

Agricultural Law Update

JUN 17 1996

LAW LIBRARY, U. OF ARK.

VOLUME 13, NUMBER 6, WHOLE NUMBER 151

APRIL 1996



Official publication of the
American Agricultural
Law Association

INSIDE

- The Packers and Stockyards Act: an overview
- Conference Calendar
- *Federal Register* in brief

IN FUTURE ISSUES

- Update of developments in forward contracting of grain

Humans contract mad cow disease?

On March 20, 1996, the British government revealed a possible link between bovine spongiform encephalopathy (BSE), also known as mad cow disease, and its human equivalent, Creutzfeldt-Jakob disease (CJD). BSE is a disease that attacks the central nervous system of cattle, causing symptoms similar to rabies, including foaming at the mouth and twitching. The disease leaves the brain riddled with holes, giving it a sponge-like consistency. CJD is a rare degenerative brain condition, affecting one person in a million. The fatal disease produces apathy, severe muscle spasms, and dementia.

In 1986, mad cow disease was first identified in Britain. Since that time, some 160,000 BSE-infected cattle have been destroyed. It is now believed that BSE originated when contaminated feed was fed to cattle. Until 1989, British farmers fed rendered sheep parts to cows as a protein supplement. Due to improper rendering, sheep offal fed to cattle was infected with scrapie, a brain disease common in sheep. Some experts believe the disease was transmitted when renderers lowered cooking temperatures used on the animal carcasses before grinding them into meal. While the disease was apparently passed to cattle, there is no evidence that scrapie is directly transmissible to humans from eating lamb or mutton. Scrapie, BSE, and CJD are thought to be caused by abnormal variants of a protein, known as prions (proteinaceous infected particle).

Prompting the announcement of a mad cow-CJD link, is evidence that ten Britons contracted CJD from exposure to BSE-infected cattle. Calling the cluster of cases "cause for great concern," the scientists suggested that the ten Britons were exposed to mad cow disease before the 1989 ban on feeding sheep offal. The likely explanation, especially given that all victims were under age forty-two, was that CJD was contracted from consuming BSE-infected beef. Following the announcement, McDonald's, Wendy's, Burger King, and other restaurants pulled hamburgers from their menus, at least until non-British beef is available.

The European Commission has formally banned Britain from exporting beef or beef by-products to any country in the world. Proposed action to save the British beef industry includes incinerating up to 4.5 million of the nation's eleven million beef and dairy herd.

There have been no reported cases of mad cow disease in the United States. In 1989, the U.S. banned the import of live cattle from Britain. However, the U.S. continues to render sheep parts into cattle feed. In 1994, the Food and Drug Administration considered banning the practice but later dropped the effort. 59 Fed. Reg. 44,584 (Aug. 29, 1994). In addition, some experts believe U.S. cattle may suffer from a strain of BSE

Continued on page 2

"Moving" cattle ain't what it used to be

In the good old days, one knew what it meant to "move" cattle. Between 1866 and 1888, cowboys moved cattle, and they moved lots of them—some six million cattle went from Texas to Colorado, Wyoming, and Montana to winter on the High Plains. "To all that saw that long line of Texas cattle come up over a rise in the prairie, nostrils wide for the smell of water, dust-caked and gaunt, so ready to break from the nervous control of the riders, strung out along the flanks of the herd, there came a feeling that in this spectacle there was something elemental, something restless, something perfectly in keeping with the unconquerable land about them." Samuel Eliot Morrison et al., *A Concise History of the American Republic* 402 (1977) [hereinafter Morrison] (quoting E.S. Osgood, *The Day of the Cattleman* 26).

It ain't the same today. Ask Mr. Myles C. Culbertson. He is an occasional cattle broker, and his fight over a \$1,500 penalty for doing what those inside the Beltway call "moving" cattle led to the Tenth Circuit's reversal of the USDA's imposition of sanctions against him for aiding in the interstate movement of cattle in violation of the Contagious Cattle Disease Act (CCDA), 21 U.S.C. §§ 111-135b (1994). *Culbertson v. USDA*, 69 F.3d 465 (10th Cir. 1995). Fortunately for Mr. Culbertson, the court held

Continued on page 2

that makes them fatigued and weak—similar to “downer cows” that simply fall over and die. Downer cows are rendered and fed to cattle instead of being slaughtered for human consumption. The FDA has said it may again seek a ban on sheep rendering.

Canada has had one confirmed case of mad cow disease, in Alberta. Canada has directed that all cattle imported from Britain between 1986 and a 1990 ban be destroyed. See generally, *David Hunt Farms Ltd. v. Canada*, F.C. No. 677 (May 12, 1994) (challenging order to destroy cattle imported from Britain); *Jerram v. Canada*, F.C. No. 348 (Mar. 18, 1994); *Nelson v. Canada*, 49 F.T.R. 260 (1991).

—Scott D. Wegner, Lakeville, MN

Moving cattle/Continued from page 1

that he had not “moved” cattle within the meaning of that term as defined under the regulations adopted pursuant to the CCDA. *Id.* at 468. The \$1,500 is back in his pocket, and we all have a better understanding of what it means to “move” cattle these days.

Agricultural Law Update

VOL. 13, NO. 6, WHOLE NO. 151 April 1996

AAIA Editor: Linda Grim McCormick
Rt. 2, Box 292A, 2816 C.R. 163
Alvin, TX 77511
Phone/FAX: (713) 388-0155
E-mail: hcx652a@prodigy.com

Contributing Editors: Christopher R. Kelley, Of Counsel, Lindquist & Vennum, P.L.L.P., Minneapolis, MN; Scott D. Wegner, Lakeville, MN; Linda Grim McCormick, Alvin, TX.

For AAIA membership information, contact William P. Babione, Office of the Executive Director, Robert A. Leslar Law Center, University of Arkansas, Fayetteville, AR 72701.

Agricultural Law Update is published by the American Agricultural Law Association, Publication office, Maynard Printing, Inc., 219 New York Ave., Des Moines, IA 50313. All rights reserved. First class postage paid at Des Moines, IA 50313.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Views expressed herein are those of the individual authors and should not be interpreted as statements of policy by the American Agricultural Law Association.

Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, Rt. 2, Box 292A, 2816 C.R. 163, Alvin, TX 77511.

Copyright 1996 by American Agricultural Law Association. No part of this newsletter may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage or retrieval system, without permission in writing from the publisher.

The CCDA prohibits the interstate transportation of livestock or poultry with any known “contagious, infectious, or communicable disease.” 21 U.S.C. § 115. Animals that react to a brucellosis test, however, may be shipped from one state to another for the purpose of immediate slaughter. *Id.* § 114a-1. The CCDA also authorizes the Secretary to “make such regulations and take such measures” as deemed necessary and proper to prevent the introduction or dissemination of any “contagious, infectious, or communicable disease” of animals and live poultry from one state to another. *Id.* § 111. Movement of contaminated animals in violation of these regulations is prohibited. *Id.* § 126. Violators of the CCDA or any regulation promulgated under it may be assessed a civil penalty of not more than \$1,000. *Id.* § 122.

The CCDA is administered on the Secretary’s behalf by the Animal and Plant Health Inspection Service (APHIS). Pursuant to the CCDA, APHIS has adopted regulations requiring, among other things, that livestock be moved only when accompanied by an appropriate health certificate. 9 C.F.R. § 78.9(b)(3)(ii) (1995). With respect to cattle, the “certificate must show the official eartag number, individual animal register breed association registration tattoo... brand... number, or similar individual identification of each animal to be moved....” 9 C.F.R. § 78.1. Cattle that have reacted to a brucellosis test may not be moved interstate to areas other than recognized slaughtering establishments or quarantined feedlots unless “[s]uch cattle are negative to an official test within 30 days prior to such interstate movement.” 9 C.F.R. § 78.9(b)(3)(ii).

The APHIS regulations define “moved” as “[s]hipped, transported, delivered, or received for movement, or otherwise aided, induced, or caused to be moved.” 9 C.F.R. § 78.1. As expressed in the preamble to the final publication of this definition in 1986, APHIS intended to “extend legal responsibility for violations to persons indirectly responsible for unauthorized movement, i.e., a veterinarian who prepares false documents or a seller who promises to have animals tested but does not.” 51 Fed. Reg. 32,574, 32,577 (1986).

At issue in *Culbertson* was whether an occasional cattle broker, Myles Culbertson, had “moved” cattle suspected of being vectors of brucellosis. In 1987, after learning that a New Mexico rancher was interested in selling approximately 600 head of cattle, Mr. Culbertson approached the rancher and offered to find a suitable buyer. He did not, however, agree to arrange for the animals’ health certification or transportation.

Subsequently, Mr. Culbertson located a prospective buyer’s broker, brought the broker to the ranch to inspect the cattle,

and negotiated a price. Although Mr. Culbertson was not aware of it, blood testing had revealed that fourteen of the cattle were suspected vectors of brucellosis.

Before any of the cattle were shipped, the rancher was informed of the test results. Nonetheless, the rancher loaded some of the cattle for shipment to South Dakota. At the request of owner’s son, Mr. Culbertson and the buyer’s broker followed the trucks transporting the cattle to a veterinarian where Mr. Culbertson picked up an envelope containing the health certificates and delivered it to the truckers. The truckers then left for South Dakota. Not having inspected the certificates, Mr. Culbertson did not know they were incomplete because they failed to identify the cattle by eartag.

Two days later, Mr. Culbertson again brought the buyer’s broker to the ranch where the remaining cattle were loaded for shipment. This shipment was delayed, however, because the first shipment had been denied entry into South Dakota. The suspect cattle were subsequently reclassified, thus making them eligible for interstate transportation. Thereafter, Mr. Culbertson drove the broker and a veterinarian to the ranch where, without Mr. Culbertson’s involvement, the cattle were inspected. The remainder of the cattle were then shipped to Nebraska, but at least twenty of them were not tested for brucellosis within the required thirty days before their interstate shipment.

After learning of all this, APHIS brought administrative proceedings against Mr. Culbertson, the buyer’s broker, the rancher, and others, claiming that they had improperly “moved” the cattle. Although the administrative law judge dismissed the petition against Mr. Culbertson, the USDA Judicial Officer reversed that dismissal and assessed a penalty of \$1,500 against Mr. Culbertson. The Judicial Officer premised the penalty on his conclusion that “Mr. Culbertson’s activities fit squarely within the prohibitions [in 7 C.F.R. § 78.1] against indirectly aiding, inducing, or otherwise causing movement [of the cattle].” 69 F.3d at 467 (citation omitted).

The Tenth Circuit began its review of the Judicial Officer’s decision with the inevitable, but appropriate, invocation of deference principles. Fortunately for Mr. Culbertson, however, the court also noted that “this principle of deference . . . is not absolute . . .” and that it “need not accept an agency’s interpretation of its own regulations if such interpretation is ‘unreasonable, plainly erroneous, or inconsistent with the regulation’s plain meaning.’” *Id.* (citation omitted).

Applying these standards to the Judicial Officer’s decision that Mr. Culbertson had “moved” cattle, the Tenth Circuit concluded that “the connection between

the conduct complained of and the illegal shipment of cattle is too tenuous to support liability under the Regulations." *Id.* at 468. The court characterized Mr. Culbertson's participation as variously that of a chauffeur, courier, and broker. *Id.* at 467, 468. It noted that Mr. Culbertson neither owned nor controlled the cattle nor did he influence the decisions leading to their interstate movement. He did not have the authority to arrange for the delivery of the cattle, and he did not assist in loading them. Instead, he merely advised the cattle owner on the sale, and, as a favor, picked up the health certificates and delivered them to the truckers without ever knowing of the infected cattle. *Id.* at 468. In sum, according to the court, the Judicial Officer's decision holding Mr. Culbertson liable "suggests" a strained interpretation of the regulation defining "moved": "Using the logic employed by the USDA, the Secretary conceivably could impose liability upon the sale barn owner, or a chauffeur who transports the parties to the negotiations, or a mail courier who delivers the health certificates or a ranch hand who is present during the loading of the infected cattle." *Id.*

It is said that the winters of 1885-86 and 1886-87 ended the open range by almost annihilating the cattle on it. "Almost in a moment the cattle range replaced the open range. The cowboy, now a cattleman or ranch employee, was penned in behind wire and no longer knew the joys and dangers of the long drive." Morrison, *supra*, at 404. These days, the long drives are on the interstate, and you better have your papers in order if you are doing the driving. Or did the Tenth Circuit leave that issue unresolved?

—Christopher R. Kelley, Of Counsel,
Lindquist & Vennum P.L.L.P.,
Minneapolis, MN

PSA/Continued from page 7

§ 182(9). A "poultry grower" is "any person engaged in the business of raising and caring for live poultry for slaughter by another, whether the poultry is owned by such person or another, but not an employee of the owner of such poultry." *Id.* § 182(8).

Prohibited trade practices

With respect to live poultry, live poultry dealers are subject to the same prohibitions against unlawful practices as apply to packers under section 192. GIPSA has adopted regulations pertaining to these prohibitions. See, e.g., 9 C.F.R. §§ 200.49, 201.53, 201.71-73, 201.76, 201.82, 201.100-108-1.

The enforcement authority provided to the Secretary in sections 193-195 does not apply, however, to live poultry dealers. By their terms, sections 193-195 apply only to enforcement actions against packers. Under the Act, the Secretary's enforcement authority against live poultry dealers is limited to seeking injunctive relief under section 228a. Under section 228a, the Secretary may

seek injunctive relief if he has reason to believe that:

(a) with respect to any transactions covered by this chapter, [a live poultry dealer] has failed to pay or is unable to pay for . . . live poultry, or has failed to pay any poultry grower what is due on account of poultry obtained under a poultry growing arrangement . . . ; or (b) has operated while insolvent, or otherwise in violation of this chapter in a manner which may reasonably be expected to cause irreparable damage to another person; . . . and that it would be in the public interest to enjoin such person from operating subject to this chapter or enjoin him from operating subject to this chapter except under such conditions as would protect vendors or consignors of such commodities or other affected persons . . .

7 U.S.C. § 228a. The Secretary, however, may report violations to the Attorney General, "who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay." *Id.* § 224.

Otherwise, the injured party may commence an action for damages in a federal district court. *Id.* § 209. Reparation proceedings are unavailable. See 7 U.S.C. § 210; *Jackson v. Swift Eckrich, Inc.*, 53 F.3d at 1455-57.

Statutory trust

The Act establishes a statutory trust for the benefit of unpaid cash sellers and poultry growers applying to all poultry obtained by a live poultry dealer, "unless such live poultry dealer does not have average annual sales of live poultry, or average annual value of live poultry obtained by purchase or by poultry growing arrangement, in excess of \$100,000." 7 U.S.C. § 197(h). The trust and the procedures for preserving it are similar to that for the benefit of unpaid cash sellers to packers. Compare 7 U.S.C. § 197 with *id.* § 196; see also 9 C.F.R. § 203.15 (providing the procedures for preserving trust benefits). The Secretary may enforce the statutory trust requirement through administrative proceedings. 7 U.S.C. § 228b-2(a), (b).

Prompt payment

Live poultry dealers are required to make prompt payment under a provision contained in section 228b-1:

[e]ach live poultry dealer obtaining live poultry by purchase in a cash sale shall, before the close of the next business day following the purchase of poultry, and each live poultry dealer obtaining live poultry under a poultry growing arrangement shall, before the close of the fifteenth day following the week in which the poultry is slaughtered, deliver, to the cash seller or poultry grower from whom such live poultry dealer obtains the poultry, the full amount due to such cash seller or poultry grower on account of such poultry.

7 U.S.C. § 228b-1. Delaying or attempting to delay the collection of funds is deemed an "unfair practice" in violation of the Act. *Id.* § 228b-1(b).

As with the statutory trust requirements, the Secretary may enforce the prompt payment requirements by initiating administrative proceedings. 7 U.S.C. § 228b-2. Live poultry dealers may seek judicial review of the Secretary's final enforcement order. *Id.* § 228b-3. Violation of a final order is a criminal offense. *Id.* § 228b-4. Injunctive relief may also be available under section 228a discussed above.

Records

Like packers, stockyard owners, market agencies, and dealers, live poultry dealers must maintain complete and accurate records of their transactions and their ownership. Failure to do so is a criminal offense. *Id.* § 221. GIPSA's regulations impose specific requirements for growout contracts, including their contents, condemnation and grading certificates; grouping or ranking sheets; and purchase invoices. 9 C.F.R. § 201.100.

This outline was prepared on January 6, 1996, for the Agricultural Law Institute, February 16, 1996, sponsored by the Agricultural Law Section of the Minnesota State Bar Association.

Conference Calendar

Agricultural Law Symposium

May 16-17, 1996, Garden City, Kansas Plaza Inn

Topics include: farm income tax developments, farm estate planning, water law, UCC, bankruptcy, oil and gas, real property issues.

Sponsored by: Kansas State University/Southern Plains.

For more information, call 913-532-1501.

Federal Register in brief

The following is a selection of items that were published in the *Federal Register* from February 20 to March 18, 1996.

1. Farm Service Agency; Intermediary relending program loan limits; interim rule with request for comments; comments due 4/22/96. 61 Fed. Reg. 6761.

2. Farm Service Agency; 1986-1990 Conservation Reserve Program; interim rule with request for comments; comments due 5/14/96. 61 Fed. Reg. 10671.

3. APHIS; Cattle exportations; tuberculosis and brucellosis test requirements;

interim rule with request for comments; comments due 4/23/96. 61 Fed. Reg. 6917.

4. FCIC; Noninsured crop disease assistance program; final rule; effective date 2/22/96. 61 Fed. Reg. 7193.

5. CCC; Regulatory reform initiative; programs eliminated; final rule; effective date 4/3/96. 61 Fed. Reg. 8207.

6. PSA; Amendment to certification of central filing system- Oklahoma; elk; effective date 2/26/96. 61 Fed. Reg. 8026.

—Linda Grim McCormick, Alvin, TX

The Packers and Stockyards Act: an overview

By Christopher R. Kelley

The Packers and Stockyards Act, 1921, 7 U.S.C. §§ 181-231 (1994), is intended to ensure fair competition and fair trade practices in the marketing of livestock, meat, and poultry. In broadly prohibiting monopolistic, unfair, deceptive, and unjustly discriminatory practices, the Act gives the Secretary of Agriculture "complete inquisitorial, visitatorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith." Harold M. Carter, *The Packers and Stockyards Act*, in 10 *Agricultural Law* § 71.01 at 71.05 (Neil E. Harl ed. 1989) [hereinafter Carter] (footnote omitted).

As remedial legislation, the Act is liberally construed. *E.g.*, *Bowman v. USDA*, 363 F.2d 81, 85 (5th Cir. 1966). The Secretary has "jurisdiction to deal with 'every unjust, unreasonable, or discriminatory regulation or practice' involved in the marketing of livestock." *Rice v. Wilcox*, 630 F.2d 586, 590 (8th Cir. 1980) (quoting 7 U.S.C. § 208(a)).

The Secretary has delegated responsibility for administering the Act to the Assistant Secretary for Marketing and Regulatory Programs who, in turn, has subdelegated that authority to the Administrator, Grain Inspection, Packers and Stockyards Administration (GIPSA). 60 Fed. Reg. 56,392, 56,415-17, 56,458-59 (1995) (final rules to be codified at 7 C.F.R. §§ 2.22, 2.61). GIPSA's regulations implementing the Act are codified at 9 C.F.R. pts. 201-203.

GIPSA's enforcement activities on behalf of the Secretary often result in formal administrative adjudications. Hearings are conducted by administrative law judges (ALJs), and the ALJ's decision may be appealed by the respondent to the USDA's Judicial Officer. *See* 7 C.F.R. §§ 1.130-.203 (containing the USDA's formal adjudication rules of practice). Final decisions of the USDA's Judicial Officer are published in *Agricultural Decisions* and are available in print and on database services such as WESTLAW.

The Act has two basic purposes. First, it is intended to protect the immediate financial interests of livestock and poultry producers by, among other things, ensuring that they are paid promptly based on accurate animal weights. In this respect, the Act serves to ensure the integrity of livestock and poultry marketing transactions. Second, the Act is intended to protect producers and consumers by prohibiting monopolistic or predatory practices.

The Packers and Stockyards Act and market concentration

The early 1900s and the "Big Five"

The Act's prohibitions against anticompetitive and unfair, deceptive, or unjustly discriminatory practices were a response to market concentration and anticompetitive practices in the beef-packing industry in the early 1900s. A major impetus for the Act was a 1919 Federal Trade Commission

(FTC) report concluding that the five largest meat packers, the "Big Five," had engaged in anticompetitive practices:

It appears that five great packing concerns of the country—Swift, Armour, Morris, Cudahy, and Wilson—have attained such a dominant position that they control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands....

The rapid rise of the packers to power and immense wealth and their present strangle hold on food supplies were not based necessarily on their ownership of packing houses, but upon their control of the channels of distribution, particularly the stockyards, private car lines, cold storage plants, and branch houses. Similarly the great profits which they have secured and are now securing are not primarily due to exceptional efficiency in operating packing houses and manufacturing plants, but are secured through their monopolistic control of the distributive machinery.

Campbell, *supra*. § 3.02 at 187-88 (quoting FTC, *Report of the Federal Trade Commission on the Meat Packing Industry* 392 (1919)).

The FTC recommended governmental ownership of the stockyards and their related facilities. Congress, however, chose a less drastic alternative and enacted the Packers and Stockyards Act in 1921, a year after the "Big Five" packers and others entered into a consent decree under the Sherman Act. *Id.* at 188; *see generally* Carter, *supra*, § 71.03 (discussing the consent decree).

The 1990s and the "Big Three"

Ironically, nearly seventy-five years after the enactment of the Packers and Stockyards Act, the meat packing industry "is now more concentrated than it was in 1921." *Oversight of Livestock Market*, *supra*, at 3. Today, however, the "Big Five" have become the "Big Three"—"ConAgra, IBP, and Excel, which together have 60 percent of beef-packing sales." Donald B. Pederson & Keith G. Meyer, *Agricultural Law in a Nutshell* 246 (1994); *see also* Wayne D. Purcell, *The Case of Beef Demand: A Failure by the Discipline*, Choices, 2d Quarter 1989, at 16, 17 ("Massive consolidation of packers, prompted at least in part by the difficult financial times, has quickly created a structure in which only 3 firms now produce over 80 percent of U.S. boxed beef.").

Most of this concentration occurred in the last twenty years. U.S. Gen. Accounting Office, *Beef Industry: Packer Market Concentration and Cattle Prices* 3 (Pub. No. RCED-91-28, Dec. 1990) [hereinafter *Packer Market Concentration*]. This increasing concentration is associated with a decline in the number of beef-packing firms. *Id.* at 4.

In addition to controlling a dominant market share, large beef packers have vertically linked with other sectors of the beef industry. For example, "the largest packers are now producing boxed beef themselves.... [and] beef packers have increasingly entered into forward contracts—contracts to purchase cattle at a future date—and special marketing agreements with feeders to

ensure a steady supply of fed cattle for slaughter." *Packer Market Concentration*, *supra*, at 5. "From 1988 to 1989, the percentage of cattle owned or partially controlled by the four largest packing firms prior to slaughter increased 4.4 percentage points, from 20.5 percent of the total slaughter to 24.9 percent." *Oversight of Livestock Market*, *supra*, at 19.

The sheep and lamb industry also has become concentrated. The four largest firms account for about 74% of the slaughter. The hog industry, however, is not as concentrated—"the four-firm ratio has remained relatively constant, ranging from 29 to 37%; in 1989, the ratio was 34%." *Id.* at 15.

Livestock and poultry production

The Packers and Stockyards Act defines "livestock" to include cattle, sheep, swine, horses, mules, or goats, both alive and dead. 7 U.S.C. § 182(4). The Act also applies to "poultry," including chickens, turkeys, ducks, geese, and other domestic fowl. *Id.* § 182(6).

Poultry production is almost totally vertically integrated, with individual firms handling all stages of production from breeding to processing. Feeding is typically done under contract with independent growers. *See generally* 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, 1208-10 (1995) (discussing poultry production contracts) (hereinafter Roth); Clay Fulcher, *Vertical Integration in the Poultry Industry: The Contract Relationship*, Agric. L. Update, Jan. 1992, at 4 (same).

Hog production is becoming more vertically integrated. "[O]ver 20% of swine are now produced under contract, up from only 2% in 1980." Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. Mem. L. Rev. 1051, 1056 (1995). Nonetheless, most hogs are still bred and fed by a single operation before being sold for slaughter and processing. About 70% are farrow-to-finish operations, and "hog operations with less than 100 head still account for 60 percent of all U.S. hog operations." Leland Southard and Steve Reed, *Rapid Changes in the U.S. Pork Industry*, Agric. Outlook, Mar. 1995, at 11, 12-13. The numbers of these small operations are declining, however. "In 1980, 670,000 farms produced hogs. Only 236,000 such farms remain." Chris Hurt, *Industrialization in the Pork Industry*, Choices, 4th Quarter 1994, at 9, 9 (noting also that these figures reflect a 65% "outmigration").

Cattle production has three phases—breeding, feeding, and slaughter. Breeding is typically done by "cow-calf" operations that breed cows for the production and sale of young steers and heifers. *Id.* at 2. The number of these operations has declined in the last decade. *Id.* at 5. "There are about 900,000 cow-calf operations in the U.S., with about one-third of the beef cows on family-owned operations of less than 50 cows." Teresa Glover & Leland Southard, *Cattle Industry Continues Restructuring*, Agric. Outlook, Dec. 1995, at 13, 15 [hereinafter Glover & Southard].

Christopher R. Kelley, of Counsel, Lindquist & Vennum, P.L.L.P., Minneapolis, MN.

Most cattle from cow-calf operations are fed at cattle-feeding operations before slaughter. See generally Frederick A. Vogel, *Cattle on Feed Estimates: Problems and Changes*, Choices, 4th Quarter 1992, at 11 (discussing estimates of cattle populations in feedlots). Feedlot operators either purchase the cattle they feed or custom feed cattle owned by cow-calf operations or others, including beef-packing firms. *Packer Market Concentration*, supra, at 2. "Currently, there are about 45,000 feedlots..., down 75 percent from 1970.... About 90 percent of beef cattle marketings currently come from feedlots with a capacity greater than 1,000 head.... Nationwide, there are at least 70 feedlots with capacity above 32,000 head...." Glover & Southard, supra, at 14. Economies of scale and technological advances, such as feed additives, computerized feed mills, and improved transportation, have encouraged the development of large-capacity feedlots. *Id.* at 14-15. The trend probably will continue. Mark Drabenstott, *Industrialization: Steady Current or Tidal Wave*, Choices, 4th Quarter 1994, at 4, 6 (predicting that cattle feeding will follow swine and poultry as the next livestock segment to become "industrialized").

Fed cattle are sold either to a beef-packing firm or a packing firm's agent, and about 80% of all cattle slaughtered are fed cattle. Packing firm operations differ. Most slaughter the cattle and fabricate the carcasses into boxed beef. Others purchase the carcasses and fabricate them into boxed beef. Some only slaughter the cattle and sell the carcasses. *Packer Market Concentration*, supra, at 2-3.

The Packers and Stockyard Act's provisions

The Packers and Stockyards Act contains four titles:

- Title I (7 U.S.C. §§ 181-183) provides general definitions;

- Title II (7 U.S.C. §§ 191-197) specifically addresses the practices of "packers" and "live poultry dealers";

- Title III (7 U.S.C. §§ 201-217a) specifically addresses the practices of "stockyards," "dealers," and "market agencies"; and

- Title IV (7 U.S.C. §§ 221-229) contains administrative and other requirements.

As suggested by the subjects of the Act's four titles, the Act regulates three segments of the livestock, meat, and poultry industry. First, it imposes comprehensive restrictions on the practices of "packers." Packers include buyers of livestock for slaughter, meat processors, and wholesale distributors of meats, meat food products, or livestock products in an unmanufactured form. Second, the Act regulates certain activities of "stockyard owners," "market agencies," and "dealers." "Stockyard" is broadly defined to include public markets for livestock producers and other facilities where livestock is received or held for sale or shipment in interstate commerce. A "market agency" is any person who buys or sells livestock on a commission basis or who furnishes stockyard services. A "dealer" is a person who buys or sells livestock on his own behalf or as the employee or agent of a buyer or seller. Third, the Act regulates certain activities of "live poultry dealers," persons who purchase live poultry or

who obtain live poultry under a poultry growing arrangement.

The sections that follow briefly explain how each of these segments is regulated under the Act. Also discussed are the procedures for enforcement of the Act's requirements.

As threshold matters, the term "person" includes individuals, partnerships, corporations, and associations. 7 U.S.C. § 182(1). The acts, omission, and failures of an agent are attributed to the principal. *Id.* § 223. The Secretary and the courts have used the *alter ego* doctrine to pierce the corporate veil to hold owners of corporations liable under the Act. *Bruhn's Freezer Meats*, 438 F.2d at 1343; *In re Sebastopol Meat Co., Inc.*, 28 Agric. Dec. 435, 441 (1969).

The Act also expressly defines when a transaction is deemed "in commerce." 7 U.S.C. § 183. It expressly preempts certain state authority but permits some state regulation. 7 U.S.C. § 228c.

Packers

Packer

The Packers and Stockyards Act defines a "packer" as any person "engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce." 7 U.S.C. § 191. A "packer," therefore, may include a person who purchases and then resells in the same form processed and packed meat in "sizes and quantities suitable for re-sale to institutions such as hospitals and schools and some restaurants and hotels." *Id.* (also ruling that the phrase "in an unmanufactured form" only modifies "livestock products"). Likewise, large supermarket chains that cut, grind, and wrap meat may be "packers." See *Safeway Stores, Inc. v. Freeman*, 369 F.2d 952, 954-55 (D.C. Cir. 1966). A freezer plant that cuts meat and wraps it in portions for sale to consumers may also be a "packer." See *Bruhn's Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332, 1336-39 (8th Cir. 1971). The retail sale of meat, however, is the primary responsibility of the FTC, even if a "packer" is involved. 7 U.S.C. § 227(b)(3); see also *Giant Foods, Inc. v. FTC*, 307 F.2d 184, 187 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963).

Bonds

Packers must be bonded unless their average annual purchases do not exceed \$500,000. 7 U.S.C. § 204; see also 9 C.F.R. §§ 201.29-34 (prescribing the terms and conditions of packer bonds). If the Secretary determines that a packer is insolvent, the Secretary may seek a cease and desist order prohibiting or limiting the packer from purchasing livestock. 7 U.S.C. § 204; see also 9 C.F.R. § 203.10 (statement of policy defining insolvency).

Prohibited trade practices

Packer practices are comprehensively regulated. Specifically, with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, packers may not:

(a) Engage in or use any unfair, unjustly dis-

crimatory, or deceptive practice or device; or (b) Make or give any undue or unreasonably preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

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

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

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

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

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

7 U.S.C. § 192 (also regulating "live poultry dealers" with respect to live poultry).

GIPSA's regulations add specificity to some of these prohibitions. For example, packers may not circulate misleading reports about market conditions or prices. 9 C.F.R. § 201.53. Purchases and sales on a weight basis must be based on actual weights. *Id.* § 201.55; see also *id.* §§ 201.71-76 (pertaining to scales, weighing, and reweighing). Packers may not, in connection with the purchase of livestock, "charge, demand, or collect from the seller of the livestock any compensation in the form of commission, yardage, or other service charge." *Id.* § 201.98. Packers may not own, finance, or participate in the management or operation of a market agency selling livestock on a commission basis. *Id.* § 201.67; see also *id.* §§ 203.19 (statement of policy with respect to packers engaging in the business of livestock dealers and buying agencies), 203.18 (statement of policy with respect to packers engaging in the business of custom feeding livestock). "[P]ackers and dealers engaged in purchasing livestock, in person or through employed buyers, ... [must] conduct ... [their] buying operations in competition with, and independently of, other packers and dealers similarly engaged." *Id.* § 201.70. Packers also must use reasonable care and promptness in the handling of livestock. *Id.* § 201.82. In addition, advertising allowances and other merchandising payments and services are subject to restrictions. *Id.* § 203.14. Finally, GIPSA has adopted policies

Continued on page 6

concerning meat packer sales and purchase contracts, the giving of gifts to government employees, and the disposition of records. *Id.* §§ 203.7, 203.2, 203.4.

The phrase "unfair, unjustly discriminatory, or deceptive practice or device" is not defined in the Act. Accordingly, the meaning of the words in the phrase "must be determined by the facts of each case within the purposes of the Packers and Stockyards Act." *Capital Packing Co. v. United States*, 350 F.2d 67, 76 (10th Cir. 1965) (citations omitted). Conduct that has been held to be "unfair, unjustly discriminatory, or deceptive" has included discriminatory pricing, *Swift & Co. v. United States*, 347 F.2d 53 (7th Cir. 1963); predatory pricing, *Wilson & Co. v. Benson*, 286 F.2d 891 (7th Cir. 1961); and deceptive advertising, *Bruhn's Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332 (8th Cir. 1971). A conspiracy to force auction stockyards to alter sale terms, *DeJong Packing Co. v. USDA*, 618 F.2d 1329 (9th Cir.), cert. denied, 449 U.S. 1061 (1980), and false weighing, *Barruss v. USDA*, 575 F.2d 1258 (8th Cir. 1978), also have been held to violate the Act. See generally Campbell, *supra*, §§ 3.45-.58 (discussing judicial applications of § 192); Carter, *supra*, § 71.08 (same).

Prompt payment

The Act imposes a prompt payment requirement on packers. As a general rule, full payment of the livestock's purchase price must be made "before the close of the next business day following the purchase of livestock and transfer of possession thereof...." 7 U.S.C. § 228b(a). This rule is qualified in two respects:

Provided, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price; Provided further, that if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

Id.; see also 9 C.F.R. § 201.43(b) (implementing the statutory prompt payment rule). This prompt payment requirement may be waived by written agreement. 7 U.S.C. § 228b(b); see also 9 C.F.R. §§ 201.200 (providing for the terms of credit sales agreements with respect to packers whose average annual purchases of livestock exceed \$500,000), 203.16 (statement of policy regarding the mailing of checks in cash purchases of live-

stock for slaughter). Any delay or attempt to delay the collection of funds is deemed an "unfair practice." 7 U.S.C. § 228b(c).

Packers must maintain records of their business transactions and other matters. *Id.* § 221.

Statutory trust

The Act also establishes a statutory trust for livestock purchased by a packer whose average annual purchases exceed \$500,000. The trust is for the benefit of unpaid cash sellers, and it extends to "all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom...." 7 U.S.C. § 196(b). "[A] cash sale means a sale in which the seller does not expressly extend credit to the buyer." *Id.* § 196(c). Because the trust assets do not become part of the bankruptcy estate if a packer files bankruptcy, unpaid cash sellers do not compete with secured creditors for the trust's assets.

To make a claim against the trust, the unpaid cash seller must give notice to the Secretary within thirty days of the final date for making payment under section 228b or within fifteen business days of being notified that the payment of a promptly presented check was dishonored. 7 U.S.C. § 196(b); see also 9 C.F.R. § 203.15 (statement of policy regarding the preservation of trust benefits). In fiscal year 1990, eighteen packing firms paid out more than \$4.7 million under the statutory trust provision. *Oversight of Livestock Market, supra*, at 29.

Enforcement

When the Secretary has reason to believe that a packer has violated the Act, the Secretary may commence formal administrative adjudicatory proceedings against the packer. 7 U.S.C. § 193(a). The proceedings are conducted under the procedures prescribed in 7 C.F.R. §§ 1.130-151. A cease and desist order may be issued, and civil penalties of up to \$10,000 may be assessed for each violation. 7 U.S.C. § 193(b). Judicial review is available in the federal court of appeals for the circuit where the packer resides. *Id.* § 194(a); see also 28 U.S.C. §§ 2342-2350 (Hobbs Administrative Orders Review Act).

Violation of a final cease and desist order is punishable by a fine and imprisonment. 7 U.S.C. § 195. The Secretary also has the authority to request a temporary injunction or a restraining order in certain circumstances. *Id.* § 228a.

Private parties may seek damages for any violation of the Act or of an order of the Secretary by commencing an action in federal district court. *Id.* § 209. Other statutory and common law claims may be asserted. See *id.* § 409(b). The doctrine of primary jurisdiction may apply, however. See, e.g., *Crain v. Blue Grass Stockyards Co.*, 399 F.2d 868, 871-73 (6th Cir. 1968); see generally 2 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* ch. 14 (3d ed. 1994 & Supp. 1995) (discussing primary jurisdiction); Bernard Schwartz, *Administrative Law* §§ 8.26-.32 (3d ed. 1991) (same).

Stockyards, market agencies, and dealers

Stockyards

"Stockyards" are defined in the Act as: any place, establishment, or facility commonly known as stockyards, conducted, operated, or

managed for profit or nonprofit as a public market for livestock producers, feeders, market agencies, and buyers, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held or kept for sale or shipment in commerce.

Id. § 202(a). A "stockyard owner" is any person "engaged in the business of conducting or operating a stockyard...." *Id.* § 201(a). "Stockyard services" are "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock...." *Id.* § 201(b).

A feedlot is not a "stockyard," at least when its owner receives no fees for assisting the cattle's owners in making sales directly to packers. See *Soloman Valley Feedlot, Inc. v. Butz*, 557 F.2d 717 (10th Cir. 1977). The USDA, however, takes a contrary view. *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 220-35 (1980) (holding that a custom feedlot that buys or sells livestock for its customers is subject to the Act); see generally Campbell, *supra*, § 3.41 at 235-36 (discussing *Soloman Valley Feedlot and Sterling Colorado Beef Co.*); Carter, *supra*, § 71.07[11] (same).

Market agencies

A "market agency" is any person "engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services." *Id.* § 201(c).

Dealers

A "dealer" is "any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser." *Id.* § 201(d). A person may be a "dealer" even if buying and selling livestock is not his or her only business. *Kelly v. United States*, 202 F.2d 838 (10th Cir. 1953); see also *United States v. Rauch*, 717 F.2d 448 (8th Cir. 1983) (distinguishing a "dealer" from a "rancher").

Stockyard postings

When the Secretary determines that a stockyard meets the statutory definition of a "stockyard," the stockyard is posted as such. *Id.* § 202(b); see also 9 C.F.R. §§ 201.5-6. Within thirty days of a stockyard's posting, market agencies and dealers must obtain written authorization from the stockyard owner to do business at the stockyard and must register with the Secretary. Otherwise, after the thirty-day period has expired, they must cease doing business at the stockyard. 7 U.S.C. § 203; 9 C.F.R. §§ 201.10-11.

Bonds

As a prerequisite to registration, market agencies and dealers must obtain a bond. 7 U.S.C. § 204; see 9 C.F.R. §§ 201.29-.34; *United States v. Wehrein*, 332 F.2d 469 (8th Cir. 1964). Registrants may not operate while insolvent. 7 U.S.C. § 204.

Prohibited trade practices

Reasonable and nondiscriminatory services and charges

Stockyard services furnished by a stockyard or

market agency must be "reasonable and nondiscriminatory," and such services may not be refused "on any basis that is unreasonable or unjustly discriminatory." 7 U.S.C. § 205; see also 9 C.F.R. § 203.12.

Rates or charges for stockyard services furnished at a stockyard by a stockyard owner or market agency must be "just, reasonable, and nondiscriminatory..." 7 U.S.C. § 206. Rates and charges must be filed with the Secretary and be open for public inspection. *Id.* § 207(a); see also 9 C.F.R. § 201.17. Changes in rates and charges also must be filed, and the Secretary may hold a hearing on the lawfulness of a rate or charge or any regulation or practice affecting a rate or charge. 7 U.S.C. § 207(e); see also 9 C.F.R. §§ 202.1-6 (establishing the rules of practice applicable to rate proceedings), 203.17 (statement of policy with respect to rates and charges at posted stockyards). If the Secretary determines that a rate, charge, regulation, or practice violates the Act, the Secretary may prescribe the appropriate rate or charge. 7 U.S.C. § 211. The same authority applies to rates, charges, regulations, or practices that discriminate between intrastate and interstate commerce. *Id.* § 212.

Stockyard owners and market agencies have the duty "to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services," and regulations and practices that are not just, reasonable, and nondiscriminatory are unlawful. 7 U.S.C. § 208(a). Stockyard owners must manage and regulate their stockyards so that persons buying and selling livestock at their stockyards "conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive market." *Id.* § 208(b).

Unfair, unjustly discriminatory, or deceptive practices

Stockyard owners, market agencies, and dealers may not:

engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

Id. § 213(a). GIPSA's regulations elaborate on the statute's prohibitions. For example, stockyard owners, market agencies, and dealers may not circulate misleading reports about market conditions or prices. 9 C.F.R. § 201.53. Purchases and sales must be based on actual weights when livestock are bought or sold on a weight basis. *Id.* § 201.55. Market agencies must sell livestock "openly, at the highest available bid..." *Id.* § 201.56(a), and are restricted from purchasing livestock from consignments, *id.* § 201.56(b)-(d). Market agencies' relationships with dealers and other buyers also are restricted. 60 Fed. Reg. 42,777, 42,779 (1995) (final rule to be codified at 9 C.F.R. § 201.61). Dealers and market agencies are restricted in the information they furnish to competitors. 9 C.F.R. § 201.69. Dealers must act independently of other dealers. *Id.* § 201.70. Dealers may not "charge, demand, or collect from the seller of... livestock any compensation in the form of commission, yardage, or other service charge."

Id. § 201.98. Scales, weighing, and livestock handling are also regulated. *Id.* §§ 201.71-82.

Violations of the prohibition against unfair, unjustly discriminatory, or deceptive practices may result in a cease and desist order and the assessment of a civil penalty up to \$10,000 for each violation. 7 U.S.C. § 213. Market agencies and dealers may also have their registration suspended "for a reasonable period." *Id.* § 204. Any person who is responsible for or participated in the violation on which an order of suspension was based may not register under the Act during the suspension period. 9 C.F.R. § 201.11.

"In determining the amount of the civil penalty to be assessed... the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business." 7 U.S.C. § 213.

The Judicial Officer's sanctions are judicially reviewable. *Ferguson v. United States Dep't of Agric.*, 911 F.2d 1273, 1275-78 (8th Cir. 1990). A violation is willful if a person carelessly disregards the Act's requirements. See, e.g., *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186-88 (1973). A stricter standard may apply in some circuits. See *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079-81 (4th Cir. 1991); *Capital Produce Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1991).

Prompt payment

Like packers, market agencies and dealers are subject to the prompt payment provisions of section 228b. The failure to make prompt payment is deemed an "unfair practice." 7 U.S.C. § 228b(c).

Financial irregularities may result in violations of sections 213(a) and 228b. For example, the issuance of insufficient funds checks is considered to be an unfair and deceptive practice in violation of section 213(a), and the resulting failure to pay when due and the failure to pay are considered violations of section 228b. *In re Jeff Palmer*, 50 Agric. Dec. 1762, 1773 (1991); *In re Richard N. Garver*, 45 Agric. Dec. 1090, 1095 (1986), *aff'd sub nom. Garver v. United States*, 846 F.2d 1029 (6th Cir.), *cert. denied*, 488 U.S. 820 (1988).

Accounts and records

Like packers, stockyard owners, market agencies, and dealers must "keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in... [their] business, including the true ownership of such business by stockholding or otherwise." 7 U.S.C. § 221; see also 9 C.F.R. §§ 201.43-49. The failure to make and maintain correct accounts, records, and memoranda is punishable by fine or imprisonment. 7 U.S.C. § 221. Annual reports regarding compliance with the Act may be required. 9 C.F.R. § 201.94.

Compliance with the Secretary's orders

Stockyard owners, market agencies, and dealers must obey orders made by the Secretary under sections 211 (relating to rates, charges, regulations, or practices), 212 (relating to discrimination between intrastate and interstate commerce), and 213 (relating to unfair, unjustly discriminatory, or deceptive practices). 7 U.S.C. § 215. Civil penalties of \$500 may be assessed for each of-

fense, and, in the case of a continuing violation, each day is deemed a separate offense. *Id.*

The Secretary or any injured party is authorized to seek an injunction against any stockyard owner, market agency, or dealer who fails to obey "any order of the Secretary other than for the payment of money while the same is in effect..." *Id.* § 216. Orders of the Secretary, other than orders for the payment of money, take effect in not less than five days and remain in effect for the time specified in the order, unless suspended, modified, or set aside by the Secretary or set aside by a court. *Id.* § 214.

Custodial accounts

The statutory trust provisions applicable to livestock purchases by packers do not apply to market agencies and dealers. Nonetheless, payments made by a livestock buyer to a market agency selling on commission are deemed trust funds and must be deposited in a custodial account. 9 C.F.R. § 201.42(a), (b). Deposits and withdrawals from custodial accounts are regulated. *Id.* § 201.42(c), (d).

Reparation proceedings

A person injured by a stockyard owner's, market agency's, or dealer's violation of the Act or order of the Secretary relating to the purchase sale, or handling of livestock or the purchase or sale of poultry may commence an action in federal district court "for the full amount of damages sustained in consequence of such violation." 7 U.S.C. § 209(a), (b). The action may be subject to the doctrine of primary jurisdiction. See, e.g., *McCleneghan v. Union Stockyards Co.*, 298 F.2d 659 (8th Cir. 1962).

Alternatively, persons complaining of a violation of the Act or an order of the Secretary by a stockyard owner, market agency, or dealer may commence a reparation proceeding for money damages. *Id.* §§ 209(b), 210. By the Act's terms, reparation proceedings are not available against packers and live poultry dealers. See *Jackson v. Swift Eckrich, Inc.* 53 F.3d 1452, 1455-57 (8th Cir. 1995).

To initiate a reparation proceeding, the complaint must be filed within ninety days after the cause of action accrues. 7 U.S.C. § 210(a). The rules of practice for reparation proceedings, including the requirements for the contents and filing of the complaint, are set forth at 9 C.F.R. §§ 202.101-123. See generally Campbell, *supra*, § 3.83 at 318-20.

Live poultry dealers

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

Id. § 182(10).

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..." *Id.*

Continued on page 3

CORRECTION REQUESTED
ADDRESS

219 New York Avenue
Des Moines, Iowa 50313



AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

The American Agricultural Law Association and the Agricultural Management Task Force of the American Bar Association Section on Natural Resources, Energy, and Environmental Law will co-sponsor a seminar entitled **Farm Management: A Whole-Farm Plan Case Study** on June 5, 1996 at the Ritz-Carlton Hotel in Kansas City, Missouri. The seminar will explore the vexing issues of the impact of environmental laws upon agricultural entities by using a detailed case study of a fictional farm. Speakers will address the practical application of the Clean Water Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the federal hazardous waste laws, the Federal Food Drug & Cosmetic Act, and international trade treaties to management and horticultural decisions for this fictional "case-study" farm.

As a member of the AALA, you should receive the brochure on this CLE seminar in your mail shortly. The brochure will provide full and complete details about topics, speakers, and fees. If you do not receive a brochure, or desire additional information after receiving the brochure, please call William P. Babione, the AALA Executive Director (501-575-7389) or Drew L. Kershen, the AALA President (405-325-4784). The AALA looks forward to your attendance at this excellent seminar.