weight of the truck," she said. By that estimate, a farmer getting paid about 3.7 cents per pound of chicken would lose \$129.50 per truck. "As a contract farmer, there's no way to verify anything they do," she said.

"We're looking at several issues," Dan VanAckeren, director of field operations for the USDA's Grain Inspection, Packers and Stockyards Administration, told AP.

Tita Cherrier, a spokeswoman for **Perdue** said she did not know about the investigation, but said she knows some growers under contract to raise broilers for **Perdue** are "unhappy."

"I'm sure the USDA is compelled to investigate complaints," she said. "We do know that there are some growers, they've formed groups, who are dissatisfied and may have made complaints."

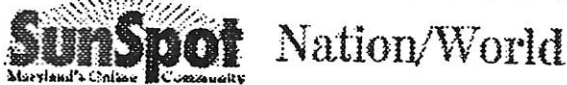
In 1992, some 300 southern Alabama and northern Florida poultry growers were awarded by a federal court jury in Alabama nearly \$17 million after being cheated by **ConAgra** on the weight of their birds. The company's poultry-processing plant at Enterprise, Alabama had deliberately made trucks seem heavier before they left the plant and then tinkered with the scales when they returned loaded to make the trucks appear lighter. Growers were paid on the basis of the weight difference.

Later, in the summer of 1995, **ConAgra** abruptly canceled poultry producing contracts with over 178 independent contract growers in the U.S. South. In offering new and what one producer described as "abusive" contracts **ConAgra** demanded binding arbitration be included.



A typical poultry contract is a unilateral contract, often referred to as a contract of adhesion. An adhesion contract is simply a "take it or leave it" contract. Frequently a farmer who has borrowed one-third to a half million dollars in order to secure a business contract with a processor like **ConAgra** has no option other than to sign, even if it means giving up his or her constitutional right to access their state and federal courts should anything go amiss in terms of fraud or dispute.



Some 53 families, at the risk of losing their farms and their homes, refused to accept such terms, saying it was clearly a violation of their freedom of speech. **ConAgra's** cancellation of contracts, many of the producers believed, came in retaliation for the earlier court suit brought on and won by the aforementioned 300 poultry growers.

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From the big poultry companies comes a new twist on capitalism: Farmers put up half the money, companies get all the power.

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THE NEW PECKING ORDER

The plucking of the American chicken farmer

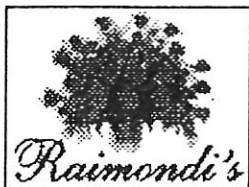
By Dan Feserman and Kate Shatzkin
 Sun staff



First of three parts

To Ed Probst, the poultry company's invitation sounded like the fulfillment of a dream: Come on down to Alabama and be a chicken farmer. Share the wealth. Be your own boss. Having scanned the horizon of America's poultry empire from the plains of Delmarva to the foothills of the Ozarks, Probst knew he'd need \$250,000 just to get started. He'd be on call 24 hours a day. But he counted on succeeding the same way farmers had for centuries: Live off the land, pay your debts, then enjoy the fruits of independence.

- [Some growers happy with 'the real good money'](#)
- [Ventilation system almost cost him the flock](#)
- [A chick's six-week odyssey from hatchery to dinner table](#) [117k file]
- [10 ways to show who's boss](#)
- [Part 2: Taking a stand, losing the farm](#)
- [About the series](#)



So, in 1992 Probst sold his home in Pennsylvania and staked his family's future on four used chicken houses near the Alabama town of Luverne.

With his wife, Georgia, and their children pitching in, Probst began to turn around a once lackluster farm. But every year the poultry company -- ConAgra -- wanted more, eventually

demanding that he install \$200,000 worth of new equipment and sign away his right to sue if things went wrong.

Probst decided he'd had enough, and in 1996 he put his farm up for sale. He then got his last, harshest lesson: Without ConAgra's approval, his farm was virtually worthless. The company refused to offer a chicken-growing contract to any prospective buyer, and within three months the Probsts lost everything to foreclosure.

Only with the help of a collection by their Baptist church did they make it out of town, hauling their last possessions on a rented truck to a relative's house in San Angelo, Texas.

"They were toying with us, that's what they were doing," Probst said later. "They make it look good, and it's so deceiving. And once they have you, once you sign that contract, either you grow chickens for them or you don't grow them at all."

The ruination of the Probsts is an all too familiar tale among America's 30,000 contract chicken growers. Like Probst, they must invest hundreds of thousands of dollars in land and equipment just to get into the business. But once a farmer signs a contract to grow chickens, he finds himself at the bottom of a rigid pecking order, in which the poultry company controls his fortunes to the last detail.

Dictating much of that power today are the five largest companies -- Tyson Foods, Gold Kist, Perdue Farms, Pilgrim's Pride and ConAgra -- controlling more than half the business of this wealthy industry. Together they have transformed a barnyard byproduct into the cheap, plentiful centerpiece of the national diet.



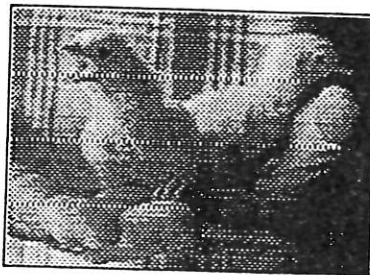
▲ Ruined: Ed and Georgia Probst -- once growers for the nation's fifth largest chicken processor, ConAgra -- lost their Alabama farm to foreclosure. "They were toying with us," Ed Probst says of the company. (Sun photo by John Makely)

But while the companies have been flourishing on Wall Street and extending their political reach to the White House, the growers have been increasingly beleaguered: The public denounces them as polluters whose chicken manure fouls waterways, while the poultry companies squeeze them ever tighter for profits. Formerly able to share in the bounty of an industry on the rise, they have become the land-owning serfs in

an agricultural feudal system.

An eight-month Sun investigation across 13 states has found:

- A new chicken farmer today can expect an annual net income of only \$8,160 -- about half the poverty level for a family of four -- until he has paid off the 15-year loan he took to get into the business, and even that estimate may be overly optimistic. Fewer than half of Delmarva's chicken farmers say they're making enough to meet expenses.
- Getting into the business is more expensive than ever, requiring an investment of about \$257,000. In return, a farmer is saddled with round-the-clock responsibility, daily collecting dead birds by hand during strolls through dust and ankle-deep manure. A farmer battles heat waves, power outages and outbreaks of avian disease, and his every move is controlled by the vagaries of a contract that can be canceled virtually anytime, cutting income to zero.
- A chicken farmer's first big loan is almost never his last. Companies routinely require farmers to install expensive and sometimes unproved new equipment. The additional debt means most chicken houses aren't paid for until they've reached the age when productivity -- and income -- generally begin to decline.
- Some companies have systematically cheated growers at the place that matters most on payday -- the scales where chickens are weighed. Class action lawsuits in four states uncovered evidence that such cheating went on for years. Yet law enforcement agencies launched no criminal probes.
- The chicken farmer has virtually no one in government to help him. The lone federal agency charged with protecting his interests has missed evidence of fraud. Even when empowered to investigate, the U.S. Department of Agriculture's Grain Inspection, Packers and Stockyards Administration almost never produces tangible results. Despite fielding more than 1,000 complaints from chicken farmers, the agency has gone to court on their behalf only twice. The only resulting financial penalty: \$477, paid by a small poultry company in South Carolina.
- The farmer's only proven defense against companies is the private lawsuit, which is rapidly being disarmed. Most poultry



⚡ (Sun photo by John Makely)

contracts now require farmers to sign away most rights to sue. Growers who refuse, such as Ed Probst, lose their contracts and their livelihoods.

□ When chicken growers ask state legislatures for help, poultry companies almost invariably defeat them by threatening to move their plants and jobs elsewhere. The industry made similar threats in Maryland and Oklahoma when legislatures considered ways to curb pollution from chicken-manure runoff. The result: rules and penalties directed at farmers, not at companies.

□ The companies have almost absolute power when growers like Probst try to sell their farms. Getting a contract to grow chickens is essential to potential buyers. Without one, a farm is virtually worthless and unsellable.

"They just gave us the runaround," said Celia English, 62, a ConAgra grower in Alabama who lost her 290-acre farm to foreclosure when the company refused to offer a contract to any prospective buyer.

"What they wanted to do is close down as many of us [older farms] as they could. ... I lost everything that I've ever had," she said.

The relationship between chicken farmers and their companies is equal only in terms of their financial stake. Both sides put up about half of the poultry industry's capital investment.

A company's investment -- in factories, hatcheries, feed mills and employees -- lets it compete freely for as much as it can earn in a marketplace that has proved very profitable.

The stock of Tyson Foods Inc., the biggest of the poultry companies, is worth nearly 200 times what it was 25 years ago, and its slower growth during the past several years is attributable mostly to the company's unsuccessful forays into the fish and pork businesses. Tyson has lost money only once, in 1994, and followed that with its best year, a profit of \$219 million.

A farmer's investment in land, barns and equipment, however, buys him into a more restricted competition for a pool of money

that has been largely predetermined by the companies. The farmer works within an artificial economy in which the most efficient farms earn the highest pay, while lesser performers earn barely enough to survive. And at all levels, incomes have stagnated. It is a system that guarantees that some farmers will fail, even if all are vigilant and efficient.



▲ Packing: At Perdue's Salisbury hatchery, workers sort newborn chicks by gender and toss them into funnels leading to a conveyor belt and packing crates. (Sun photo by John Makely)

This imbalance of power begins and ends with a farmer's contract.

A company agrees to provide a farmer with day-old chicks and enough feed, medicine and advice to keep the birds growing during the six weeks until they're ready for the slaughterhouse. The farmer agrees to provide his time and effort, giving the birds enough food and water while keeping them at the right temperature, watching for disease and culling daily casualties.

But first he must build chicken houses, generally at least two at about \$128,000 apiece. Being "independent contractors," the farmers get neither a salary nor benefits. They do get a guaranteed price per pound for their birds, regardless of what happens to the prices on the open market for feed and chicken.

While this insulates them from the kinds of price shocks that recently have decimated hog farmers, none can survive for long on minimum pay, poultry economists say. Only by outperforming other chicken farmers in a flock-by-flock competition can growers hope to pay off their debts and make a living income.

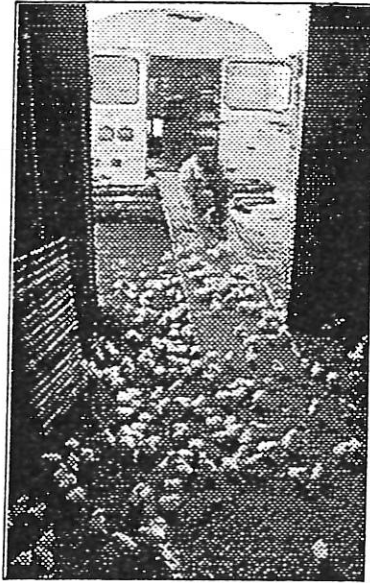
The farmers compete when their birds go to the slaughterhouse. Basically, whoever produces the heaviest, healthiest chickens on the least feed gets the best rate of pay. But for every winner there's a loser, and growers who lose often enough also lose their contracts, whether they still owe money on their loans or not.

They can then try to sell their chicken houses, but if a buyer can't get a contract from a poultry company the seller can end up like Probst and English -- in foreclosure.

Meanwhile, the processor simply signs up another grower and moves on, getting another new "factory" in the bargain.

Options for farmers only keep shrinking. Where there were once more than 1,000 poultry companies, about 50 remain -- a core of tough, lean companies built by tough, unsparing men, such as Arthur and Frank Perdue, John and Don Tyson.

These companies say that their critics are a disgruntled minority, and that companies that cheat are the exception. Better communication, not better pay or fairer treatment, will make



▲ Turnaround: A worker delivers 20,000 chicks to a grower in Waco, Ga. Some newborns try to follow him back to the bus. (Sun photo by John Makely)

farmers happier, they say, and chicken farmers who don't make it simply aren't doing a good job.

Tyson spokesman Archie Schaffer is especially critical of chicken farmers who join the National Contract Poultry Growers Association, a 8-year-old growers' rights group. Every last one is a poor farmer, he said: "All of them."

In defense of paying out poverty-level incomes, executives say chicken farming was never intended to be a sole source of income, even if many farmers say that's exactly what companies led them to expect --

65 percent of Delmarva growers now call poultry their full-time business.

But ultimately the companies worry more about angering consumers than farmers, and lower payments to farmers mean lower prices at the supermarket.

"The American consumer definitely has an advantage here, and it's because the agriculture is so efficient," James A. Perdue, chief executive of Salisbury-based Perdue Farms Inc., said in an interview. "But it's a very low-margin business. ... We measure profitability in half a cent a pound."

And if the system is so awful and unfair, executives say, how come so many people are on waiting lists to build new chicken houses? Even if the pool of money for farmers is limited, farmers compete for their shares in a pure meritocracy, the companies say, a system that is quintessentially American: Whoever does best makes the most money.

Wrong, many farmers say, because key variables of success are

beyond their control.

There is the varying quality of the chicks themselves -- maybe you'll get a weak flock while your neighbor gets a strong one. There are the feed deliveries, weighed at the feed mill but not at your farm, leaving plenty of room for mistrust. And there is the weighing of your birds, with each delay at the farm and factory costing you poundage.

There also is the pay system, complicated and controlled by companies. For example, USDA's Packers and Stockyards has been investigating the way Perdue pays its growers -- in some cases, excluding some poor performers from the rankings in a way that can cost others money.

"I got sucked into this thing thinking I had some control over my own destiny, and I don't have any," said a fuming Jerry Wunder, 52, of Westover, who has grown chickens for Perdue on his Shore farm since 1988. "I'm two years behind on my taxes. My lender threatened to foreclose on my farm. They assure you, if you work hard you can't help but be successful. But now you've got the Wal-Marting of agriculture. When I started, Frank Perdue was worth \$200 million. Now he's [worth more than \$800 million], and I don't begrudge him that. But at whose expense?"

It is not the work itself that farmers dislike -- in a 1997 poll of 1,344 Delmarva chicken farmers, 73.5 percent were at least somewhat satisfied with the job they'd chosen, even if fewer than half would recommend it to others. But ask them about the steps of the process and their mistrust shows: 43 percent don't trust their company's feed delivery weights, 41 percent don't trust the figures in their pay statements, 57 percent believe their company will retaliate if they raise concerns.

Other segments of the agriculture business seem to like the poultry industry's system, known as "vertical integration." Hog farming is headed toward the same start-to-finish controls. So is the beef industry. Companies dealing with more specialized grains are dabbling with variations.

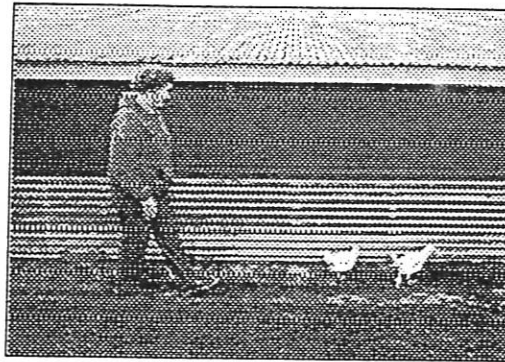
"This is not just about chicken," said Randi Roth, executive director of the nonprofit Farmers' Legal Action Group in Minnesota. "This is the incubator to see if we can do this with all of agriculture."

It is impossible to say how many chicken farmers drop by the wayside each year by losing their contracts, succumbing to debt or giving up. Companies either don't keep track of such numbers or won't reveal them, and no government agency keeps tabs.

But financial reports, sworn testimony, government documents and hundreds of interviews with farmers, lenders, regulators and former company employees paint a picture at odds with the poultry industry's portrait of relative happiness and well-being. It is one in which, increasingly, growers are too indebted to quit and too weak and intimidated to fight back.

A business is born

To see how much the chicken business has changed, journey to within a few miles of where it began. Head to Bishopville, just south of the Delaware line in Maryland. The crossroads town is so enveloped by the mills, plants, labs, hatcheries and farms of the poultry industry that the local fire department tests its siren daily, lest chickens grow unaccustomed to the noise. Weekly tests caused lethal stampedes.



▲ **Escape:** Jean Bunting of Bishopville, chasing stragglers that dodged a trip to the slaughterhouse, is from a pioneering family of poultry farmers. Her mother began the chicken for meat business on an Ocean View, Del., farm a few miles north in 1923. (Sun photo by John Makely)

On Hatchery Road
you'll find Jean and

William Bunting. At age 67, Jean is from America's first family of poultry farming. Not only have she and William, 69, tended chicken houses for 47 years, but her mother, Cecile Steele, started the chicken for meat business in 1923.

Eggs were the main object of the poultry business then. The meat was an expensive byproduct, a dinner-table luxury that made "a chicken in every pot" such an appealing slogan for Herbert Hoover's presidential campaign.

Steele, who lived just up the road in Ocean View, Del., got started by mistake. She ordered 50 egg layers and got 500, so she put them in a piano crate, then a shed. She scattered feed for 18 weeks, then sold them for about \$600 in a year when a new Ford cost \$380.

It was a providential time for a windfall. The strawberry business that had once saved Delmarva agriculture was dying, and when the Steeles ordered 1,000 more chickens and bought a new car, the neighbors took notice.

In the coming decades, so would thousands of farmers

throughout the country looking for a better way to squeeze a living from thin, weary soil, including a Salisbury egg farmer named Arthur Perdue. Chickens caught on especially in the South, where poultry offered relief from the war with the boll weevil, the ravaging pest of cotton.

From there, technology and big business took charge.

Crossbreeding developed bigger and faster-growing birds. Science juiced up the feed. And in the 1950s, companies began taking control of all aspects of the operation, hatching the birds and milling the feed.

Most farmers liked the "vertical integration" because the companies absorbed the price shocks of the feed and chicken. There were hundreds of firms to choose from, and with Americans eating more chicken every year the demand for growers kept rising.

Down-home entrepreneurs such as Don Tyson, Lonnie "Bo" Pilgrim and Arthur Perdue's son, Frank, rode the wave all the way to the top.

Frank Perdue turned his father's egg and [See Chicken, 10a] feed operations into a huge meat business that became the largest U.S. broiler company by the late 1960s. Masking a shy nature, he knocked on doors to sign up his friends and neighbors as contract growers by the dozen.

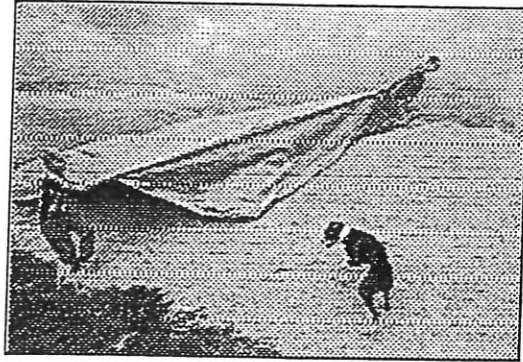
In the 1970s, he did the unthinkable -- gave the anonymous chicken a brand name and a slogan. He was his own best pitchman, making fun of himself in television ads and suffering comparisons of his sharp features to a chicken's.

Twelve hundred miles away, in northwestern Arkansas, Don Tyson was building a fiefdom in Springdale, where his father, John, got started by hauling chickens on a flatbed trailer.

Tyson also stamped his name on the product, and his company outgrew Perdue's. Along the way he befriended his state's ambitious young governor, Bill Clinton. Their fortunes rose in tandem.

As the young giants of poultry grew, they shaved costs as they went, penny by penny. It never seemed to hurt growers, because for years there were plenty of competing companies to choose from. With chicken overtaking first pork and then beef as America's preferred meat, the companies always needed more farmers.

Tom Shelton, then in charge of Perdue's growers, lamented in 1974 that when he recruited farmers on Delmarva he'd sometimes find representatives of four other companies waiting in the driveway when he left.



▲ Cover: Benny Bunting and his son, Jason, pull a tarpaulin over wood shavings that will be used as litter in three houses owned by the elder Bunting's father, Wiley, in Oak City, N.C. (Sun photo by John Makely)

Shelton, now the head of Case Farms, speaks these days of an "overcapacity" of growers. Not only have mergers and consolidations winnowed the field of companies, but America's appetite for chicken has leveled off and exports have slumped.

As the industry grew, Cecile Steele's 14-by-14-foot coops gave way to 40-by-500-foot automated superstructures, where 28,000 birds at a time grow to twice the size of hers on half the feed in a third of the time.

About the only things that haven't kept pace with these leaps of progress, says Steele's daughter, Jean Bunting, are grower profits. Farmers now pay \$5 per bird to build a chicken house, compared with \$1 a bird 20 years ago, but their incomes have become the industry's most easily controllable cost.

"We haven't made a bit more money than we did 10 or 15 years ago," Bunting lamented. "I wish my mother could see what they've done to the chicken industry. They have put the farmer all the way to the bottom."

Promises beckon

Then why do so many people still want in? Why does every company boast of its waiting list of prospective growers? One reason is the cheery promotional ads and optimistic income projections that companies produce -- emphasizing the gross pay, not the net.

A recent Perdue newspaper ad mentioned a possible minimum annual gross income of more than \$26,500, one "you can't get from crops or livestock." A grower quoted on Tyson's World Wide Web site gushes, "This is the best job I've ever had, and I've had some good jobs."

A shorter, catchier slogan caught David Mayer's attention when he was visiting North Carolina in June 1979.

" 'Invest in part-time work for full-time pay,' " Mayer recalled reading. "I was thinking I might look into something like that."

In those days, Mayer was running three fitness centers in Richmond, Va. He was looking to sell them and move his family south. He met with a Perdue representative.

"He said to me, 'Let me tell you something. If you just put out a little effort, you're going to beat average [pay] every time,' " Mayer said. "They had a very sophisticated sales presentation -- 'We're going to be in business together. As we grow, so will you.' ... He told me that if I had a chicken house, all I needed was a wheelbarrow and a pitchfork."

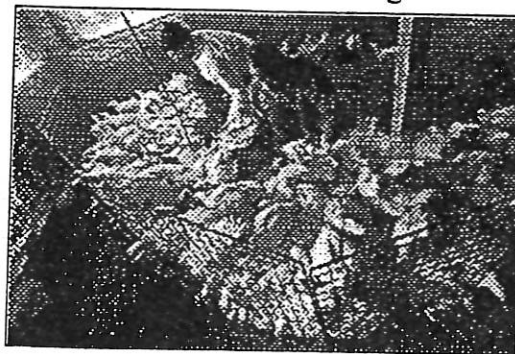
Mayer soon found out he also needed a tractor, a front-end loader and other expensive equipment. "Once I'd signed that promissory note," he said, "it was like Dr. Jekyll and Mr. Hyde. ... Initially it was, 'This [job] is all you need.' Then it became, 'Listen, we never intended for this to be your full-time job.' "

Now, at age 43, Mayer works under a huge burden of debt on his chicken farm in Hobgood, N.C., even though he generally finishes toward the top of the pay settlement rankings. He wonders whether he'll ever earn the independence he sought when he entered the business.

"They say they absorb all the risks," he said. "But in fact we risk everything -- the farm, our homes. If the market is hurt tomorrow, it won't affect Frank Perdue's lifestyle a bit, but they might not put chickens in my house tomorrow."

Mayer's nonfarming background indicates the pressure the industry was under in the 1970s and '80s to find new growers. Its broadened recruiting began attracting a whole new breed of contractor -- doctors and lawyers, business people and retired military officers.

"There were a large number of farmers who began to see this as their primary means of income," said Tom Smith,



▲ Harvest: Chicken catchers Dwight Manuel (left) and Lavaughn Jones, at the Bunting farm in Bishopville, just south of the Delaware line in Maryland, grab 6-week-old chickens for slaughter. (Sun photo by John Makely)

former chief executive of Wayne Farms. "In many cases, [growers] were far down the road before they realized they'd bitten off more than they could chew, and by that time they were deep in debt."

Former Maryland Secretary of Agriculture Lewis R. Riley, who grows chickens for Perdue in Parsonsburg, recalled the peak years of that period on the Eastern Shore 12 to 15 years ago.

"There were people who came in and thought they would build three or four chicken houses and it would be the most wonderful thing in the world," Riley said. "The industry was being promoted this way by companies, that this could happen. ... I won't say they were sold a bill of goods, but [farmers] interpreted it as utopia."

James Rushing, live production manager for Lady Forest Farms in Forest, Miss., as much as admitted in a sworn deposition this year that he'd made empty promises in his sales pitch.

Reminded that he'd told a grower, whose contract was later canceled, that he'd have a contract "as long as he grew a good bird," Rushing answered, "If you buy a new car, the salesman might tell you it might last you a lifetime, but would you believe that?"

Banks and other lenders were virtually forced into a cheerleader's role in this process, especially in regions where poultry loans became a major part of their business.

So, even under the tighter economies for farmers today, "If somebody has a contract to grow chickens and they qualify, we'll loan to them, [even] knowing the farmer doesn't have a real good shake," said Don Davis, a Winder, Ga., chicken grower who also is a board member of North Georgia Farm Credit.

Deathbed confession

Occasionally, someone inside the poultry industry, whether a serviceman who supervises growers or a manager in the plant offices will talk candidly about the high-pressure nature of their business, and how, eventually, that pressure can crush the farms at the bottom of the production chain.

Ken Trew decided to talk after he got cancer. The former live haul manager at ConAgra's Dalton, Ga., plant was a witness in the weight-cheating lawsuit by the plant's growers, and in an interview last spring he talked of the troubles he saw daily in his industry until his retirement in 1992.

Wheezing and weak, Trew would pause for long stretches between observations. He died a month after the interview.

Even when ConAgra wasn't tampering with scales or arbitrarily deducting weight from a farmer's load of chickens, Trew said, the company would let the birds sit on the trucks for hours, to lose pounds to dehydration before the weigh-in.

The trucks would "come in [from the farms] at 6 or 7 o'clock in the morning, and not weigh them until about 2 p.m.," he said. "You're talking about losing anywhere from 1,800 to 2,000 pounds per truckload, and sometimes in the summertime they'd lose more than that."

When growers would ask him if that sort of thing was going on, he'd lie for the company. "I'd say, 'I guess they're doing the best they can.' Really I never did feel good about it. I was really close to some of those growers."

Trew also talked of stressful monthly management meetings at the plant, lasting all day.

"They'd tell me, 'Do better,' every month, even though you were the best the month before, putting pressure on you all the time. And of course you'd put pressure on your own [service] people, and you'd have turnover all the time. ...

"Some of them [in management] would say, 'Hey, you need to get rid of this man.' And he'd be a good grower to me and close to town. But maybe the field man didn't like him, or maybe he'd given the office manager a bad time. And maybe he'd only have two bad batches [of chickens], and they'd say, 'Let's get rid of him.' "

Sometimes, talk would turn to the subject of the hatchery and of which farmers would get the best and worst chicks.

"A lot of times, one grower would get nothing but bad chickens," Trew said.

The only times the company took pains to place an extra good flock, he said, were when the company was delivering birds to growers for other companies, because "if you sent them a bad bunch with bad mortality, you'd have to pay [the other company] for it, but if it was just one of your growers, he took care of it."

Opponents in high places

Every now and then, a grower stands up to a poultry company. Probst did it in Alabama and paid for it with his home. In Oak

City, N.C., Benny Bunting stood up to Perdue, and his case shows the levers of power at a company's disposal.

It is a 21-year saga in which Bunting only recently discovered the ultimate price of his defiance.

Bunting, the sort of independent-minded tinkerer who builds his own equipment, does his own research and always seems to have another question for whoever happens to be his boss, signed his first Perdue contract in 1976. But by late 1981, his paychecks were suffering.

His chickens were healthy and gained weight just as fast as they were supposed to. Yet, their "feed conversion" -- the rate at which chickens convert feed to weight -- was below par.

He figured that the company must be misweighing his birds or his feed, and he refused to sign a new contract until Perdue got to the bottom of the problem.

Perdue cut off his contract.

He then sought the help of North Carolina Assistant Attorney General John F. Maddrey, who believed Bunting was protected by the state's Business Opportunity Sales Act. Maddrey said so in a stern letter to Perdue demanding Bunting's reinstatement. But a few weeks later, Maddrey dropped the case.

Mistrust on the Shore

From a 1997 survey of 1,344
DonaMarva chicken farmers

*My average payment is
adequate to handle my
poultry expenses.*



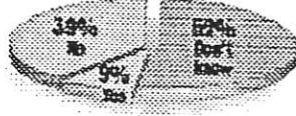
*My company will retaliate if
I raise concerns.*



*I am getting a fair return on
my investment.*



*In your opinion, is chick quality
evenly distributed among all
growers?*



SOURCE: University of Tennessee
Cooperative Extension

ENTIRE PAGE 1 APR 97

Bunting called to find out why. "And [Maddrey] said, 'I will tell you this and deny it any other time it's ever brought up.' He said, 'When your [state] representative has lunch with my boss, and my boss comes in and says I will have no further correspondence with you or with Perdue, then I have to do what I'm told.' "

Maddrey indeed denies the conversation, but said, "I do recall Perdue retained the services of a very competent lawyer, Mr. [Stephen] Burch, who met with the upper echelons of the attorney general's office. At some point, Burch got Harrington involved."

That would be state Sen. J. J. "Monk" Harrington, who was Bunting's senator but also represented Perdue, his district's biggest employer.

"Harrington may have gotten in touch with Edmisten," Maddrey said.

That would be North Carolina Attorney General Rufus Edmisten, Maddrey's boss.

Bunting sued Perdue in December 1982 in federal court, seeking relief under, among other statutes, the Business Opportunity Sales Act. A month later, Harrington introduced a bill to exempt Perdue from the act. It passed unanimously.

Bunting's suit, meanwhile, was going nowhere. A judge threw out most of it as one year passed, then another. In the meantime, Bunting was doing some detective work. He'd heard that some Perdue feed-truck drivers had been fired a while back and wondered whether they'd been caught stealing feed -- his, perhaps, which would explain his earlier slump.

In late 1985 Bunting tracked down a series of cases investigated by sheriff's deputies and Perdue's Jim McCauley, an investigator from Salisbury.

Local court records show that the thefts of Perdue feed involved 10 people -- including at least six Perdue employees -- and

stretched back to May 1982, suggesting that Perdue had begun investigating not long after Bunting complained.

Bunting's attorney, David Duffus, asked to take a deposition from McCauley. According to a witness that day, the Perdue investigator read from his notes that Bunting's feed had indeed been stolen. The feed of other growers had been stolen, too.

Perdue attorneys immediately secured a court order to keep anyone else from finding out, then settled Bunting's case two weeks later with a confidential agreement.

Bunting began growing chickens again under a contract in the name of his father, Wiley B. Bunting Sr. A Perdue service person advised him to keep the arrangement that way until later, when tensions eased.

Bunting never did switch the contract to his own name, and last year that suddenly mattered. That's when his son, Jason, decided to buy a neighbor's used chicken houses at a bargain price. Perdue listed the needed improvements, and the Buntings went to work, hoping to soon have a contract in hand.

Then word came down that the deal was on hold. Bunting was mystified until April 3, when a letter arrived from Perdue complex manager Rod Flagg. It was addressed to Bunting's father. There would be no contract for Jason, the letter said, nor for anybody else except him, the eldest Bunting, because, "Perdue Farms refuses to have a contractual relationship with Wiley B. (Benny) Bunting Jr. or any successors, heirs or assigns of Benny Bunting Jr."

Perdue officials say they're simply abiding by the terms of their original, confidential settlement with Bunting, according to spokesman Richard C. Auletta. That settlement barred further dealings with Bunting and his "heirs or assigns," Auletta said.

Not true, said attorney Clay Fulcher, now handling Bunting's case. The agreement only said the company and Bunting himself would "go their separate ways." If the company can't deal with any potential heirs or assigns, he said, then how could it have continued its contract with Bunting's father?

"It looks like a blacklist to me," said Bunting, still pondering his next move.

High cost of escape

As expensive as it is to get into the business, it can be even more costly to get out.

Probst found out when he tried to sell his chicken farm in Alabama in 1996. No potential buyer could get a contract to grow chickens with any of the poultry companies in the area.

It is a problem that worries all growers who want out. Companies have become more selective than ever in choosing new growers, and almost always prefer new farms to used ones.

Drive across Delmarva today, and for every lot with a set of long gleaming chicken houses and a big tidy home there seems to be another with old or abandoned chicken houses, staved-in places with torn curtains and bowed walls, open to the breeze and the songbirds.

Jean and William Bunting have one like that, even if it's not nearly as outdated as the coop her mother, Cecile Steele, built in 1923, now a museum piece in Delaware.



Theirs, more than 30 years old, has little if any resale value. But it is free and clear of debt, meaning the Buntings can resort to chicken farming's most elemental means of escape.

"We're selling whatever anybody wants out of it," Jean said.

And then?

"We're going to burn it."

Originally published on Feb 28 1999

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Contract Farming Breeds Big Problems for Growers

by Randi Ilyse Roth
 Farmers' Legal Action Group, Inc.

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This article originally appeared in the Winter 1992 issue of [Farmers' Legal Action Report](#).

Bracketed numbers refer to endnotes, which appear at the bottom of this article. For example, [1] refers to endnote 1.

Contract farming and vertical integration in agriculture raise troubling issues. Some of those issues, including concerns about food safety, are very important to consumers. Some, including concerns about terrible conditions in processing plants, are very important to labor. Others, which focus on fraud, deception, and manipulation in the contracting arrangements, are very important to growers. This article focuses on the growers' concerns, with a special emphasis on the concerns of poultry growers.[1]

Definitions

The term "contract farming" generally refers to situations in which a farmer raises or grows an agricultural product for a vertically integrated corporation. For example, tens of thousands of farmers nationwide are growing broilers under contract farming arrangements for major poultry-producing companies. Contract farming arrangements are also becoming common in other kinds of poultry production (such as eggs, turkeys and geese), in hog production, and in fruit and vegetable production.

There are two parties in a typical contract farming arrangement: the grower and the company. Generally, the grower provides the land, the buildings, the equipment, and the labor. The company provides the birds or animals, the feed, the medicine, and management directions.[2]

Unfairness Is Illegal

2-53

The types of difficulties that the growers encounter will be explained in detail below. As a background matter, though, it is important to understand that, in general, it is illegal for poultry companies to treat growers unfairly.

The courts have not yet had a chance to determine exactly which practices or conduct will be declared "unfair." Poultry growers and their lawyers are working very hard now to break new ground in this area of law. Ten of the types of practices that may be declared legally unfair are listed below.

There are many laws on the books that can be used to protect growers. One of the most important laws is the federal Packers and Stockyards Act, 7 U.S.C. § 181, *et seq.* Also, there are additional federal laws[3] and some state laws[4] that can also be used to protect growers.

Ten Types of Unfairness

Poultry companies commonly subject growers to at least ten categories of practices that are arguably "unfair" under the Packers and Stockyards Act.

#1: Early Termination of Contract. To begin a poultry operation, a grower is likely to make an investment of \$200,000 to \$400,000 to purchase the necessary buildings and equipment. The grower usually finances the investment by mortgaging his or her farm.

Despite this substantial capital investment, poultry companies usually make extremely short contractual commitments to growers. Most contracts commit for one flock (about seven and one-half weeks), or, at most, for one year.[5] Notwithstanding oral representations that the contract "will certainly be renewed if all goes well," companies sometimes terminate contracts in three years or less.

It would normally take a grower at least 15 years of poultry work to earn enough money to pay off the initial capital investment. When a grower's contract is terminated early, he or she has nowhere to turn.[6] The chicken houses are generally considered to be "single-use" buildings; most ex-growers are unable to find any other use for the buildings that can generate substantial income. Therefore, when the grower's contract is terminated before the investment is paid off, the grower's farm is at great risk of foreclosure.

#2: Company Requires Grower to Make Improvements at Growers' Expense.

Most poultry-growing arrangements implicitly require that the grower must make any improvements requested by the company at the grower's expense. As a practical matter, the company representative generally tells the grower that if he or she refuses to make the requested improvements, the grower's contract will not be renewed.

It is not uncommon for these improvements to cost from \$5,000 to \$30,000. Sometimes the improvements are nonsensical, such as one company's requirement that the growers install expensive cooling systems where loss of birds due to heat has never been a problem. Growers suspect that the companies are using these requirements to undertake costly "research and development" concerning new products and procedures at the growers' expense.[7] The financial burden imposed by these requirements compounds the difficulties described in problem #1 above.

#3: Manipulation of Inputs. Growers are generally paid based upon the weight of the full-grown birds and the birds' feed conversion efficiency. The birds' weight and feed conversion efficiency is largely determined, though, by factors that are in the company's exclusive control. As described above, the company typically supplies all of the "inputs," including the baby chicks, the feed, and the medicine. The company also provides

2-54

management direction, prescribing even minute details of the operation, such as when the curtains must be opened and closed and when the lights must be turned on and off.

Growers frequently complain that they receive bad inputs from the company and that those inputs cause poor weight and feed conversion results, which in turn yield low income. Some growers are able to document stories of baby chicks that are too sick to stand up, of fatal mistakes in the birds' medicine mixture, and of inappropriate feed formulas that impede the birds' weight gain. In all of these cases, the company's negligent or intentional manipulation of inputs caused loss of income for the growers.

#4: Unprofitable Contracts. Poultry growers generally enter into contracts based upon oral representations by the company that the grower will earn substantial income. One company even gives potential growers a glossy pamphlet entitled "Partners In Profit," which contains sample grower income projections.

Despite these representations and projections, many contract arrangements simply do not yield a profit for the grower. Often, a contract is profitable for the grower for the first year or two, and then the income stream takes a nose dive.[8] By the third or fourth year, growers are often taking off-farm jobs or adding additional farm enterprises to pay for the chicken operation. Growers joke that chickens are a very expensive and unpleasant hobby; the bitter truth is that growers continue raising chickens even when the poultry operation becomes a substantial liability because the growers fear retaliatory foreclosure.

#5: Underweighing of Poultry. Since the growers' income is based largely on the weight of the full-grown birds, accurate weighing is critical to growers. Many growers have complained that the weight which the poultry company records for their birds is significantly less than the actual weight. In one case, poultry growers alleged that the company underweighed their poultry by putting a forklift under the truck full of chickens while the truck was on the scales[9] and by using false tare weights.[10]

#6: No Payment. Sometimes a company simply fails to pay a grower. On occasion, the company that fails to pay is a small subsidiary of a larger parent company; the small company files bankruptcy, and the parent company refuses to assume the smaller company's debts.[11] In any instances of nonpayment, growers have very powerful remedies under the Packers and Stockyards Act if they file for their remedies on time.[12]

#7: False Rankings. It is common for poultry growers' pay to be computed based upon a formula that factors in the grower's "rank." In this scheme, all growers who have birds picked up in the same week are put into a ranking group. The growers are ranked based upon a formula that usually focuses on the weight of the birds and the feed conversion efficiency. The "best" grower is ranked #1, and the "worst" grower is ranked #30, or #40, or whatever number signifies the last place in the line. Growers who have a good ranking are paid a higher price per pound of chicken.

Growers complain that they are sometimes given false rankings. Some growers complain that they always end up at the bottom of the ranking list no matter how well they actually do. Also, growers complain that because they have no control over inputs, they have no control over how well they do.

#8: Retaliation for Complaining and/or Organizing. When growers complain to the company about problems and unfair practices, they are often treated worse as a result. When growers organize to deal with systemic problems together, they fear retaliation. This type of retaliation is illegal.[13] In one case, a federal court ordered a poultry company to reinstate a terminated grower who alleged that he was terminated because he is the leader of a poultry growers' organization.[14]

#9: Stuck With One Company. Poultry growers in some areas complain that once they start raising chickens for one company, they can rarely switch to another company. When they

apply to other companies in their geographic area, they are almost invariably turned down. It is as if there is an agreement between the companies providing that they will not contract with each others' growers.[15]

The other very important blacklisting problem is that growers who have had any disagreements with a poultry company seem to be on some kind of list of "known troublemakers." These growers are rejected by all poultry companies in their geographic area.

#10: Grading Problems. One of the factors in the formula that determines how turkey growers are paid is the grade of the bird. Growers are reimbursed at a higher rate for Grade A birds and at a lower rate for Grade B birds. Growers report that grading is being done in an inaccurate manner, and that this is adversely affecting their pay. For example, one turkey grower explained that two trucks full of birds were taken out of one of his houses on a certain night. Those two trucks were taken to two different processing plants. Eighty-six percent of the birds from one truck were labeled Grade A, and only 34 percent of the birds from the other truck were labeled Grade A.

Conclusion

Poultry growers are now beginning to organize and to learn about and assert their rights. A National Contract Poultry Growers Association (NCPGA) was formed in October, 1991, with chapters from all 13 of the major poultry producing states.[16] This newsletter will continue to report about the status of growers' rights as growers continue to file lawsuits, organize, conduct legal education workshops, and draft model legislation to protect their rights.

Endnotes

- 1/ For excellent descriptions of the consumer and labor problems referred to above, see "Ruling the Roost," *Southern Exposure*, Vol. XVII, No. 2 (Summer 1989) (Institute for Southern Studies, Durham, NC).
- 2/ This scenario is typical for a poultry or hog contract farming arrangement. It does not necessarily apply to a fruit or vegetable contract farming arrangement. Also, there are some hog "contracts" in which the grower owns the hogs. Those arrangements are usually made with a smaller, local company. Those arrangements are not being addressed in this article.
- 3/ For example, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.*, was invoked to protect poultry growers in *Baldree v. Cargill*, 758 F. Supp. 704 (M.D. Fla. 1990), *affl.*, 925 F.2d 1474 (11th Cir. 1991).
- 4/ For example, state laws regarding breach of contract, fraud, negligence, gross negligence, tortious interference, deceptive trade practices, breach of implied duty of good faith and fair dealing, and business opportunity sales could all be used to assert poultry growers' rights.
- 5/ The statement about the duration of "most" contracts is based upon an interview with Mary Clouse of the Rural Advancement Fund International (RAFI), who has collected copies of contracts from growers across the country.
- 6/ Minnesota has a new state law that was designed specifically to address this problem. Minn. Stat. § 17.92, "Recapture of Capital Investment Required By an Agricultural Contract" (West Supp. 1992).
- 7/ Another problem is that sometimes the company requires costly improvements just before the company cuts off a grower. A Durham, North Carolina, news weekly reported that Holly Farms required a group of 56 growers to make expensive improvements to their chicken houses just before terminating their contracts. See Yoeman, Bates, and Goldoftas, "Ruling the Roost—What's Bigger Than Tobacco, More Dangerous than Mining, and Foul to Eat?" *Independent Weekly*, Vol. VII, No. 20 (July 20-26, 1989).
- 8/ There are many reasons for this. One common reason relates to equipment maintenance

2-5b

and replacement. Ammonia buildup in the poultry houses ruins metal equipment: electrical motors burn out, curtains deteriorate, and cables snap. Another reason for a cash-flow nosedive can be tax consequences of built-in changes in the financing arrangement. For example, one company structures part of the growers' income as payments on real estate debt. As those payments shift from representing interest payments to representing principal payments, tax consequences also shift, which in turn has a significant negative impact on the grower's net income.

9/ *Baldree v. Cargill, supra.*

10/ *Baldree v. Cargill.* Typically, a company weighs chickens by subtracting the *tare* weight (the weight of an empty truck) from the *gross* weight (the weight of the truck full of chickens) to obtain the *net* weight (the weight of the chickens).

11/ Minnesota has a new state law that is designed to address this problem. Minn. Stat. § 17.93, "Parent Company Responsibility for Contracts of Subsidiaries" (West Supp. 1992).

12/ There are very short time deadlines for filing for Packers and Stockyards Act protections in non-payment situations. For a description of these deadlines, see "Making Complaints Under the Packers and Stockyards Act," *Farmers'*

Legal Action Report, Vol. 6, No. 1 (Winter 1991). If you need to know a deadline quickly, call the Packers and Stockyards Administration in your region or in Washington, DC.

13/ Retaliation for organizing is arguably a violation of the Packers and Stockyards Act (because it is an unfair practice) and of the Agricultural Fair Practices Act, 7 U.S.C. §§ 2301-06. See *Baldree, supra.*

14/ In *Baldree v. Cargill, supra*, the court ordered Cargill to reinstate Arthur Gaskins, the president of the Northeast Florida Broiler Growers' Association.

15/ These practices are difficult to prove. They may violate the anti-monopoly provisions of the Packers and Stockyards Act.

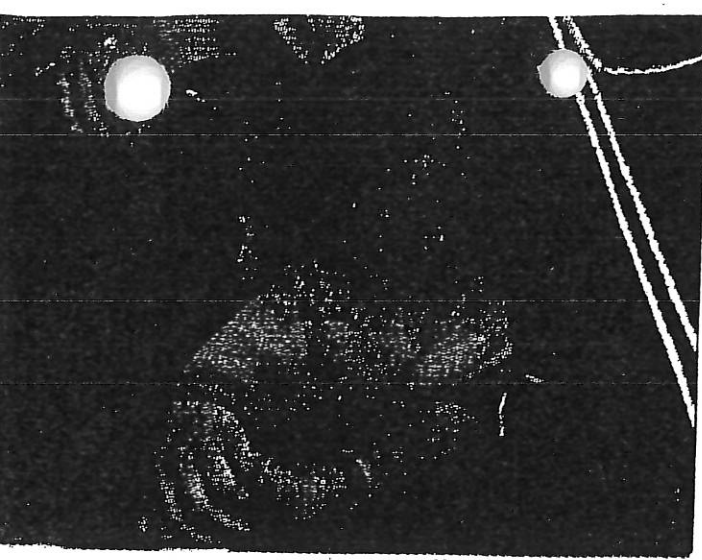
16/ For information about the NCPGA, call the Rural Advancement Fund International (RAFI), 919-542-1396.

[Back to Articles Table of Contents](#)

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New York Times News Service

Amida Zenili, a mother of eight, outside their tent at

Knowing Kosovo, but not a way out

Peacekeepers agree on what they've seen in Kosovo — but aren't sure how to end the fighting.

By Roy Wenzl and Polly Elliott

The Wichita Eagle

Before the bombs began to fall, before reports of widespread massacres came creeping with the refugees to the Albanian border, German peace verifier Stefan Weinlein got a lesson in how difficult it will be to bring peace to the Balkans.

He was speaking with an Albanian rebel, a sniper, who stared at distant Serb security forces through the telescopic sight of his rifle.

Weinlein asked if he would stop fighting if his leaders agreed to peace.

"Never," the sniper told him. "He said he would never put down his rifle, never stop fighting in Kosovo until they had driven the Serbs out," Weinlein said in a telephone interview this week from his home in Germany.

That sort of determination to fight is typical of what independent peacekeepers have seen from

See **MONITORS**, Page 5A

Social Security fund



U.S. Sen. Sam Brownback talks to an El Dorado crowd Friday as part of a

her own mother and caretaker — a woman who likely shared the same hopes, dreams and wishes for her child that all parents feel and then died at the hands of that child. "To me, that is inconceivable," Lyle said. "I am removing you from society as long as I can." Ignoring requests for leniency from both defendants' attorneys, Lyle stacked the prison sentences for the pair.

Tracie M

Wichita Paper See **MURDER**, Page 4A

4/10/99

Excel accused of underpaying hog farmers

Wichita-based meat packer says Agriculture Department complaint is without merit.

By Phyllis Jacobs Griekspoor

The Wichita Eagle

WASHINGTON — The Agriculture Department on Friday charged Wichita-based meat packer Excel Corp. with violating federal laws and underpaying hog farmers by about \$1.8 million.

An Excel executive said the company disputes the government's findings and will fight the complaint.

USDA officials said they could request that an administrative judge fine the company almost \$200 million for violating the Packers and Stockyards Act, which prohibits unfair and deceptive practices by packers.



The USDA alleges that Excel altered the method it uses to compute the amount of lean meat in a carcass without telling producers about the change.

The government charges that Excel cheated more than 1,250 farmers who did business at the company's plants in Beardstown, Ill., Ottumwa, Iowa, and Marshall, Mo., by underpaying them for more than 19,900 hogs. The period of the alleged violation is from October 1997 through June 1998.

"To remain competitive and to survive, America's small and medium-sized producers need a level playing field," Agriculture Secretary Dan Glickman said. "Today's action demonstrates how seriously we at USDA take our responsibility for ensuring that level playing field."

Excel spokesman Mark Klein said the company will contest

See **EXCEL**, Page 4A

INDEX

Business & Farm	14A
Classifieds	1F
Comics	6E, 7E
Faith & Values	1E-3E
Home & Garden	1B-8B
Local & State	9A-13A
Markets	15A-17A
Movies	4E-5E
Obituaries	10A
Opinion	6A, 7A
People	2A
Sports	1C-8C

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Check out The Eagle's

2-58

...judge said
Lyle sentenced both defendants
25 years to life for
medita

EXCEL

From Page 1A

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the government's action.
The action "is legally without merit and was taken without first providing adequate notice of an alleged violation," Klein said.

At issue is the payment of a premium on the base price of pork, known as "carcass merit basis." A probe is inserted into the carcass to measure lean and fat layers and to compute how many pounds of lean meat it will produce. A carcass that has a high percentage of lean brings a higher price.

Excel said the calibration equation of that tool, a Danish invention called a "Fat-O-Meter," was changed in October 1997 because a more accurate equation had been developed by researchers at Purdue University, who were working for the National Pork Producers Council.

The old calibration gave results that were about 70 percent accurate," Klein said. "Purdue's research data showed that the new calibration was about 90 percent accurate.

"We believe we would have erred by failing to implement a more accurate equation," Klein said.

The USDA's deputy administrator for packers and stockyards, Harold Davis, said Excel broke the law by telling farmers about the change.

"What they did was reduce the lean value for most hogs, which meant the farmer was getting less money for his hogs," Davis said.

Excel was told during a routine inspection in June 1998 that it was required to notify producers of the

change, Klein said.
He said the company turned over all records of payments to the inspectors at that time and volunteered to repay producers who had lost money.

The USDA "turned us down on that and proceeded with a complaint," Klein said. "We were not told why they chose that route."

Klein said Excel is still willing to pay producers the price difference, which amounts to about \$1.8 million. But he said additional penalties are unwarranted.

Excel, which controls 9 percent of the hog slaughter market, is a subsidiary of Minneapolis-based Cargill Inc. Excel owns five beef slaughter operations in Nebraska, Colorado, Kansas and Texas.

Vice President Al Gore said Thursday that the administration will push for mandatory price reporting among meat processors to ensure that farmers have a fair shot in the marketplace. Many livestock producers have complained that prices paid under contracts based on carcass merit are not reported to the rest of the industry.

Most of the nation's hogs are now marketed under some type of contract for delivery. The cattle market is also moving in that direction. Excel, with a beef plant in Dodge City, is a major player in the Kansas cattle market.

Lawmakers have held several hearings this year on how concentration in agriculture has affected farmers.

Contributing: Associated Press, Bloomberg News

Ho S with No

BROWNBACK

From Page 1A

At a speech in Wichita immediately following his El Dorado appearance, Brownback stopped short of sharing that point with his new audience.

Instead, he joked with Chamber of Commerce members that some had done their part by having children and that more needed to get started. A similar tongue-in-cheek comment brought chuckles in El Dorado from the young crowd.

"You all can have a lot more kids," he said, pointing to the students. "You need to think about having five or six more children in the family, instead of two or three."

By 2013, when baby boomers begin to leave the work force, the Social Security Trust Fund will begin to pay out to retirees more than it is taking in from current workers.

So while there may be a basis for Brownback's abortion-work force remark, it still took some people aback. "I don't think women

About 100 people turned out in El Dorado and again in Wichita to listen to Brownback's ideas about saving Social Security, tax relief and paying off the national debt.

Brownback ended his speeches with his thoughts on the United States' involvement in the Kosovo conflict.

He reminded his Wichita audience about his vote against bombing the Serbs, saying the nation's leaders did not think the decision through.

"NATO (North Atlantic Treaty Organization) is about defense," he said. "But they went into a sovereign nation on the offensive factor for the first time."

He said NATO's act could trigger tension with hard-liners in the Parliament.



CONAGRA

An Unhealthy Choice For Farmers, Workers, Consumers and Environment?

By A.V. KREBS

Special to the Progressive Populist

Everett, Wash.

ConAgra Inc., is the nation's second largest food manufacturer. It is the only major food company that operates across the food chain -- providing feed, fertilizers and chemicals to farmers and ranchers, trading meat and grain, and producing packaged foods for consumers.

Corporate agribusiness today, from seedling to supermarket, is dominated by such transnational corporate giants as Unilever, Nestle, Philip Morris, RJR Nabisco, Cargill and Archer Daniels Midland.

In attempting to demonstrate the nearly complete control that corporations have now acquired over our everyday lives, the Alliance for Democracy, a fledgling two-year old national populist movement, believes that food and the process by which we obtain our food is the appropriate place to begin an effort to achieve both corporate responsibility and corporate accountability.

The Alliance for Democracy (AfD), in its effort in seeking to end large corporation's domination of our economy, our government, and our culture, seeing the corporation's role as illegitimate in a self-governing democracy, believes that the time is now to publicly dramatize the need for corporate responsibility and accountability.

In ConAgra the Alliance sees a corporation that clearly reflects not only the prototype of a modern transnational corporation, but also one which graphically illustrates the unhealthy prices that family farmers, workers, consumers, the environment and our communities are being required to pay to support such corporate behemoths. It believes the record shows that by many of its recent actions ConAgra can be considered antithetical to the common good.

The AfD points to some recent examples:

(ogonek) ConAgra Inc. earlier this year agreed to pay \$8.3 million in penalties, including a criminal fine of approximately \$4.4 million, to settle federal fraud charges pleading guilty to a felony charge of wire fraud. In addition, ConAgra agreed to plead guilty to misdemeanor charges of misgrading crops and adding water to grain.

ConAgra officials have maintained that the company's sophisticated watering systems were used to suppress the grain dust that can fuel elevator explosions. But the water also increases the weight of the grain, and thus its market value, because grain is sold by weight. The government investigation focused on whether Peavey Grain elevators around Terre Haute, Ind., and elsewhere padded profits by excessively dousing crops -- which the government considers "economic adulteration."

The Justice department said ConAgra reaped \$3.5 million in criminal profits. U.S. attorney Judith A.

2-60

Stewart also announced that the company agreed to plead guilty to charges that it systematically cheated farmers who sold crops to a dozen of ConAgra's Peavey grain elevators in Indiana from 1989 to 1992.

Among other things, ConAgra employees doctored samples of grain being offered by farmers to make the crops appear to be of lower quality, and thus less valuable, according to documents in federal court in Indianapolis.

(ogonek) In September, 1992 some 100 undocumented workers were arrested in a raid on a Monfort meatpacking plant in Grand Island, Nebraska and were deported. In all, 307 illegal immigrants, most from Mexico, were arrested. Subsequently, the company, which is a wholly owned subsidiary of ConAgra, was fined \$103,000 by a federal judge after pleading guilty to 25 counts of knowingly hiring undocumented workers and one count of engaging in a pattern and practice of employing aliens at its Monfort facility.

(ogonek) In the summer of 1995, ConAgra abruptly canceled poultry producing contracts with over 178 independent contract growers in the southern United States. In offering new and what one producer described as "abusive" contracts, ConAgra demanded binding arbitration be included.

A typical poultry contract is a unilateral contract, often referred to as a contract of adhesion. An adhesion contract is simply a "take it or leave it" contract. Frequently a farmer who has borrowed one-third to a half million dollars in order to secure a business contract with a processor like ConAgra has no option other than to sign, even if it means giving up his or her constitutional right to access their state and federal courts should anything go amiss in terms of fraud or dispute.

Some 53 families, at the risk of losing their farms and their homes, refused to accept such terms, saying it was clearly a violation of their freedom of speech. ConAgra's cancellation of contracts, many of the producers believed, came in retaliation for an earlier court suit brought on behalf of some 300 poultry growers in the region where a federal court jury awarded the producers some \$17 million after they presented evidence of being cheated by ConAgra on the weight of their birds.

(ogonek) In 1991 the Exxon Corp. made a secret deal with seven Alaska seafood processors whereby the seafood processors settled claims with Exxon for about \$70 million, but then promised to return to Exxon any money they received from awards of punitive damages. After the jury awarded \$5 billion in such damages against Exxon, the nation's largest oil company, the seven processors put in claims totaling \$745 million, or 15 percent of the \$5 billion. The seafood processors, however, had previously and privately agreed to "kick back" the \$745 million to Exxon if their claims were upheld, and in turn receive from Exxon \$12.4 million.

One of those seafood processors was Trident Seafood Corp., at the time a wholly owned subsidiary of the ConAgra Corp. Presiding Federal Court Judge H. Russel Holland of the U.S. District Court which tried the case, in a June 13, 1996, decision, described the arrangement as an "astonishing ruse," saying Exxon had deceived the jury and acted as "Jekyll and Hyde" by "behaving laudably in public and deplorably in private."

(ogonek) A federal court ruled that Golden Valley Microwave Food, a ConAgra subsidiary, obtained patents through "deception," concealing information from the government, filing fake affidavits, misrepresenting test results and unlawfully claiming another company's invention as its own. Golden Valley Microwave Foods was also one of several companies that agreed to pay \$6.8 million to settle a price fixing lawsuit after a federal court ruled in 1991 that "sufficient evidence exists that Golden

Valley engaged directly or acquiesced in a pricing conspiracy."

(ogonek) In April 1996 Monfort abruptly closed its Des Moines, Iowa, plant giving some 1322 workers just one day's notice of termination. In announcing that ConAgra was cutting 6500 jobs planning to alter or shutting down 29 plants Philip Fletcher, ConAgra CEO and chairman declared: "For our shareholders and employees, this is the right step to make ConAgra more competitive, more secure, more profitable."

(ogonek) After ConAgra agreed in 1983 to buy Armour Foods Co. from Greyhound, it said it would retain Armour's 2,250 union workers only if they agreed to concessions. The workers refused an hourly pay cut to \$8 from \$10.69, so Greyhound dismissed them and shut down the plants shortly before ConAgra assumed possession. When ConAgra reopened the plants, including one in Mason City, Iowa, a few days later, they announced they had hired new workers at "competitive compensation" -- an average base wage of \$6 an hour.

Later, ConAgra officials, after being accused of discriminatory hiring practices, but without admitting any wrongdoing, agreed to a \$6.6 million settlement. In addition to back pay plus interest, the settlement called for job offers, retroactive seniority and preferential hiring rights for the union workers.

ConAgra, Latin for "in partnership with the land," is the second largest food manufacturing company (behind Philip Morris) in the U.S. with 1996 sales of \$24.82 billion and with earnings of \$545.2 million, as compared with the previous year's earnings of \$495.6 million. It is estimated that six cents of every dollar Americans spend for food goes to ConAgra.

In 1996 ConAgra's return on common equity (profitability) was 24.3 percent. It's 1992-96 yearly average was 23.4 percent. Had a person invested \$30,000 in ConAgra stock in 1974 and sold it in May 1992 it would have been worth \$5 million.

ConAgra is currently:

No. 3 in marketing fed beef.

No. 2 in beef packing (CR4 = 87%)

No. 3 in pork packing (CR4 = 60%)

No. 4 in broilers (CR4 = 45%)

No. 1 in turkeys (CR4 = 35%)

No. 1 in sheep slaughter (CR4 = 73%)

No. 2 in flour milling (CR4 = 62%)

No. 4 in dry corn milling (CR4 = 57%)

CR4 = Refers to the market concentration percentage of the top four firms.

ConAgra's principal business in terms of growth has been its prepared foods segment (including its

over \$1 billion flagship brand) "Healthy Choice", which has accounted for more than three-quarters of its total sales. The corporation typically has 80-100 "acquisition candidates" in screening at all times. ConAgra has described itself as "a mutual fund of the food chain" with "about 70" operating units "across the food chain." It has seen increases in sales and profits every year for the past 15 years.

Currently ConAgra's board of directors, which reads like a who's who of American business, is comprised of members who also serve as board members of the following corporations:

RJR Nabisco, Valmont Industries, Norwest Corp., Peter Kiewit Sons, E.I. Dupont de Neimours & Co., Wells Fargo Bank (ConAgra's second largest stockholder), Columbia/HCA Healthcare Corp., Ford Motor Co., Pacific Gas & Electric Co., Newhall Management Corp., SunAmerica Inc., The Economist Newspaper Group, W.H. Smith PLC, Public Radio International, The Atlantic Council, KRA Inc., Opus Corp., North Star Ventures, MFS Communications, Berkshire Hathaway Inc., Burlington Resources Inc., California Energy Corp. FirstTier Financial Inc., Sears Roebuck & Co., Wales Group Int., American Software Inc., Apple South Inc., Bell South Inc., Georgia Power Co., National Life Insurance Co., Global Connections, Inc., Asian Fine Arts, Fidelity Group Mutual Funds, McKesson Corp., Cornerstone Properties and C-Tec Corp.

Clayton C. Yeutter, past president and CEO of the Chicago Mercantile Exchange, former U.S. Secretary of Agriculture, domestic affairs advisor to President George Bush and U.S. trade representative, was named to ConAgra's board of directors in December 1992. He also serves on the boards of Texas Instruments, FMC Corp., Oppenheimer Funds, B.A.T. Industries, and Farmers Insurance Co.

As the University of Missouri rural sociologist Bill Heffernan points out, "We no longer have a competitive agriculture sector in the U.S. The food system resembles an hourglass with many producers and millions of consumers, but the few firms that control the processing are in a position to control the food industry.

"There is a general assumption," Heffernan said, "that when four firms control 40 percent or more of the market, the market no longer behaves as a competitive market. The conclusion to be drawn is that for poultry meat, cattle, pork, sheep, wheat, soybeans and corn processing, United States farmers no longer sell in a competitive market."

Also, says Heffernan, "a few firms -- names like ConAgra, Cargill, Archer Daniels Midland, Bunge and IBP -- now appear on the list of several commodities." And "a few of these firms control the food system from 'seed to shelf.' "

He cited ConAgra which operates elevators and owns railroad cars and barges. It's one of the four top firms in processing of poultry, beef, pork, sheep and wheat.

"With this type of an integrated food system, one can ask: Where do farmers fit into the overall production process, and how do the farm family and the rural community benefit?" Heffernan asks. He believes control by a relative few companies allows them to "receive a disproportionate share of the economic benefits from the food system."

Since early August, the Alliance for Democracy has been engaged in its fall harvest Food Action Campaign throughout the nation, making ConAgra Inc. the campaign's focal point. The campaign consists of two stages, while also seeking the ideas and participation of local and national farm,

worker, environmental and consumer groups.

The AfD prepared "The People's Report" on ConAgra, which includes an 18-page "Corporate Profile" and an eight-page "Bill of Particulars." These reports are being circulated to the AfD's approximately 50 local alliances across the US. They can be obtained by sending a 10 x 13 stamped (\$1.47) self-addressed envelope to AfD's Food Action Campaign, P.O. Box 2201, Everett, Wash. 98203-0201

These local alliances, along with other farm, labor, environmental and consumer organizations and groups, are being urged to join with the Alliance for Democracy throughout the nation in planning a local non-violent action on Thursday, September 25 at one of the Company's facilities in their area. The date September 25 coincides with ConAgra's annual stockholders meeting in Omaha, Nebraska.

At that meeting the Food Action Campaign representatives will present to the stockholders and the ConAgra management a list of its corporate accountability expectations. These demands, in keeping with the AfD's historic populist roots, will be presented as the Omaha Platform of 1997.

Just as the populists of the late 19th century framed their grievances, criteria and alternative solutions to the concentration of capital in the historic Omaha Platform of 1892, the AfD, after inviting its membership and allies to submit their corporate accountability demands, will present those demands in a modern-day version of that famous document both inside and outside of the September 25 meeting.

The Omaha and local actions on September 25 will be but the kickoff of the AfD's harvest season Food Action Campaign, with other events and actions scheduled for such locations as its National Convention outside of Kansas City, Missouri on October 30-31 and November 1-2.

A. V. Krebs is director the Corporate Agribusiness Research Project. Contact him at P.O. Box 2201, Everett, Washington 98203-0201; phone 206-258-5345; or e-mail: avkrebs@earthlink.

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Senate Agriculture Committee
February 10, 2000
Senate Bill 565

Testimony from the Kansas Cattlemen's Association

Chairman Morris and members of the Senate Ag committee,

The Senate Bill 565 being heard today is another step in allowing the ag producers some assistance with legal recourse in the event that any integrator shall engage in any deceptive acts or practices. This is an issue that has happened in the poultry industry, hog industry and can happen to the cattle industry. From KCA's view the scenario is in place which the integrators could lead to producers to signing contracts for the packers or feeders of cattle which offer a contract with benefits that exceed what is currently being paid in the competitive market, the producer is offered a premium and contract for producing the product, the producer upgrades and completes the improvements to make the contract profitable with expansion, once the improvements are completed the integrators have then the ability to stop doing business and can move on to the next producer or reduce the value of the contract terms. This has happened to producers in the chicken factories and hog factories.

If we give producers the ability to hold the contractor responsible for the condition of the product received, as in cattle. The producer should have the right of refusal. It will further allow the contract integrator to carry out the responsibility of the contract. This bill will make the integrators of contracts understand that if they are entered into with a producer, that they are to be held responsible, that they have not misled or intimidated a producer that may be under financial pressure and that contracting is their only chance of survival if they wish to be a ag producer and stay on the farm or ranch.

In production agriculture it is a very heavy capitalized industry. Producers wanting to farm or ranch do not have competitive markets within their industry with 3 major grain companies and 4 packers, therefore they need protection that they themselves cannot afford, which is why the State of Kansas Legislation needs to pass this bill. It gives legal recourse to make integrators play fair in an uncompetitive market. **If there were competition, producers would not need contracts that further reduce competition. The Kansas Cattlemen's Association supports this Senate Bill no.565 until a free, fair and competitive marketing system is reestablished in Kansas. We believe that legislation should come from the State first not the Federal Government.**

Your friends in the Cattle Industry,
Mike Schultz Chairman
Kansas Cattlemen's Association

*Senate Agriculture
2-10-00
Attachment 3*

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*Admitted in Kansas & Texas

**Testimony before Senate Agriculture Committee
Re: SB 565, Kansas Agricultural Production Contract Fair Practices Act
Presented by Ronald R. Hein
on behalf of
Kansas Restaurant and Hospitality Association
February 10, 2000**

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Kansas Restaurant and Hospitality Association. The KRHA is a trade association for restaurant, hotel, lodging and hospitality businesses in Kansas.

The KRHA has concerns about SB 565, but has not yet taken a position either for or against the bill. Our concerns about the legislation are that we are not certain yet how it will impact our members who provide food service at retail.

For example, looking at the definition of integrator on page 1, line 20, it appears that restaurants, who purchase products in a manner which would appear to be included in this definition, would be, under this act, integrators. We have spoken with supporters of bill and they have indicated that was not their intent.

The restaurant and lodging industries are dependent upon a stable supply of beef and other food products at a certain quality and a relatively consistent price, in order to insure that restaurants have a steady supply of their menu items. Price is important because of the difficulty of changing menus frequently.

I apologize to the committee that I am here testifying about a bill with which I am not intimately familiar. I understand that it was not the intent of the sponsors of this legislation to impact restaurants in the way that we fear we might be impacted. We were asked if we could come up with some language to solve this problem, assuming that we are reading the bill correctly. However, since we have limited information on the total legislation, and due to the complexity of the legislation, I did not feel that we were capable of proposing such amendments. The sponsors may have contacted staff about this issue, and if the committee is desirous of our participation, we would certainly provide whatever information we can to the Revisor's staff or this committee.

If through the course of this hearing or otherwise, we learn that our reading or possible interpretation of this legislation is not accurate, it may well be that no legislative changes would be necessary.

Thank you very much for permitting me to testify, and I will be happy to yield to questions.

*Senate Agriculture
2-10-00
Attachment 4*

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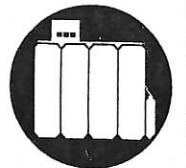
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Association

**Statement of the
Kansas Grain and Feed Association
regarding
Senate Bill 565
Presented to the
Senate Agriculture Committee
Senator Steve Morris, Chair
February 10, 2000**

*Senate Agriculture
2-10-00
Attachment 5*

**KGFA, promoting a viable business
climate through sound public policy for more
than a century.**



Chairman Morris and members of the Senate Agriculture Committee my name is Tom Tunnell and I am President, of the Kansas Grain and Feed Association (KGFA). The KGFA is a voluntary state association with a membership encompassing the entire spectrum of the grain receiving, storage, processing and shipping industry in the state of Kansas. Our membership includes over 1,150 Kansas business locations and represents 99% of the commercially licensed grain storage in the state.

Thank you for the opportunity to testify on Senate Bill 565. Because our Association's Legislative Committee or Board of Directors have not had the opportunity to review the provisions of Senate Bill 565 to develop a formal position on it, I am appearing today neither as a proponent or an opponent of the legislation.

However, having said that, I do have a number of questions and comments for your consideration.

My first question is, has there been a serious problem in Kansas with producer contracts that this bill is attempting to address? Our members normally work very closely with their producer customers and depend on them to supply whatever specific grain in terms of kind and quality that may be specified in a "grower contract". To engage in "coercion, intimidation", or

“threats of retaliation” as mentioned in lines 40 on page one of the bill is just not how the grain storage and handling industry does business in Kansas.

Also on page four, lines 17-19, how can a so-called integrator be held legally responsible for half the cost of compliance with environmental standards of the producer? Should this be mandated by state law? If the producer wanted to insist this provision be in a contract, could this not be a negotiated point between the integrator and the producer anyway?

Another concern is the language in Section 13 on page five, which deals with a producer’s lien. It mentions the need to file the lien “with the clerk of the district court of the county in which the integrator’s registered office is located”. Since Kansas is a “central filing” state, meaning liens of this type must be filed in the office of the Secretary of State to be perfected, would not this provision be in conflict with our current state law? The other provisions of this section pertaining to liens should be looked at closely to determine whether there may be other conflicts with our existing state law.

In closing this legislation is very complicated and seems to be targeted towards something, as I stated at the beginning, I did not know existed. But whatever the reason for this bill, the Kansas Legislature should study it closely to be sure it is good public policy.

STATE OF KANSAS

BILL GRAVES, GOVERNOR
Jamie Clover Adams, Secretary of Agriculture
109 SW 9th Street
Topeka, Kansas 66612-1280
(785) 296-3558
FAX: (785) 296-8389



KANSAS DEPARTMENT OF AGRICULTURE

Senate Agriculture Committee

February 10, 2000

Testimony Regarding Senate Bill 565

Mary Jane Stattelman, Assistant Secretary of Agriculture

Good morning Chairman Morris and members of the Senate Agriculture Committee. I am Mary Jane Stattelman, Assistant Secretary and Chief Counsel of the Kansas Department of Agriculture. SB 565 places the following responsibilities on the Secretary of Agriculture:

- to provide mediation or arbitration services if requested by an integrator or a producer;
- to accredit an association seeking to bargain for contract producers if the Secretary determines the association meets the provisions of the Capper-Volstead Act;
- to conduct a hearing if the Secretary believes the association has failed to maintain proper standards or if the Secretary is proposing to amend the order of accreditation;
- to promulgate necessary rules and regulations.

These responsibilities require specialized knowledge in mediation/arbitration and the Capper-Volstead Act. Furthermore, we are unsure how frequently the Secretary would be called upon to mediate/arbitrate or to accredit an association. Therefore, we are not asking for an FTE, but instead are planning on contracting with someone with some level of expertise to assist with these services. However, to be able to contract for these services, we are requesting that Sec. 15 be amended to "authorize the secretary of agriculture to enter into contracts." This would allow the Department the flexibility to either contract for the services, or to provide in-house service, depending upon the level of expertise and the amount of work that is requested.

I would be glad to answer any questions you may have at this time.

Equal Opportunity in Employment and Services

Senate Agriculture
2-10-00
Attachment 6

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**Testimony of Ron Gaches
Of McGill, Gaches & Associates**

Regarding Senate Bill 565

**On behalf of the Farm Credit Bank of Wichita
And the Farm Credit Associations of Kansas**

**Submitted to the Kansas Senate Agriculture
Committee**

February 10, 2000

Senate Agriculture

2-10-00

Attachment 7

Thank you Chairman Morris. We appreciate this opportunity to provide written testimony to the Kansas Senate Agriculture Committee on Senate Bill 565.

We wish the Committee to understand our viewpoint on this bill is strictly that of a lender. We are not interested in debating the many other issues contained in the bill that might appear to create advantages or disadvantages for producers or integrators. We finance agriculture and, as such, have loans with both large and small producers, integrators and those who contract with integrators. Our interest stems from concerns as to the workability difficulties that will result if the bill is adopted in its current form.

Our analysis of this bill reveals the following concerns.

First, the definition of the term "integrator" appears to be far too broad. In its current form, it would include nearly every agricultural producer. This is because nearly all agricultural producers purchase agricultural commodities, in one form or another, and would be included as integrators. This may not have been the intent, but is the result of the definition as it is currently written. We believe the definition should be narrowed so as to be limited to transactions involving grower contracts. One farmer purchasing grain or livestock from another farmer should not be included in the definition. In fact, we do not believe a feedyard contracting for corn should be automatically included in the definition as an integrator.

Second, the bill is generally in direct conflict to Uniform Commercial Code attempts to discourage "secret liens." This bill would foster an additional secret lien which would be a barrier to open commerce and is contrary to the intent of many pending revisions to Article 9 of the UCC.

Third, we note that as stated in Sec.4(f), the bill would, in theory, provide an opportunity for a producer to breach the producer's obligations under the contract in order to force the integrator to terminate the contract. In concept, this bill would force the integrator to assume a financially troubled producer's obligations and liabilities, regardless of the source of the producer's financial difficulties. If this were to occur, it would result in damage to contract producers who are relying on the financial integrity of the integrator to supply their business opportunity.

And finally, it is unclear to us when evaluating Sec.13(h) as to the methodology of the described lien enforcement. The ability to seize manufactured agricultural products creates potentially wide ranging problems for innocent purchasers of those products, especially since these purchasers have no way of knowing of the existence of the liens. It is doubtful that this is the true intent. If it is, it will only serve to undermine producers and integrators in the long run.

In summary, we believe that Senate Bill 565 in its current form contains several provisions that will create unworkable business conditions for both integrators and producers. As currently written, it will create serious barriers to open commerce, and, in the end, put lenders into a situation that could greatly reduce the amount of risk they are willing to assume with agricultural businesses. We urge the Committee to carefully consider that a bill with the potential far reaching effects of 565 should undergo a prolonged period of input from the public, lenders, agricultural businesses and agricultural producers before enactment. We believe that for agriculture to realize maximum value for its products, there must be open commerce, clear ability to finance risk with borrowed capital, and an appropriate balance of the varied interests that make the food chain work to the benefit of all of Kansas agriculture.

Thank you for letting us share out thoughts concerning this important piece of legislation.

**Testimony of Ken Bull
Vice President for Cattle Procurement
Excel Corporation of Wichita Kansas**

**Before the Kansas Senate Committee on Agriculture
Thursday, February 10, 2000**

Mr. Chairman and members of the committee, I am Ken Bull, Vice President for Cattle Procurement with Excel Corporation, which is headquartered in Wichita. We have a beef processing plant in Dodge City and other beef plants in Texas, Nebraska, Colorado and Alberta. We process about 6.5 million head per year and are the nation's second largest fed cattle processor.

I very much appreciate the opportunity to speak with you today about Senate Bill 565, the Kansas Agricultural Production Contract Fair Practices Act. If enacted, the bill would establish the most comprehensive, far-reaching legislation on agricultural contracting in America today.

To clearly understand the implications of this legislation, I think it is important to take a minute or two to share with the committee a little background on contracting.

Contracting is a producer's choice.

Producers choose to contract their livestock for two reasons: they want to lock in a guaranteed price for their production as a hedge against fluctuating markets, or they are producing for a specialized market, and they believe their livestock will perform well in a more intricate pricing structure that pays premiums and discounts based on quality. An

*Senate Agriculture
2-10-00
Attachment 8*

important factor that the committee must consider is that the presence of a contract can often help a producer gain more access to credit.

Under the Packers and Stockyards definition of forward contracting, Excel buys less than 3 percent of its cattle in this manner. If you add in value-based pricing arrangements the figure moves up to the 20 to 25 percent range. The figure for market hogs sold under contracts and value-based programs is 60-70 percent. Incidentally – the greatest number of contract producers are small and mid-sized operations – the kind of production you most want to help. The largest producers use the futures markets to manage their risks, while the smaller operators will often work directly with a processor.

Review of this bill helps me state as fact – not opinion – that its enactment will cause tremendous harm to the farmers and ranchers of Kansas, and to a somewhat lesser extent to agribusiness firms such as ours. I would like to use my few minutes before you today to illustrate why this is the case.

First, if the goal of the bill is to end contracting for agricultural goods in Kansas, then this bill does it. But a much easier way to do this would be a simple prohibition. This legislation creates such hurdles and obstacles that no processing interest will be in a position to offer contracts. Let me illustrate this case using several of the bill's provisions:

- 1) It obligates a processor to honor a contract even in a case where a joint venture between a producer and a processor may have failed and no longer be in existence;
- 2) The entire pricing structure of formula grids would be made illegal;
- 3) Any buyer would be held responsible for 50 percent of the state and federal on-farm environmental compliance mandates; and,
- 4) A contractor would be held in violation of the law simply for failing to come to terms on renewal of a contract.

Passage of the contracting bill will have some very clear repercussions for production agriculture. Gazing into the crystal ball, one can easily see a number of scenarios develop through this legislation. These include:

- 1) There will be little if any beef, pork, grain or oilseeds contracted in Kansas;
- 2) Bankers will tighten credit in the absence of risk management contracts;
- 3) Kansas will lag behind other states in the development of higher value agricultural products that are attainable through alliances that involve contracts, causing agricultural investment to occur outside the state;
- 4) Entities seeking greater quality control will develop purely vertically integrated operations rather than contracting with independent producers; and,
- 5) Millions of dollars will be spent by ag processors, farmers and livestock producers challenging the constitutionality of provisions of the law.

As you can see in my testimony, we strongly oppose this legislation, and we believe most producers, if they really study it, will too. Before moving forward, we would encourage the committee to carefully consider the unintended consequences this bill will create. The bill has far reaching implications and will cause problems for business and producers that are difficult to even imagine

Again, I appreciate the chance to appear before you. I can stop here and hopefully answer any questions you might have.



Testimony in Opposition to SB No. 565

Presented on behalf of the Kansas Pork Producers Council

by Mike Jensen

Mr Chairman, members of the committee, I am Mike Jensen, I serve as Executive Vice-President of the Kansas Pork Producers Council. Our membership base includes the production of the overwhelming majority of pork produced in this state.

Our organization has significant differences of opinion than those of the proponents, as to the need for this type of legislation.

For some, the term "contracting" conjures images of an evil dragon. In fact, contracting is a form of financial risk management. In essence, it is no different than utilizing futures contracts or other forms of agreements so prevalent in modern agriculture. Our membership is adamant that they want **less government, not more!** They perceive governmental intrusion and oversight in this arena as nothing more than a big brother approach. It effectively says: "We as your government do not feel you have the intellectual ability to fairly enter into a business agreement without our involvement and oversight".

As this bill is currently drafted, a number of our own producers, would in effect, be defined as an integrator. Thus, they would incur the same stipulations in the bill as the apparent "dragons" that we seem so concerned with protecting.

Our membership feels that current law already exists to adequately protect any of their rights.

In the years to come, successful agricultural enterprises will be defined as those that have continually adopted not only new production practices, but also those who recognize the globalization of agriculture. They must be allowed to capitalize on our principles of free enterprise, and not rely on unnecessary government protectionism as represented in this bill.

We strongly urge your negative action on not only any single component of this bill, but also in the entire philosophy exemplified by this type of legislation.

Senate Agriculture
2-10-00
Attachment 9



PUBLIC POLICY STATEMENT

SENATE COMMITTEE ON AGRICULTURE

**RE: SB 565 – Enacting the Kansas Agricultural Production
Contract Fair Practices Act.**

**February 10, 2000
Topeka, Kansas**

**Prepared by:
Leslie Kaufman, Assistant Director
Public Policy Division
Kansas Farm Bureau**

Chairman Morris and members of the Senate Agriculture Committee, thank you for the opportunity to appear on behalf of the farmer and rancher members of Kansas Farm Bureau. I am Leslie Kaufman and I serve as Assistant Director of Public Policy for the association.

Farm Bureau strongly believes in the laws of supply and demand and the free and open movement of the market and its prices. Incumbent within this belief is the freedom of individuals to conduct their business practices, including the freedom to contract, with as little interference from the government as necessary. We do realize there are situations where legislation may be necessary to ensure that business practices are not abusive, and thus are quite legitimate.

*Senate Agriculture
2-10-00
attachment 10*

SB 565 seeks to establish the Kansas agricultural production contract fair practices act. Although the act may have been originated in an attempt to level what some may say is uneven bargaining power between certain contract growers and those they contract with, we believe SB 565 tries to address this situation much too broadly. We have significant concerns with several provisions of the bill and will outline a few of our major objections.

If we were to characterize the bill, one word that could apply is "overbroad". It is too far-reaching and pulls in people, business entities and situations that do not need to be included in a bill attempting to focus on contract production. For instance, as we read the definition of "integrator" (*page 1, line 20*) it could include the local grain elevator or the family farm operation purchasing then reselling hay, cattle, hogs or other commodities. Any one who regularly purchases agricultural commodities, no matter what the volume or what the size or ownership structure of their operation, will qualify as an "integrator". Under this bill, an "integrator" does not even have to execute production contracts to fall within the definition.

Section 8 (*page 4, line 17*) requires the producer and the integrator to share equally the costs associated with environmental regulation. On the surface, this may appear fair, but what if the producer could have negotiated and secured the integrator's commitment to assume more than 50 percent of the burden? We believe this provision is better dealt with during individual contract negotiation. Legislating such a provision into a contract could have a negative impact on producers.

Another example of the broad sweep of this legislation is the mandate that all production contract disputes between an integrator and a producer must be submitted

to mediation or arbitration (*page 4, line 20*). We recognize there is a move to see many types of disputes handled outside the court system. Often there are financial and time benefits to keeping matters out-of-court. We support resolving bargaining impasses by mediation and arbitration by a joint settlement committee utilizing the principle of final offer selection. We support this type of program being implemented under a comprehensive federal marketing and bargaining act. Although we support the concept of resolving bargaining impasses through arbitration or mediation, we are somewhat concerned that SB 565 not only attempts to apply this concept prospectively, but would also imply it into previously executed contracts (*page 4, line 24*).

Section 13 of the bill provides for a producer's lien for an unpaid contract, or if there is no contract, for products delivered to an integrator (*page 5, line 16*). The bill provides this type of lien can take priority over other previous encumbrances (*page 6, line 25*). Kansas Farm Bureau Policy strongly opposes any measures that would eliminate or pre-empt the statutory priority of lien holders under current statutory agriculture liens. In fact, we recently testified in opposition to a bill, SB 366, which, in its current form, could alter current statutory agriculture lien priorities. We have also opposed a requested amendment which could give super-priority to in-put liens. This policy position also leads us to oppose the producer lien provisions as contained in SB 565.

One further concern with SB 565 is Section 14 (*page 7, line 12*) dealing with accreditation to bargain for contract producers. Farm Bureau is active in monitoring the contract-production segment of the industry to determine if there is a need for some kind of legislation to ensure that farmers engaged in contract production and marketing

have adequate protections. We support the enactment of a comprehensive federal marketing and bargaining act. This act should allow producers in all states to organize marketing associations and operate within the federal act. The federal act should include procedures for defining bargaining units, accrediting bargaining association and resolving bargaining impasses by mediation and arbitration. Although we agree in concept that bargain associations need to be accredited, we believe an overall system implemented under a comprehensive federal act is a better alternative than implementing a state program. One other concern with initiating a state program in this time of tight budgets is whether the Kansas Department of Agriculture will have adequate funding and personnel to implement the accreditation program without diverting resources away for other important agricultural programs.

Just as important as establishing federal marketing and bargaining act is educational efforts to inform farmers and ranchers about market-oriented agriculture, assist producers in efforts to negotiate fair and equitable production contacts, develop an information clearinghouse on production contracts and aid farmers in forming small local producing groups that can aid in capturing specialty crop premiums. In addition, we strongly support farmer owned and controlled agriculture cooperatives based on principles of private competitive enterprise.

Farm Bureau, on both the state and national levels, is in the process of developing and implementing several member service and education programs designed to inform members on contract production, negotiation and contract formation. These include identifying a pool of reference attorneys for members to consult on production contract issues, developing a list of negotiators individual member producers

can contact to assist in securing and drafting fair and equitable production contracts and educational activities.

These are just a few of the major concerns Kansas Farm Bureau has with SB 565. Due to these concerns, we respectfully request the committee to refrain from passing this legislation, preferring to see many of the provisions dealt with in SB 565 addressed under a federal marketing and bargaining act. Thank you.

Kansas Bankers Association

800 SW Jackson, Suite 1500

Topeka, KS 66612

785-232-3444 Fax - 785-232-3484 kbacs@ink.org

February 10, 2000

TO: Senate Committee on Agriculture

FROM: Chuck Stones, Kansas Bankers Association

RE: SB 565: Creating a Super Priority Lien for Producers

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear today regarding certain provisions of **SB 565**. Our testimony today will express concerns we have with Section 13 of the bill.

Section 13 establishes a "super priority" lien on behalf of producers who are unpaid for the product they have produced and delivered for sale to an "integrator". It is a "super priority" lien because the bill provides that it will have priority over all other liens whether those liens are filed before or after the producer's lien attaches.

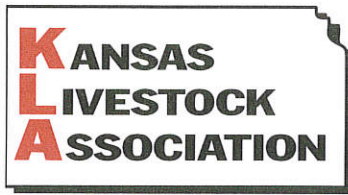
Many Kansas banks are deeply involved in agricultural lending. They provide loans not only to agricultural producers, but also to businesses that provide a means by which to buy and sell those products. Banks finance the operations of buyers such as sale barns and grain elevators, and they secure those loans with the assets of these businesses. They then "perfect" their security interest in these assets by following the rules set up in the Uniform Commercial Code – they file a financing statement with the Secretary of State's office. This filing serves as notice to the world that the assets of this business are encumbered by the bank. The rules for priority are clear: first in time is first in line. The lender who files a financing statement first has first priority to the collateral.

Our concern is that in providing for this new super priority lien, this law disregards the system of priorities established under the Uniform Commercial Code (UCC). No longer will the traditional lender be able to rely on the rules set forth in the UCC. No longer will any potential lender be able to conduct a search of the UCC filings with the Secretary of State's office and be assured of the line of priorities.

We understand the plight of the unpaid agricultural producer all too well. It is unfair that he or she has put so much time, effort and money into producing a crop or herd of cattle for sale, and then go unpaid by the buyer. How then, is it fair to usurp the security of the lender to the buyer, by giving the ag producer first rights in the collateral – the very collateral the lender has relied on as security for its loan?

This is a fine tight rope we are walking here today because on the other hand, there would be some cases where the bank was financing the agricultural producer, that this super priority lien might be helpful in getting that loan repaid. However, we believe that all parties should play by the same rules. We do not necessarily oppose the giving of a statutory lien to unpaid agricultural producers, but we do oppose the "super priority" lien that allows them to spring ahead of existing lienholders.

Senate Agriculture
2-10-00
Attachment 11



Since 1894

Testimony

Presented by

Rich McKee

Executive Secretary, Feedlot Division

Regarding

Senate Bill 565

Before the

SENATE COMMITTEE ON AGRICULTURE

February 10, 2000

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 7,000 members on legislative and regulatory issues. KLA members are involved in all segments of the livestock industry, including cow-calf, feedlot, seedstock, swine, dairy and sheep. In 1998, cash receipts from agriculture products totaled over \$7.8 billion, with over fifty-five percent of that coming from the sale of livestock. Cattle represent the largest share of cash receipts, representing ninety percent of the livestock and poultry marketings.

Mr. Chairman and other members of the committee, we appreciate the opportunity to express the position of the membership of the Kansas Livestock Association on this bill.

*Senate Agriculture
2-10-00
Attachment 12*

This bill is extremely broad and would have far reaching affects. The effect of this bill would be to deny Kansas producers the freedom to utilize forward contracts, alliances and other partnerships in Kansas. **With that in mind we ask you to reject Senate Bill 565.**

The definition of "integrator" (lines 20-23, page one) and "producer" (lines 30-33, page one) are so broad that contracts between two livestock producers would be included. Remember, most all livestock producers are both buyers and sellers of agricultural commodities. Virtually anyone that buys agricultural products raised in Kansas (restaurants, grocery stores, etc.) is defined as an "integrator". Let me say again this bill would simply prevent Kansas producers the ability to enter into contracts. For years Kansas livestock producers have chosen to use this form of marketing for a variety of reasons this least of which is risk management. In more recent years agricultural producers in general and specifically livestock producers have used contracts and alliances in order to receive higher prices. Contracts are especially important for anyone producing for a specialty market.

There are several significant legal ramifications. First, please know the textbook definition of a contract is "an agreement between two people". However, it appears that Section 12 (page 5, lines 13-15) allows any "person" to bring a complaint. Does this now give persons not parties to a contract to file complaints? Further, there is no injury required. What are the thresholds for triggering a complaint and seeking injunctive relief? Who has standing? Also, this bill must meet the state and US Constitutional requirements of the Contracts Clause. One of the tests this bill must meet, in order to be constitutional is there must be a public purpose justifying the legislation's adoption. In fact this bill works against the public purpose to further agriculture and maintaining the freedom to contract.

Of significant interest is what has occurred in the South Dakota legislative session this year. An almost identical bill was introduced on January 19th of this year (a copy of the bill is attached). A hearing was held on February 1st in their Senate Agriculture Committee and on that same day the bill was tabled on a vote of 8 to 1. We respectfully ask that you take that same action today.

Add Notes

State of South Dakota

SEVENTY-FIFTH SESSION
LEGISLATIVE ASSEMBLY, 2000

471D0481

SENATE BILL NO. **133**

Introduced by: Senators Kloucek, Flowers, Hutmacher, Moore, Reedy, and Symens and Representatives Chicoine, Diedrich (Elmer), Fischer-Clemens, Hanson, Kazmerzak, Sutton (Duane), and Weber

FOR AN ACT ENTITLED, An Act to provide for fair practices in agricultural production contracts.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. Terms used in this Act mean:

- (1) "Agricultural commodities," a material produced for use in or as food, feed, seed, or fiber and includes crops for fiber, food, oilseeds, seeds, livestock, livestock products, poultry, poultry products, or byproducts of the farm for the same or similar use;
- (2) "Integrator," a person who in the ordinary course of business buys agricultural commodities grown or raised in this state or who contracts with a producer to grow or raise agricultural commodities in this state;
- (3) "Producer," a person who produces or causes to be produced agricultural commodities by contracting with an integrator to provide management, labor, machinery, facilities, or any other production input for the production of agricultural commodities; and
- (4) "Secretary," the secretary of agriculture.

Section 2. No integrator may engage in any deceptive act or practice as provided in this Act

in connection with any agricultural production contract involving agricultural commodities. Deceptive acts and practices include the following, each of which is a violation of this Act, whether or not any producer has been misled:

- (1) Using coercion, intimidation, the threat of retaliation or the threat of contract termination, cancellation, or nonrenewal to impose, demand, compel, or dictate the terms, payment, or manner of payment or the signing of a contract by a producer;
- (2) Using coercion, intimidation, the threat of retaliation, or the threat of contract termination, cancellation, or nonrenewal in order to require the producer to make capital improvements such as buildings or equipment;
- (3) For the integrator to interfere with, restrain, or coerce producers in the exercise of their rights to join, form, and assist associations of producers;
- (4) For an integrator to terminate, cancel, or fail to renew a contract with a producer if the producer is financially obligated for an investment in buildings and equipment which was made to meet the minimum requirements of the contract;

(5) For an integrator to refuse to provide to the producer upon request the statistical information and data used to determine compensation paid to the producer for settlement. This statistical information and data includes feed conversion rates, feed analyses, averages of other growers, origination, and breeder history;

(6) For the integrator to refuse to allow a producer or the producer's designated representative to observe, by actual observation at the time of weighing, the weights and measures used to determine the producer's compensation at settlement; and

(7) For an integrator to use the performance of any other producer to determine the settlement of a producer.

Section 3. Unfair trade practices also include those practices prohibited by the Perishable Agricultural Commodities Act, 7 U.S.C. § § 499a-499s, as amended to January 1, 2000, and the

rules promulgated thereunder at 7 C.F.R. part 46, as amended to January 1, 2000, and those practices prohibited by the Packers and Stockyards Act, 7 U.S.C. § 181 et seq., as amended to January 1, 2000, and the rules promulgated thereunder at 7 C.F.R. part 201 et seq., as amended to January 1, 2000.

Section 4. If federal and state regulation are identical, federal jurisdiction and enforcement control unless the federal authority decides not to enforce the regulation.

Section 5. No integrator may terminate, cancel, or fail to renew a contract that required a producer to make a capital investment secured by financing statement, promissory note, deed of trust, or otherwise in buildings or equipment that cost twenty-five thousand dollars or more and have a useful life of five or more years until:

(1) The producer has been given written notice of the intention to terminate, cancel, or not renew the contract at least one hundred eighty days before the effective date of the termination, cancellation, or nonrenewal, or as provided in section 7 of this Act; and

(2) The producer has been reimbursed for damages incurred by an investment in buildings or equipment that was made for the purpose of meeting minimum requirements of the contract.

Section 6. Except as provided in section 7 of this Act, if a producer fails to materially comply with the provisions of a contract that require a capital investment subject to section 5 of this Act, an integrator may not terminate, cancel or fail to renew that contract until:

(1) The integrator has given written notice with all the reasons for the termination, cancellation, or nonrenewal at least ninety days before termination, cancellation, or nonrenewal, or as provided in section 7 of this Act; and

(2) The producer, as recipient of the notice, fails to correct the reasons stated for termination, cancellation, or nonrenewal in the notice within sixty days of receipt of

the notice.

Section 7. The one hundred eighty-day notice period under section 5 of this Act, the ninety-day notice period under section 6 of this Act, and the sixty-day notice period under section 6 of this Act, are waived and the contract may be canceled, terminated, or not renewed immediately if the alleged grounds for termination, cancellation, or nonrenewal are voluntary abandonment of the contract relationship by the producers or conviction of the producer of an offense directly related to the business conducted under the contract.

Section 8. An integrator may terminate a contract if the integrator secures a bond or irrevocable letter of credit in a sufficient amount to cover the probable claim if the damages the producer is entitled to under section 5 of this Act have not been received within one hundred eighty days after notice of the intent to terminate, cancel, or not renew has been received by the producer.

Section 9. If the one hundred eighty-day or ninety-day notice periods expire before the end of a

production cycle, the contract does not terminate until the end of that production cycle. An integrator may terminate a contract at the end of a production cycle that occurs before the end of the one hundred eighty-day or ninety-day notice period has expired if the producer agrees to the termination.

Section 10. If the integrator terminates, cancels, or fails to renew a contract other than as provided in this Act, the integrator assumes the outstanding financial obligations and liabilities of the producer and shall pay the producer fair market value for equity, if any, in the buildings and equipment that were acquired as minimum requirements under the contract. All buildings and equipment which accrue to the integrator pursuant to this section must be removed from the producer's premises within ninety days of the date of termination, cancellation, or nonrenewal.

Section 11. For purposes of this Act, notice is effective upon receipt by the producer.

Section 12. There is an implied promise of good faith by all parties in all contracts between

integrators and producers. There is an implied producer's right to refuse any livestock when delivered if the livestock are in less than normal condition, in all contracts between integrators and producers.

Section 13. The integrator shall agree to meet and confer with the producer or the producer's authorized representative at a time and place mutually agreeable to the parties to discuss concerns of the producer. The integrator shall provide a sixty-day written notice of intent to modify terms or conditions of the contract to the producer. The written notice shall state the proposed changes to the contract. Notice is effective upon receipt by the producer.

Section 14. If an integrator is required to obtain a license to purchase agricultural products, the licensing authority may require the parent company of a licensee subsidiary to guarantee payment or contract performance as a condition of licensing. If an integrator is the subsidiary of another corporation, partnership, or association, the parent corporation, partnership, or association is liable to a producer for the amount of any unpaid claim or contract performance claim if the integrator fails to pay or perform according to the terms of the contract or the provisions of this Act.

Section 15. The integrator shall reimburse the producer for the costs incurred by the producer for disposal of dead livestock.

Section 16. A contract for the production of agricultural products between an integrator and a producer shall contain language providing for resolution of contract disputes by either mediation or arbitration services as specified in the contract to facilitate resolution of disputes. Contracts executed after the effective date of this Act shall contain an implied provision that all contract disputes shall be submitted to mediation or arbitration for dispute resolution. If the parties contract for mediation of matters that are in dispute and mediation does not resolve the dispute, either the integrator or the producer may request that the matter be submitted to arbitration.

Neither the mediator nor the arbitrator may be an employee or agent of the producer, the integrator, or the integrator's subsidiaries, or parent company. If the parties cannot agree upon a mediator or arbitrator, either party may make a written request to the secretary of agriculture for mediation or arbitration services to facilitate resolution of the dispute.

Section 17. Notwithstanding the existence or pursuit of any other remedy at law, any person violating the provisions of this Act or any rules promulgated pursuant to this Act is guilty of a Class 2 misdemeanor. In addition, the court may suspend the integrator's license to operate in this state for a period not to exceed thirty days or the court may revoke the integrator's license. In an action to recover damages or for injunctive relief, if the court finds that there has been a violation of this Act, court costs and attorney fees may be recovered by the producer.

Section 18. Notwithstanding the existence or pursuit of any other remedy, a person, in the manner provided by law, may maintain an action for injunctive relief or other process to prevent violations of this Act.

Section 19. A producer of agricultural products shall have a lien for the contract price or, if there is no contract, the fair market value of the agricultural product produced and delivered to an

integrator. The lien attaches to the agricultural products and proceeds thereof as well as to all tangible or intangible assets of the integrator. If the agricultural product becomes commingled with other agricultural products, the lien continues in the proportionate share of the other agricultural products. If the agricultural products become manufactured or processed to become a part of another product, the lien continues and attaches to the product manufactured or processed.

Section 20. The lien claimed by the producer is perfected without filing a statement of nonpayment from the time that the agricultural product is delivered to the integrator until thirty days after delivery. The producer shall file a statement of nonpayment in the office of the clerk of the court for the county of the integrator's principal place of business. If the integrator is not

a resident of the state, a filing shall be made with the clerk of the superior court for the county in which the integrator's registered office is located. The clerk shall note the claim of lien on the judgment docket and index the claim under the name of the integrator at the time the claim is filed.

Section 21. A statement of nonpayment shall be in writing and notarized by the producer and shall contain:

- (1) The name and address of the integrator to whom the agricultural products were delivered;
- (2) A statement of the amount due to the producer after deducting applicable credits and offsets;
- (3) A description sufficient to identify the agricultural product delivered and subject to the lien;
- (4) The date and location to which the agricultural product was delivered; and
- (5) The date on which payment was due.

Section 22. The producer shall furnish a copy of the statement of nonpayment as provided by this section to the integrator, which constitutes a notice of claim of lien. The notice shall be served personally or by certified mail to the integrator at the place of business where the producer has conducted business with the integrator. The lien is effective as of the time it is filed with the clerk of the court. The integrator has the right to contest the validity of the lien by filing with the clerk of the court and serving on the producer within ten days after the integrator receives notice that the producer has filed a claim of lien, a notice that the integrator contests the amount due. If the integrator fails to contest the lien or is unsuccessful in obtaining a discharge of the lien, the lien is perfected as of the date of filing with the clerk of court.

Section 23. A producer's lien has priority over all other liens and encumbrances in:

- (1) The agricultural products;

- (2) The proceeds from the agricultural products;
- (3) The proportionate share of the agricultural products with which the agricultural products have been commingled;
- (4) The products manufactured or processed with the agricultural products; and
- (5) The integrator's tangible and intangible assets.

A producer's lien that is continuously perfected from the time of delivery has priority over other liens and encumbrances whether they are filed before or after the producer's lien. A producer's lien that is filed after thirty days after delivery of the agricultural products has priority in the order that it is filed. Priority among perfected producer's liens is according to the first lien filed. A producer's lien that is not filed has the priority of an unperfected security interest under the uniform commercial code.

Section 24. The lien may be discharged in any of the following manners:

- (1) By filing with the clerk of the court a notarized statement by the producer that the lien has been satisfied;
- (2) By depositing with the clerk of the court money equal to the amount of the claim, which

12-6

money shall be held for the benefit of the producer; or

(3) By an entry in the lien docket that the action on the part of the lien claimant to enforce the lien has been dismissed.

A producer shall remove a lien statement from the filing system after the lien is satisfied. If the producer does not remove the lien statement, the clerk of the court shall remove the lien statement upon request of an affected party who has furnished proof that the lien has been terminated.

Section 25. An action to enforce the lien created by this Act may be instituted within one hundred twenty days of the date that payment is due in any court of competent jurisdiction in the county where the lien was filed or where the property to which the lien attaches is located or the

county where the agricultural product was originally delivered. The court may award costs including attorney fees to the prevailing party. Nothing in this section precludes the parties from mediating or arbitrating the claim of nonpayment at any time before or after a lien statement has been filed.

Section 26. Any association seeking accreditation to bargain for contract producers of agricultural products or services shall submit to the secretary of agriculture a petition for accreditation. The petition shall:

(1) Specify the agricultural products or services for the contract producers of which the association seeks accreditation to bargain;

(2) Designate the integrators, individually or by production or marketing area or by some other appropriate classification, with whom the association shall be accredited to bargain; and

(3) Contain such other information and documents as may be required by the secretary.

Section 27. Upon receiving the petition and any supporting material, the secretary shall give notice of the petition to all designated integrators. Integrators who have been designated individually shall receive personal notice, and integrators who have been designated by production or marketing area or by some other general classification shall be given notice through publication in a legal newspaper that has countywide distribution within that area.

Section 28. The secretary shall accredit the association if, based upon the evidence submitted, the secretary finds that:

(1) Under the charter documents or bylaws of the association, it is owned by contract producers and meets the requirement of the Capper-Volstead Act, 7 U.S.C. § 291-2, as amended to January 1, 2000;

(2) The association has submitted a copy of its bylaws which provide that each member of the association has one vote in all votes of the membership of the association, that

officers and directors are elected by a majority of the members voting or by delegates representing a majority of the membership, and that all elections are by secret ballot; and

(3) The association has contracts that are binding under South Dakota law with its members empowering the association to sell or negotiate terms of sale of the products or services of its members;

(4) The association represents a sufficient number of contract producers or that its members produce a sufficient quantity of agricultural products or services to enable it to function as an effective agent for contract producers in bargaining with the designated integrators. In making this finding, the secretary shall exclude any quantity of the products or services contracted by contract producers with contract producer owned and controlled processing cooperatives and any quantity of such products or services produced by integrators; and

(5) The association has as one of its functions acting as principal or agent for its members in negotiations with integrators for prices and other items of trade with respect to the production, sale,

and marketing of their products or services.

Section 29. The secretary shall give notice within sixty days of the filing date of the petition for accreditation by an association whether the association shall be accredited. If the secretary determines that insufficient evidence was filed by the association, the secretary may permit the association to file an amended request. The secretary shall then determine, within thirty days of filing the amended petition, whether the association shall be accredited.

Section 30. An association that is denied accreditation after filing of an amended request may not file another request for accreditation for a period of one year. Within thirty days of a decision by the secretary denying accreditation to an association, the association may request a hearing before the secretary. The secretary shall then conduct a hearing to determine whether the

association is to be accredited. This hearing and any appeal shall be governed by chapter 1-26.

Section 31. If the secretary believes that an accredited association has ceased to meet the standards for accreditation set forth in this section, the secretary shall notify the association of the respects in which the secretary believes it has ceased to maintain such standards and allow it a reasonable time to answer or to correct the deficiencies noted. Thereafter, if the secretary is not satisfied that the association is then in compliance with this section, the secretary shall notify the association and hold a hearing to consider the revocation of accreditation. If, based upon the evidence submitted at the hearing, the secretary finds that the association has ceased to maintain the standards for accreditation, the secretary shall revoke the accreditation of the association.

Section 32. The secretary may amend the order of accreditation only with respect to the products or services specified in the order. The secretary shall give notice of any proposed amendment and the reasons for the amendment to all accredited associations and integrators that would be directly affected and shall provide an opportunity for a public hearing. Thereafter, the secretary may amend the order if the secretary finds the amendment will be conducive to more effective bargaining and orderly marketing by the accredited association of the products or services of its members.

12-8

BUSINESS

12-9

Jim McLean, Managing Editor/Business; Michael Hooper, Assistant Business Editor; 295-1282; e-mail biz@cjonline.com

Friday, July 9, 1999

THE TOPEKA



CAPITAL-JOURNAL

www.cjonline.com

Business briefs

► **Pricing battle affects Sioux Falls cattle sale** — While various groups and individuals argued the merits of the state's new mandatory price reporting law, the Sioux Falls Stock Yards saw a slump at its regular cattle sale.

About 30 buyers and farmers showed up for the Wednesday sale. But only 600 cattle were available, compared to a normal total of 2,000.

"This is about the lowest we've ever had for this sale," said stockyards manager Gordon Wilkerson.

Prices for the cattle were down \$1 to \$2 compared to a week ago, he said.

South Dakota's law requires meat-packers to report the prices they pay each day for slaughter livestock. It also lets farmers who don't receive the same price sue for damages.

Feedstuffs

THE WEEKLY NEWSPAPER FOR AGRIBUSINESS

November 1, 1999

Volume 71, Number 45 \$3



**FOCUS
ON
POULTRY**

Iowa cattlemen, Excel study plan to build new plant

■ By ROD SMITH
Feedstuffs Staff Editor

Excel Corp., the Iowa Cattlemen's Assn. (ICA) and the state of Iowa announced a cooperative effort last week to determine the feasibility of constructing a new, state-of-the-industry beef cattle plant in Iowa.

The plant would be "a real boost" for the beef cattle industry in Iowa, said ICA president Dave Petty. The study "brings us a big step closer" to a goal to have a new beef cattle processing facility for Iowa producers and to enhance competition for Iowa cattle in the marketplace, Petty, a producer from Union, Iowa, said.

The cooperative effort would establish "a partnership" among Excel, ICA and Iowa to determine the feasibility of the plant in which Excel would evaluate engineering requirements — from location and highway and rail access to power and water supplies to waste and wastewater issues — as well as workforce staffing and training requirements and pay and benefit rates, according to the announcement.

ICA would organize the Beef Supply Network, which would be a business entity owned by beef cattle producers in Iowa and other surrounding states who would buy memberships in the cooperative and pledge to deliver cattle to the plant, according to ICA executive vice president Joel Brinkmeyer. He

Excel/ p. 3

Excel/ From p. 1

said the network would supply an estimated 25-45% of the cattle that the plant would need on a yearly basis for at least five years.

Brinkmeyer told *Feedstuffs* that the plant would be jointly owned by Excel and the network, and network members would market animals to the plant on a grid specifically created for them to recognize the value of their cattle. He said non-members would market on a secondary grid or other terms, including the cash market.

He said the cooperative would be similar to U.S. Premium Beef (USPB), but would be kept open for other producers to join in the future. USPB is a closed cooperative of beef cattle and feedlot producers that acquired a minority interest in Farmland National Beef Co. to market animals on a Farmland grid and receive higher value for them.

Ownership in the plant would be the "key to this project," the announcement said, and Brinkmeyer suggested that the kind of alliance the network represents "is the direction" of the beef industry. ICA's involvement in the project "is an exciting event" not only for Iowa producers but for the industry nationally, he said, as it sets an example for the industry in the future.

The plant would kill cattle and produce value-added products that can be branded, he said. Excel has introduced a branded line of special beef products and has said it plans to expand the line and volume.

The Iowa Department of Economic Development would coordinate activities between Excel and ICA, the announcement said. A location for the facility has not yet been selected.

Brinkmeyer said the feasibility study is "a long way through" being completed and said the announcement was made last week because ICA needs to begin taking the project to producers to explain it and seek support for the network. He said the study should be completed and made public by the end of February.

The plant would help reverse a disturbing trend in the Iowa beef cattle industry, said Wythe Wiley, ICA past president and chair of the ICA packer recruitment effort. He explained that 70% of Iowa cattle are currently harvested outside the state, and he said it has long been an ICA priority "to change that statistic and increase market competition for Iowa cattle."

Wiley said the goal was accelerated following the closing of the Monfort, Inc., plant in Des Moines, Iowa, in 1996.

The announcement noted that Excel, the beef cattle and pork business of Cargill, Inc., is "no stranger" to Iowa, with a pork house in Ottumwa and a further processing facility for meats in Orange City. ■