

Truth or Consequences: The Future of Contracts in Agriculture

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***Roger A. McEowen**

- **Associate Professor of Agricultural Economics and Extension Specialist Agricultural Law & Policy, Kansas State University, Manhattan, Kansas. Member of Kansas and Nebraska Bars.**

Contract Production – The Involvement of the Legal System

- **American agriculture is increasingly being controlled by vertically integrated corporate agribusinesses. This has given rise to various types of legal issues:**
 - **Consumer issues**
 - Food safety
 - Environment
 - **Worker issues**
 - Wages
 - Working conditions
 - Discriminatory/Exclusionary conduct
 - Safety concerns
 - **Grower issues**
 - Labor arrangements

Contract Production

- **Contractual relationships between vertically integrated firms with market power and producers operating in near perfect competition give rise to numerous problems due largely to unequal bargaining power**

Contracting Between Firms With Disparate Levels of Market Power

The more powerful tend to draft the contracts and to prescribe a division of risk and reward favorable to the firm with the greatest market power.

The more powerful tend to use legal representation and threats of legal action offensively.

Contract renewals are a time of vulnerability unless the weaker party has a range of options.

Misweighing of Poultry

- ***Braswell v. ConAgra*, 936 F.2d 1169 (11th Cir. 1991)**
 - Producers awarded multi-million dollar judgment against ConAgra for using false tare weights to undervalue weight of finished birds
- ***Baldree v. Cargill, Inc.*, 758 F. Supp. 704 (M.D. Fla. 1990), *aff'd*, 925 F.2d 1474 (11th Cir. 1991)**
 - Growers win preliminary injunction, based in part on claims of manipulation of weights through use of false tare weights
- **Other cases involving integrated firms reducing growers' pay by manipulating calculation of weight:**
 - *Pavlik v. Cargill, Inc.*, 9 F.3d 710 (8th Cir. 1993); *Jackson v. Swift-Eckrich*, 830 F. Supp. 486 (W.D. Ark. 1993); *Ambrose v. ConAgra, Inc.*, (W.D. La. 1993); *Evans v. Herider Farms, Inc.*, (E.D. Tex. 1991)

Required Improvements

- Often, producers must improve existing facilities to get a contract, and must later make requested improvements to keep the contract. All improvements are typically entirely at the producer's expense
 - Concerns:
 - Integrators require improvements as a way to conduct R&D and have the grower pay for it
 - Requiring costly improvements just before contract termination
 - Much litigation on this issue
 - See, e.g., *Pavlik v Cargill, Inc.*, 9 F.3d 712 (8th Cir. 1993); *Ambrose v. ConAgra, Inc.*, (W.D. La. 1993)

Faulty Inputs

- **Deposition testimony of industry representative:**
 - **Q: If when you were there you had a bad grower, what kind of poultts would you get to that grower?**
 - **A: Well, that depends. That can work both ways. If you've got an exceptionally good grower, sometimes you'll give him the bad birds because you can get them through. But if you've got one that you've just had it with and you're done with, you might give him the bad ones just so he'll quit.**
 - Testimony of E. Wetzel
- **See also *Brooks v. Ralston Purina Co.*, 270 S.E.2d 347 (Ga. Ct. App. 1980)**

Misrepresentations Concerning Profitability

- ***See e.g., Crowell, et. al. v. Campbell Soup Co., 264 F.3d 756 (8th Cir. 2001)***
 - Parol evidence rule precluded statements of defendant's representative as to expected profits
- ***Tyson Foods, Inc. v. Davis, 347 Ark. 566, 66 S.W.3d 568 (2002)***
 - Case tried as fraud-in-the-inducement and misrepresentation case; jury verdict of almost \$900,000 for producer upheld on appeal

Retaliation for Organizing

- ***Baldree v. Cargill, Inc.*, 758 F. Supp. 704 (M.D. Fla. 1990), *aff'd*, 925 F.2d 1474 (11th Cir. 1991)**
 - Preliminary injunction granted against Cargill for terminating poultry contracts in response to grower efforts to organize
 - Court cited PSA and AFPA as authority for its decision – “unfair and unjustly discriminatory and deceptive practice”

Contracts Used as Means to Shift Economic and Environmental Risk

- ***Crowell v. Campbell Soup Co.*, 264 F.3d 756 (8th Cir. 2001)**
- ***Segers v. Pioneer Hi-Bred International, Inc.*, 997 F. Supp. 1124 (N.D. Ind. 1998)**
 - Farmer grew seed corn for defendant under contract and crop failed due to herbicide application; farmer liable for crop loss under contract provision even though choice of herbicide subject to defendant's approval

Other Unfair/Discriminatory Practices

- Termination in violation of contract terms
- Fraudulent inducement to contract
- Termination for refusal to purchase feed
- Termination for integrator's policy of undercounting birds (case involved Tyson in North Carolina)
- Unfair arbitration clauses
 - See, e.g., *Archer v. Tyson Foods, Inc.*, No. CIV-2002-497 (Pope County, Ark. Cir. Ct. Feb. 21, 2003)(court struck down arbitration clause in hog production contract due to lack of mutual obligation)

Trade and Consumer Protection Issues

- **Vegetable procurement trade practices**
 - “Passed acres” clauses allow contracting firms to determine that acres of vegetables otherwise suitable for harvest will not be harvested and that producers will receive only partial payments from funds contributed to “passed acre pools”
 - *Myron Soik & Sons, Inc. v. Stokely USA, Inc.*, 498 N.W.2d 897 (Wis. Ct. App. 1993)
 - Growers of sweet corn brought class action against defendant over interpretation of production contracts. Defendant able to assert “accord and satisfaction” as defense
 - » Led to state legislation limiting use of “passed acres” clauses – Wis. Admin. Code § Ag. 101.01(13)

Packers and Stockyards Act

- Functions as a federal unfair and deceptive trade practices act for the poultry and livestock industries
 - Prohibits any “unfair, unjustly discriminatory, or deceptive practice or device
- *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197 (E.D. N.C. 1996)
 - Growers allowed to proceed on claim that integrator breached PSA by failing to weigh birds in timely manner, providing low-quality poults, and engaging in retaliatory weighing

Packers and Stockyards Act

- **Livestock industry is dominated by “captive livestock” – livestock that are either owned directly by packers or through contracts.**
 - **Packer need not rely on auction-price purchases in open market for most of supply**
 - **Packer uses this leverage to depress market prices for independent producers on cash and forward markets**
 - **Such practice is ostensibly illegal under PSA**
 - **Nationwide class action certified on whether practice violates PSA – *Pickett v. IBP*, No. 96-A-1103 (M.D. Ala. Dec. 26, 2001)**
 - **Trial set for January 12, 2004, in Montgomery, AL**

Independent Contractor/Agent Relationship

- **Contract provisions typically designate producer as an independent contractor**
- **But, courts examine actual roles played by the parties – control is the key**
 - **Okla. Att’y. Gen. Op. No. 01-017 (Apr. 11, 2001)**
 - ***Tyson Foods, Inc. v. Stevens*, 783 So. 2d 804 (Ala. 2000)(court upheld jury determination that farmer was plaintiff’s agent under hog production contract)**

Independent Contractor/Agent Relationship

- *Tulsa v. Tyson Foods, Inc., et. al.*, 258 F. Supp. 2d 1263 (N.D. Okla. 2003)
 - Tulsa, OK, sued Tyson, Cobb-Vantress, Peterson Farms, Simmons Foods, and Cargill for contamination of Tulsa's drinking water supply.
 - The lawsuit was spurred by the Oklahoma A.G.'s opinion that poultry companies could be held liable for pollution produced by contract chicken growers
 - The issue is responsibility for cleaning the mess up
 - Tulsa?
 - Contract chicken growers?
 - Chicken companies?

City of Tulsa v. Tyson Foods, Inc., et. al.

- ***Key point*** – issue of Tyson’s control over contract growers does not go to jury because Tyson liable *as a matter of law* for any nuisance or trespass caused by the known or foreseeable contract activities of their growers
 - Restatement (2d) of Torts §427B
 - “One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve a trespass upon the land of another or the creation of a public or a private nuisance, is subject to liability for harm resulting to others from such trespass or nuisance.... It is not necessary...to the application of the rule that the trespass or nuisance be directed or authorized.... It is sufficient that the employer has reason to recognize that, in the ordinary course of doing the work in the usual or prescribed manner, the trespass or nuisance is likely to result.”

Impact of Production Contracts

- **The basic concern with contracting is an eventual tilt in market power coupled with a possible shift in bargaining power as input suppliers and output processors gain greater economic power at the expense of producers**

Impact of Production Contracts

- **Increased concentration in various agricultural sectors is the loss of alternative outlets for farmers. Farmers with few options for buyers of their products may view contract farming as their only means of staying in production agriculture, and are more vulnerable to unfair contract provisions. The loss of alternative outlets for farm products also presents serious concerns when an existing contract expires**

The Road to Serfdom

Example: A farmer has a five-year contract to sell hogs to dominant packer. The replacement contract is, predictably, less advantageous to the farmer. “Sorry, that’s all we’re doing this year.”

If the nearest meaningful, competitive outlet is 900 miles away, and 90 percent integrated, the farmer can—

- Go back to the regionally dominant packer and try to negotiate an acceptable contract;
- Cease producing hogs (and find another use for the facilities);
- Ship the hogs 900 miles and try to obtain shacklespace; or
- Organize enough producers to achieve countervailing power

The Role of the Legal System

- **The United States Court of Appeals, in *Hampton Feedlot v. Nixon*, 249 F.3d 814 (8th Cir. 2001), has ruled that a state legislature has the authority to determine the course of farming in the state**
- **Without instituting the basic principles of contract law, travel and other areas of commercial law, contractual relationships become increasingly difficult and integrated ownership of related economic activities becomes more likely.**

Limits on Economic Activity

The U.S. rejected the idea of unfettered and uncontrolled economic activity with enactment of the Sherman Act of 1890 (which codified earlier common law offenses dating back to the Middle Ages).

Closing Point

- **“When closing argument was presented against IBP in the Cook case (D. Neb. 1995), I argued to the jury that IBP had become the largest owner of cattle feedyards in America through the artifice of contracting. Forward contracts, I argued, “had permitted IBP to buy up, control and therefore, effectively own, an overwhelming portion of America’s cattle production capacities without buying one acre of land, pouring one cubic yard of concrete, installing one linear foot of feed lot, digging one post hole, stringing one wire, or investing one dime.”**
 - **The jury reacted to the argument with widened eyes, then, as I could see the thought sink in, their amazement turned to disgust.**
 - **They rewarded my client with their verdict.**
 - **David Domina, attorney for Robert M. Cook in IBP v. Cook (D. Neb. 1995)**

THANK YOU!

- **Roger A. McEowen**
 - **(785) 532-1519 (O)**
 - **(785) 293-5108 (H)**
 - **rmceowen@agecon.ksu.edu**