

Livestock and Poultry Deals Gone Wrong

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1. Packers and Stockyards Act - Who is regulated?

- a. Livestock Markets (a.k.a. stockyards or market agencies selling on commission) (7 USC § 201)
 - i. Includes online auctions handling funds and receiving commission (if annual livestock sales exceed \$500,000)
- b. Packers (7 USC § 191)
- c. Dealers and Order Buyers (a.k.a. market agencies buying on commission) (7 USC § 201)
 - i. Dealers buy and quickly resell
 - ii. Order buyers act as agent buying on behalf of a principal
- d. Swine Contractors (7 USC § 192)
- e. Live Poultry Dealers (7 USC § 192) (e.g., poultry processors)
- f. Farmers and Feedyards are not covered (*See Solomon Valley Feedlot, Inc. v. Butz*, 557 F.2d 717 (10th Cir. 1977))

2. Packers and Stockyards Act - What is required?

- a. Financial Protection
 - i. Prompt Payment for purchase of livestock (7 USC §228b)
 1. Pay in full by close of next business day after sale
 - a. Often by a check in the mail but also can be wire transfer
 - b. "Other expeditious method" added in 2017
 2. Parties to a livestock transaction may waive the prompt payment requirements through a written agreement (7 USC § 228b(b))
 - ii. Prompt Payment for Live Poultry (7 USC § 228b-1)
 1. Cash Sales – pay in full by close of next business day after sale
 2. Poultry Growing Arrangement (contract) – pay in full by close of 15th day following the week of slaughter
 3. Parties may not waive prompt payment requirements through written agreement
 - iii. Bond (7 USC § 204 ; 9 CFR § 201.30)
 1. 2 days of business, but formula limits required bond of market agencies after \$75,000 to 10% of the overage
 2. Often does not provide significant recovery
 - iv. Markets Keep Custodial Account for Trust Funds (9 CFR § 201.42)
 1. Only permissible withdraws are to pay consigners, other lawful charges (e.g. beef checkoff), and compensation due to the market (commission and yardage)
 - v. Packer Statutory Trust (7 USC § 196)

1. When selling to a packer, livestock, proceeds, and meat products are held in trust for unpaid seller of livestock
- vi. Solvency Requirement (9 CFR §203.10)
 1. Current assets exceed current liabilities
- b. Competition and Transparency
 - i. Unjust, unreasonable, unfair, deceptive, or discriminatory practices are prohibited (7 USC § 213; 7 USC § 208)
 - ii. Markets publish rates (7 USC § 207)
 1. Tariffs are posted online
 - iii. Scale requirements (9 CFR §201.71)
 1. Accuracy tested twice annually
- c. Poultry and Swine Contract Transparency Provisions
 - i. Cancellation - (7 USC § 197a(a)(1))
 1. Right to cancel contracts within 3 business days (or other period specified in contract) after execution
 - ii. Additional Capital Disclosures (7 USC § 197a(b))
 1. Notify contract grower of additional large capital investments that may be required
 - iii. Arbitration – (7 USC § 197c)
 1. If a contract contains mandatory arbitration clause, the contract grower must have the option to decline to be bound by arbitration to resolve conflicts

3. Application in litigation

- a. The Packer Statutory Trust. In Re Gotham Provision Co., Inc. 669 F.2d 1000 (5th Cir. 1982)
- b. Livestock Dealers and Auction Companies
 - i. In re Eastern Livestock Co., 2012 WL 3062741 (Bankr. S.D. Ind. 2012)
 - ii. Rezac Livestock Commission Co., Inc. v, Pinnacle Bank, 5:15-cv-04958-DDC (D. Kan. Dec. 23, 2019)

4. Application in administrative proceedings

- a. What happens when a transaction goes wrong?
 - i. Common Violations
 1. Failure to pay for livestock in full by next business day (7 USC §§ 213(a) & 228b)
 - a. Often a continuing violation – seller is never paid in full (bond rarely covers amount due)
 - b. Violation exists even if sellers are later paid in full
 2. Failure to maintain accurate scales ((7 USC §§ 192(a), 221b, 9 CFR §§ 201.71, 201.99)
 - a. Can lead to significant losses for sellers if scale issues persist for long periods of time
 3. Manipulating Shrinkage

- a. Arises with dealers – purchase cattle on one shrinkage basis, sell on another shrinkage basis
- ii. Packers & Stockyards Division Approach
 - 1. Primary focus is on protecting the seller
 - a. Require payment in full – to avoid suspension
 - i. P&SD will still consider buyer in violation if transaction has been resolved under state law (e.g., settled for fraction of amount owed)
 - ii. Compensate sellers to make up loss from inaccurate scales (records are important to ID sellers)
 - iii. Compensate sellers to make up losses due to manipulation of shrinkage
- iii. Enforcement Options
 - 1. Notice of Violation
 - a. Provides notice of alleged violation and demands correction of errors. No penalty sought.
 - i. Mostly used to address issues not involving unpaid sellers
 - 2. Stipulation Agreements
 - a. Settlement agreement with civil penalties
 - b. Resolved prior to filing complaint with USDA ALJ
 - 3. Administrative Action
 - a. AMS files complaint with USDA ALJ alleging violations
 - b. Respondent has right to hearing
 - c. Opportunity to appeal to USDA Judicial Officer, U.S. Court of Appeals
 - 4. Federal Courts
 - a. Dept. of Justice can bring lawsuits, criminal actions against alleged violations
 - i. Price-fixing
- iv. Penalties
 - 1. Cease-and-desist orders
 - 2. Suspension of licenses (market agencies, dealers only)
 - 3. Civil penalties
 - a. \$29,270 per violation
 - b. Poultry trust only - \$85,150 per violation
 - 4. Jail, fines, permanent injunctions
 - a. DOJ options

5. Packers and Stockyards Act – Potential Updates

- a. Securing All Livestock Equitably (SALE) Act (H.R. 6067 / S. 3419) would create a Dealer Statutory Trust
 - i. If passed, would provide unpaid sellers of livestock priority in livestock and proceeds when selling to a livestock dealer.
- b. Proposed Rule – Undue and Unreasonable Preferences and Advantages
 - i. Defines conduct in violation of P&S Act 202b (7 USC § 192(b))
 1. It is a violation to: “make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect”
 - ii. Mandated by 2008 Farm Bill – prior versions delayed by Congress, withdrawn by Trump Administration
 1. Primarily concerns poultry, swine contracts, but can be applied to all livestock/poultry transactions
 - iii. Identifies four criteria to evaluate whether an undue preference or advantage is provided (AMS will not limit interpretation to these criteria):
 1. whether the preference or advantage under consideration cannot be justified on the basis of a cost savings related to dealings with different producers, sellers, or growers;
 2. whether the preference or advantage under consideration cannot be justified on the basis of meeting a competitor’s price;
 3. whether the preference or advantage under consideration cannot be justified on the basis of meeting other terms offered by a competitor.
 4. whether the preference or advantage under consideration cannot be justified as a reasonable business decision that would be customary in the industry.