'FOWL' PLAY IN THE POULTRY BUSINESS: HOW MONOPSONY MARKET CONDITIONS NEGATE MUTUAL ASSENT IN PRODUCTION CONTRACT AGRICULTURE

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ABSTRACT

Commercial poultry production in the United States operates on a contract system where each flock of chicks arrives to a poultry farmer along with a contract stating the specific terms and conditions by which those growers must adhere to secure final payment upon weighing the grown-out birds. In and of itself, this system adheres to basic contracting principles. However, a closer look reveals that the system traps growers into a vicious cycle of debt and predatory contracting. Farmers invest millions of dollars building chicken growout infrastructure only to find they have two or few companies offering them contracts. They have little choice but to accept any contract offered to them, even if the terms are less than stellar. Further, at the time of initial contracting, they may not understand that their final payment depends on comparisons with other growers, who may or may not have had equal access to feed, medicines, and other inputs during the growout process. In some cases, this system, termed the "tournament system," may prevent growers from being paid at all. Additionally, while the Packers and Stockyards Act was enacted to protect competition around livestock production, lackluster enforcement over the years has allowed broiler production companies to consolidate and exert further pressure on growers to accept unfavorable contract terms. This Article examines how concentrated monopsony market conditions along with poor enforcement of Packers and Stockyards Act competition protections have essentially negated the fundamental contracting principle of mutual assent—voluntary intent to be bound. It also proposes solutions for passage of the upcoming Farm Bill; enforcing Packers and Stockyards rules already in place; employing the Sherman Act to further prevent consolidation; and, adopting the Captive Supply Rule ("WORC") rule to prevent and break up vertical integration of poultry markets. Currently, poultry growers cannot meaningfully negotiate or assent to any contract terms offered to them in a monopsony market. Without steps to restore competition, they still may never be able to do so in the future.

I. INTRODUCTION

"If it really came down to it," recalls Alton Terry, a former chicken grower for Tyson Foods, "and I couldn't get justice through the system, that I had a life

insurance policy that would pay off all my debts and leave my family without having this type of debt."[1] Terry suspected foul play when Tyson Foods weighed his finished poultry, so he tried to watch the process first-hand.[2] But when Terry repeatedly tried to gain access to Tyson's plant, they refused him access.[3] After filing a complaint with the Grain Inspection Division of the Packers and Stockyards Administration, Tyson delayed its next flock placement of chicks to Terry's farm, costing him upwards of $30,000 in lost revenue.[4] Tyson then informed Terry that they would not be placing any new flocks with his farm apparently "because of his confrontational behavior toward Tyson's representatives."[5] Terry initiated a lawsuit against Tyson to recover damages from the missed flock of birds.[6] When Terry listed his farm to try and stave off bankruptcy, Tyson indicated that any would-be purchaser of Terry's operation would have to make "costly and unnecessary changes" should they want to continue chicken farming.[7] This provision made it all but impossible for Terry to sell. Trapped in an unthinkable situation with mounting debt and no way out, Terry says he attempted to sacrifice the only thing he had left to save his family and his farm: his life; "Yeah," Terry recounts, "I did try to commit suicide."[8]

Stories like Alton Terry's expose the truth of how big agriculture[9] systems, also known as "large-scale agriculture," bear almost no resemblance to green pasture-adorned meat labels at the local grocer.[10] In the case of chicken production, growers pack thousands of immature chicks into huge barns every six to eight weeks, growing them as large as they can as fast as possible.[11] The bigger the

1. *Watch Under Contract: Farmers and the Fine Print*, RURAL ADVANCEMENT FOUND. INT'L, at 47:35 (Feb. 22, 2024, 8:22 AM), https://www.rafiusa.org/programs/challenging-corporate-power/undercontract/ [https://perma.cc/7LMG-A28N].

2. Terry v. Tyson Farms, Inc., 604 F.3d 272, 275 (6th Cir. 2010).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Watch Under Contract: Farmers and the Fine Print*, *supra* note 1, at 47:47.

9. *See generally* Cynthia Kurtz, *Big Agriculture*, ALLSIDES (Oct. 2, 2022, 3:28 PM), https://www.allsides.com/translator/big-agriculture [https://perma.cc/Y67J-P4U7] (explaining that the term "Big Agriculture" has been used as a "pejorative term used to imply that large agricultural corporations have more power than is fair or safe").

10. *Id.*

11. *See* Chase Purdy, *After Years of Designing Fatter Birds, Food Companies are Finally Realizing Chickens Shouldn't Grow So Fast*, QUARTZ (Mar. 1, 2017), https://qz.com/922309/how-chicken-farming-works-and-why-companies-like-whole-foods-

chickens grow on the least amount of feed, the more the farmer receives in payout.[12] For with every flock of chicks, growers sign a new contract with the company.[13] However, the contracts companies provide are boilerplate "take-it-or-leave-it" contracts, with little or no negotiation.[14] If growers attempt to negotiate the terms or alter the contract, companies respond by cancelling their accounts entirely.[15] If growers complain, like Alton Terry did, that they suspect foul play on the part of the companies, they may find themselves on the brink of bankruptcy.[16] In most cases, since only few chicken companies dominate the majority of the industry, chicken farmers cannot find another company to work with after they have been effectively fired from one.[17] The growers have a choice: accept less-than-favorable contracts or face the imminent threat of losing their farm.[18] This extraordinary power imbalance between companies and growers means growers accept the terms of each flock's contract as they are provided or choose to go bankrupt.[19] In the end, today's poultry contract production system disallows growers from fairly contracting with companies and because they experience neither a valid offer nor a valid acceptance, mutual assent—the fundamental basis of fair contracting—has all but been eliminated due to monopsonistic market

wfm-chipotle-cmg-and-tyson-foods-tsn-are-now-realizing-chickens-shouldnt-grow-so-fast [https://perma.cc/75Y8-LJ2Z] ("For decades, it's been a race: How could we make chickens grow a lot fatter a lot faster? It was all about feeding the largest number of people. And for the most part—whether it was pleasant for the birds or not—we have gotten pretty good at it.").

12. Alison Moodie, *Fowl Play: The Chicken Farmers Being Bullied by Big Poultry*, THE GUARDIAN (Apr. 22, 2017, 9:00 AM), https://www.theguardian.com/sustainable-business/2017/apr/22/chicken-farmers-big-poultry-rules [https://perma.cc/87UQ-N3RQ].

13. *See id.*

14. Robert Taylor, ALFA Eminent Scholar in Agric. and Pub. Pol'y at Auburn Univ., Remarks at the Panel on Monopsony, Fed. Trade Comm'n & Dep't of Just. Joint Workshop on Merger Enforcement 215–16 (Feb. 17, 2004), https://www.ftc.gov/sites/default/files/documents/public_events/ftc/doj-joint-workshop-merger-enforcement/040217ftctrans.pdf [https://perma.cc/HV9Y-DAEB] ("The integrator specifies contract terms. There is absolutely no negotiation. The grower is forced to accept whatever contract terms the integrator offers, and they change that when they see fit. And there are very few opportunities for a grower to change to another integrator because of the pay system. And the fact that an integrator doesn't have to deliver chicks, means that the growers can instantly be made bankrupt.").

15. *See id.*

16. Moodie, *supra* note 12.

17. Taylor, *supra* note 14, at 211 ("The last five or 10 years there has been massive consolidation—horizontally and vertical—in the global food system."); Moodie, *supra* note 12.

18. Taylor, *supra* note 14.

19. *Id.* at 214–16.

conditions.[20] In short, thanks to a highly-concentrated market, poultry companies have all the power and extract all the revenue while growers take on all the debt to only receive a fraction of the profits.[21]

Part II of this Article explains how contract production operates in general, the history of legislation enacted to protect competition, and specific legislation enacted to protect competition, specifically amongst meatpackers and growers. Part III explains how trending concentration and monopsony market conditions have expanded due to the failure to enforce pro-competition legislation. It also explains how, despite the broad and sweeping power Congress gives to the USDA to regulate meatpackers, the agency has failed to adequately protect growers from unfair contracts. Part IV describes how those market conditions, as created by lackluster antitrust enforcement, have negated the ability of chicken growers to meaningfully negotiate their production contracts and have essentially negated any true notion of mutual assent. Finally, Part V makes proposals for possible reforms to correct the fundamental power imbalance growers currently experience from poultry companies contracting under monopsonistic conditions.

II. HISTORY

Livestock, commodities, and farm goods were not always grown under production contracts with large companies.[22] However, a multitude of factors have led to sharp decreases in the family farm and increased consolidation of large farm conglomerates through concentrated agricultural feeding operations (CAFOs).[23] These large operations allow companies to consistently produce vast quantities of similar-quality products at a stable price, protecting their bottom line.[24] This part will explain how large-scale commodities are managed by companies and how contract agricultural production operates. It will then explain the "tournament"

20. *See id.* at 220–21.

21. *Id.* at 248–49.

22. JAMES M. MACDONALD & WILLIAM D. MCBRIDE, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV., THE TRANSFORMATION OF U.S. LIVESTOCK AGRICULTURE: SCALE, EFFICIENCY, AND RISKS 1 (2009), https://www.ers.usda.gov/webdocs/publications/44292/10992_eib43.pdf?v=0 [https://perma.cc/4KPW-DU6V].

23. Owen Walsh, *What is a CAFO (Concentrated Animal Feeding Operation)?*, THE HUMANE LEAGUE (May 23, 2022), https://thehumaneleague.org/article/what-is-a-cafo [https://perma.cc/79XQ-7XXY] ("On CAFOs, animals, feed, manure, urine, dead animals, and production operations all congregate on one small land area."); MACDONALD & MCBRIDE, *supra* note 22, at 1, 3 ("Large CAFOs are defined by animal inventories—at least 700 dairy cattle, 1,000 beef cattle, 2,500 pigs if they weigh over 55 pounds or 10,000 if they do not, and 30,000 broilers if the AFO has a liquid manure handling system or 125,000 if it does not.").

24. MACDONALD & MCBRIDE, *supra* note 22, at 1–2.

system by which growers are compared to one another to determine their final payout.[25] Throughout this Article, the terms "growers" and "farmers" are used interchangeably and refer to the same entity: a person or persons who contracts with a large company to manage the livestock growout process.

A. Contract Production Agriculture

Over the years, contract production has slowly surpassed the local, family farm.[26] Raising livestock under contract has been on the rise since 1950, seeing an 80% increase between 1950 and 1955.[27] Now, it makes up a large percentage of production in the United States. According to the United States Census of Agriculture from 2012, 96% of chickens raised for meat, known as "broilers," are now raised under production contracts.[28] In 2017, the USDA estimated that contracts control one-third of agricultural production, with a concentration in livestock.[29]

Two types of contracts operate under the umbrella of "contract agriculture."[30] First, marketing contracts are agreements by which the farmer or grower continues to own the commodity while they are in process of producing it.[31] Alternatively, production contracts are those in which the grower or farmer does not own the commodity while it is being grown.[32] The latter of the two will be the type analyzed in this Article.

25. Taylor, *supra* note 14, at 215.

26. *See generally* MACDONALD & MCBRIDE, *supra* note 22 (stating livestock agriculture has undergone a striking transformation. Today, meat and dairy products typically originate on farms whose herds of cattle or hogs, or flocks of chickens, are much larger than in the past. These enterprises usually house a single species in buildings or in open-air pens and provide them with feed that has been purchased rather than grown onsite.).

27. Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 Fed. Reg. 60010, 60013 (proposed Oct. 3, 2022) (to be codified at 9 C.F.R. pt. 201).

28. NAT'L. AGRIC. STAT. SERV., U.S. DEP'T OF AGRIC., POULTRY AND EGG PRODUCTION 2 (2015) [hereinafter POULTRY AND EGG PRODUCTION], https://www.nass.usda.gov/Publications/Highlights/2015/Poultry_and_Egg_Production.pdf [https://perma.cc/4S4L-EVQ4].

29. James M. MacDonald & Christopher Burns*, Marketing and Production Contracts Are Widely Used in U.S. Agriculture*, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV. (July 1, 2019), https://www.ers.usda.gov/amber-waves/2019/july/marketing-and-production-contracts-are-widely-used-in-us-agriculture/ [https://perma.cc/FHA9-5AD3].

30. *Id.*

31. *Id.*

32. *Id.*

When chicken growers contract with a large company, that company is known as an "integrator."[33] Following an investment in housing and infrastructure, the integrator will invite a grower to contract with them for delivery of flocks and growout production.[34] Integrators provide "inputs" such as immature animals, feed, veterinary services, medicines, and advice.[35] Over the six to eight weeks that the contract grower manages chicken growout, integrators deliver everything the animals need while the grower administers those inputs according to the guidelines the integrator provides.[36] Each grower's goal is to grow the largest chickens possible with the smallest amount of input to maximize their final payment.[37] After the chickens have been picked up and weighed, the grower then receives a final settlement payment calculated by the integrator.[38] Currently, the integrator is not required to disclose how they calculate final payments, the details of the quality of inputs they provide to each grower, or even the financial health of the integrator itself.[39]

B. Regulatory Legislation for Contract Poultry Farming

1. Sherman Act

Antitrust enforcement for meatpackers and meat commerce in the United States developed under the shadow of the anti-monopoly movement.[40] The Sherman Act was passed on July 2, 1890, stating "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize

33. Poultry Growing Tournament Systems: Fairness and Related Concerns, 87 Fed. Reg. 34814 (proposed June 8, 2022) (to be codified at 9 C.F.R. pt. 201) ("Integrators provide growers with birds and feed; and growers provide facilities and labor to raise birds to slaughter weight. Grower compensation is based on a grouping, ranking, or comparison of poultry growers whose poultry was harvested during a specified period, usually one week.").

34. *See* POULTRY AND EGG PRODUCTION, *supra* note 28.

35. MICHAEL KADES, WASH. CTR. FOR EQUITABLE GROWTH, PROTECTING LIVESTOCK PRODUCERS AND CHICKEN GROWERS 9 (2022), https://equitablegrowth.org/wp-content/uploads/2022/05/050522-packers-stockyards-report.pdf [https://perma.cc/AY8T-YXNJ].

36. *See id.*

37. *See id.*

38. *See generally id.*

39. Transparency in Poultry Grower Contracting and Tournaments, 88 Fed. Reg. 83210 (Nov. 28, 2023) (to be codified at 9 C.F.R. pt. 201).

40. *See* Martha C. White, *Momentum is Building for Antitrust Reform. Here's What that Means for Big Tech*, TIME (Nov. 12, 2021, 12:55 PM), https://time.com/6116953/antitrust-reform-big-tech-congress-biden/ [https://perma.cc/L9ZW-KYXV].

. . . shall be deemed guilty of a felony, . . .” a fine, or both.[41] At first, courts enforced the Sherman Act literally, banning combinations and agreements even when the trade restraints companies implemented were reasonable.[42] The courts deemed any agreement between entities in a cartel for the purposes of restraining trade as illegal on its face and a per se violation of the Sherman Act.[43] However, beginning with *Standard Oil Co. of New Jersey v. United States* in 1911, the courts adopted a new approach to determining whether a combination or agreement in restraint of trade violated the Sherman Act.[44] In *Standard Oil*, Justice Edward White, writing for the majority, introduced the “rule of reason” analysis when deciding whether an agreement violated the Sherman Act.[45] Introducing the idea that a court could balance pro-business justifications, Justice White asked whether there was any “room for the exercise of judgment” and hinted that the statute may not “impose[] the plain duty of applying its prohibitions to every case within its literal language.”[46] After Justice White issued the *Standard Oil* opinion, courts began employing a rule of reason approach to bless agreements, combinations, and cartel-like activity that previously they would have found unlawful.[47]

While immediate decisions after its enactment centered on blanket illegality of naked trade restraints, post-*Standard Oil*[48] courts continued to introduce even fewer illegal combinations under the Sherman Act by employing a “quick-look” approach and expanding the rule of reason.[49] After the introduction of the rule of reason, courts began to use a sliding scale methodology when analyzing trade restraints.[50] That is, instead of deeming an agreement or combination per se illegal on its face or applying the in-depth pro-competitive and business justification balancing test, they began to take a quick-look at the conduct to first determine if

41. Sherman Act, 15 U.S.C. § 2.

42. *See, e.g.*, United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290 (1897) (finding that even if a passage rate is reasonable, the agreement between companies restrains trade and qualifies as a per se violation under the plain meaning of the Sherman Act); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff’d as modified*, 175 U.S. 211 (1899) (finding an agreement to divide up territories in order to fix prices was unlawful under the Sherman Act because it was a naked restraint on trade).

43. *See Addyston Pipe & Steel Co.*, 85 F. at 301.

44. *See generally* Standard Oil Co. v. United States, 221 U.S. 1 (1911).

45. *Id.* at 66.

46. *Id.* at 63.

47. *See generally* United States v. U.S. Steel Corp., 251 U.S. 417 (1920).

48. *Standard Oil Co*., 221 U.S. at 80.

49. *See generally U.S. Steel Corp.*, 251 U.S. 417; Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933), *overruled by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).

50. Cal. Dental Ass’n v. Fed. Trade Comm’n, 526 U.S. 756, 763 (1999).

a rule of reason analysis is warranted.[51] Over the years, antitrust enforcement through the courts has loosened; now most courts consider pro-business justifications and rule of reason or quick-look approaches to alleged antitrust violations, seeming to move away from finding strict per se violations.[52]

2. The Packers and Stockyards Act (PSA)

In 1905, fifteen years after passing the Sherman Act, the court's decision in *Swift & Co. v. United States* spurred a new era of legislation aimed at regulating untoward activities by domestic meatpackers.[53] In *Swift*, the court held that defendant meatpackers engaged in various conduct that restrained trade and made up an entire scheme that was unlawful under the Sherman Act.[54] Qualifying conduct included making arrangements with railroads for an exclusive advantage; agreeing not to bid against each other in the open market after bidding up the price to induce cattlemen to send their stock to the stockyards; restricting shipments; establishing uniform rules of credit amongst them; and fixing prices all for the purpose of excluding competitors.[55] The court distinguished between each individual act of unlawful conduct in violation of the Sherman Act and applied it to the scheme restraining trade on the whole.[56] Furthermore, the analysis focused on the intent of the meatpackers' conduct and found that the meatpackers' conduct was so egregiously anticompetitive that it could not be justified by pro-business efficiency arguments.[57]

51. *Id.* In *California Dental*, the court decided that rather than immediately applying the rule of reason analysis, they should first take a quick look at the conduct of the association to determine whether it would justify that kind of in-depth analysis. The court found that this kind of quick-look is more appropriate if a court could easily ascertain whether trade restraints would produce an anticompetitive effect on consumers and markets. But the determination is not a binary, rather it's a sliding scale of the anticompetitive effects of the association's conduct. *Id.*

52. *Id.*

53. Swift & Co. v. United States, 196 U.S. 375, 398 (1905).

54. *Id.*

55. *Id.* at 394–95.

56. *Id.* at 396 ("We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can. The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful.").

57. *Id.*

Following the *Swift* decision, the Federal Trade Commission (FTC) initiated a study of the meatpacking industry and uncovered rampant unlawful combinations, unfair competition, attempts to monopolize, and other grave violations of the law.[58] They found that only five meatpackers held a "dominating or monopolistic power" over all meatpacking trade in the United States.[59] The FTC study was a "major impetus" for the passage of the PSA.[60] Even though the Sherman Act should have prohibited meatpacker collaboration in service of anticompetitive conduct, the FTC found that:

> The producer of live stock is at the mercy of these five companies because they control the market and the marketing facilities and, to some extent, the rolling stock which transports the product to the market . . . .[61]
>
> The power of the Big Five in the United States has been and is being unfairly and illegally used to—
>
> > Manipulate live-stock markets;
> > Restrict interstate and international supplies of foods;
> > Control the prices of dressed meats and other foods;
> > Defraud both the producers of food and consumers;
> > Crush effective competition;
> > Secure special privileges from railroads, stockyard companies, and municipalities;
> > and
> > Profiteer . . . .[62]
>
> 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.[63]

On February 27, 1920, the FTC filed suit against the "Big Five" meat packing companies: Swift & Co.; Armour & Co.; Cudahy Packing Co.; Wilson &

58. WILLIAM B. COLVER ET AL., ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION 5 (1918), https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1918/ar1918_0.pdf [https://perma.cc/7LAF-SL3U].

59. *Id.*

60. CHRISTOPHER R. KELLEY, NAT'L AGRIC. L. CTR., AN OVERVIEW OF THE PACKERS AND STOCKYARDS ACT 3 (2003).

61. *Id.*

62. *Id.*

63. *Id.*

Co.; and Morris & Co.[64] Within those Big Five were 80 other corporations and 50 officers operating as subsidiaries who the court joined as defendants.[65] That same day, "the packers agreed to a consent decree that restricted packers from owning or controlling the livestock marketing channels and generally prohibited packers from engaging in other sectors of the food industry."[66] While Sherman Act enforcement accomplished much in the way of regulating monopolies, attempted monopolies, and collusions in restraint of trade, Congress found that it was not adequate to address the extensive abuses meatpackers inflicted upon growers who produced the livestock.[67]

Even though courts used the Sherman Act to enforce regulations following the FTC report detailing how extensive meatpacker abuse was in 1919, Congress enacted the PSA to attempt to correct the power imbalance between meatpackers and livestock producers.[68] They concluded that while the consent decree by the Big Five was a positive general outcome, it did not go far enough to regulate meatpacker activity.[69] Since meatpackers controlled nearly all of the trade in the United States, their power allowed them to deceive buyers and commission men, as well as farmers.[70] They also engaged in discriminatory practices regarding pricing and generally pressured farmers to sell their cattle at lower prices while extorting the commission men and shipping companies.[71] As such, Congress concluded that they must pass legislation to broadly regulate the meatpacking industry as a whole.[72]

Actual language of the PSA focuses on meatpackers in general but also includes language that specifies how the Secretary may regulate poultry integrators:

64. United States v. Swift & Co., 189 F. Supp. 885, 888 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961) (discussing the original litigation against the Big Five meatpackers as background for the cited case).

65. *Id.*

66. Michael C. Stumo & Douglas J. O'Brien, *Antitrust Unfairness vs. Equitable Unfairness in Farmer/Meat Packer Relationships*, 8 DRAKE J. AGRIC. L. 91, 93 (2003).

67. *See, e.g., id.*; *see also* KELLEY, *supra* note 60.

68. KELLEY, *supra* note 60.

69. Stumo & O'Brien, *supra* note 66 (citing Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, *in* 1 AGRICULTURAL Law 186–87 (John H. Davison ed., 1981) ("Even the broad scope of the packer consent decree failed to satisfy Congress' concern with the packers' power. In 1921, it passed the [PSA] to deal exclusively with meatpackers, intending this Act to be more aggressive than all previous antitrust or trade regulation.")).

70. *Swift & Co.*, 189 F. Supp. at 888.

71. *Id.*

72. Stumo & O'Brien, *supra* note 66, at 94.

> The regulations also contain provisions relating specifically to activities of packers and live poultry dealers and handlers with respect to live poultry. They include:
>
> > (1) requiring that copies of "grow-out" (feeding) contracts be furnished to the poultry grower and specifying certain provisions which must be set forth in such contracts;
> >
> > (2) setting forth requirements for the settlement sheets or final accounting to the poultry growers;
> >
> > (3) proscribing false or misleading reports regarding the live or dressed poultry market conditions or the price of sale thereof;
> >
> > (4) requiring scales used for the purpose of weighing live poultry purchased, sold, or acquired to be installed, maintained and operated properly; and
> >
> > (5) requiring prompt and full payment for live poultry unless otherwise expressly agreed between the parties before the purchase.[73]

Although each provision generally describes information requirements by which poultry integrators must abide, they fail to specify exactly how to determine whether an integrator has violated any of these provisions.[74] Unfortunately, courts apply the regulation inconsistently, regardless of how the USDA's rulemaking periods define various parts of the PSA and how to apply them.[75]

Legal precedent has established that aspects of other livestock-integrator relationships analogous to that of the tournament system are unlawful under the PSA.[76] Federal circuits have found that when an industry conspires to unfairly shift the risk of growing livestock from the packer to the grower, then those packers are in violation of the PSA.[77] In *De Jong Packing Co. v. USDA*, meatpackers conspired to arbitrarily decide that they would not purchase livestock that did not pass a government inspection, shifting all of the risk for compliance onto the grower even after the growers had finished raising the livestock.[78] The *De Jong* court held that

73. Harold M. Carter et al., *Prohibitions on Unfair, Discriminatory, Deceptive, and Anticompetitive Practices by Packers and Live Poultry Dealers and Handlers, in* 10 AGRICULTURAL LAW § 71.07 (Matthew Bender & Co., ed., 2013).

74. *See id.*

75. *See id.*

76. *See id.*

77. De Jong Packing Co. v. USDA, 618 F.2d 1329, 1331 (9th Cir. 1980) (the facts state that packers "had conspired to force auction stockyards to change their terms of sale, from 'as is' sales of slaughter cattle, under which the packers bear the risk that the cattle will fail to pass government inspection, to 'subject' sales those subject to the cattle's passing government inspection which place the risk of loss on the seller.").

78. *Id.*

the packers had engaged in an unfair practice and a cease and desist order was affirmed.[79]

The tournament system is analogous to the packers' situation here in that nearly all of the risk is with the grower and not with the integrator.[80] Poultry integrators tend to assert that a fundamental advantage of the tournament system is that when they control all of the inputs, those same inputs are provided to all chicken growers across a tournament group.[81] Thus, if all of the inputs are the same or very similar, the only way that chicken growers are compared to one another is based on how hard they work and how well they care for the flocks.[82] The benefit is that chicken growers enter into the contracts with integrators believing that the harder they work, the better they will do and the more they will be paid.[83] In reality, no matter how hard they work, half of a tournament group will not be paid enough to cover their costs because half of a tournament group always ends up at the bottom.[84] Additionally, well-documented evidence demonstrates that integrators do not, in fact, provide the same inputs to all chicken growers.[85] Integrators control nearly all the inputs upon which poultry growers are compared to one another in determining their final payout; thus, the final payout is beyond growers' control.[86]

Integrators control every aspect of the growout process that creates profits, such as processing, selling, and distributing the final product.[87] Even so, growers bear the risk of diseased flocks delivered to them, utilities such as electricity and

79. *Id.* at 1338.

80. Poultry Growing Tournament Systems: Fairness and Related Concerns, 87 Fed. Reg. 34814 (proposed June 8, 2022) (to be codified at 9 C.F.R. pt. 201).

81. *A Bird's Eye View of How Chicken Farmers are Paid*, NAT'L CHICKEN COUNCIL (Oct. 10, 2023, 3:37 PM), https://www.chickencheck.in/infographics /how-are-chicken-farmers-paid-tournament-system [https://perma.cc/MLR9-VS79].

82. *Id.*

83. *Id.*

84. Dan Charles, *The System Supplying America's Chicken Pits Farmer vs. Farmer*, NPR (Feb. 20, 2014, 3:30 AM), https://www.npr.org/sections/thesalt /2014/02/20/279040721/the-system-that-supplies-our-chickens-pits-farmer-against-farmer [https://perma.cc/Y4TP-Q8YC] ("On top of that, there's the uncertainty created by the tournament. This is not Lake Wobegon. No matter how hard the farmers work, half of them will be below average and make less money than the numbers in the brochure. According to Bunting, it means they won't be making enough to service that debt.").

85. KADES, *supra* note 35, at 59 ("Contract farmers have been concerned that chicken integrators will punish farmers who criticize or join associations of contract farmers. One punishment is providing the farmer with sick chickens, which ensures the farmer's production will be suboptimal and, eventually, justify termination.").

86. *Id.* at 9.

87. *Id.*

water, unpredictable fuel costs, proper (and contract-specified) disposal of dead birds, complying with integrator flock supervisors, and absorbing extraneous costs or penalties caused by integrators.[88] Integrators control everything, even the amount of debt a grower is allowed to take on.[89] Fundamentally, then, basing compensation on the flagrantly unequal risk burden between growers and integrators is a clear violation of the PSA as outlined in the *De Jong* opinion.[90] Thus, even though the tournament system should entirely be banned under the PSA with adequate enforcement, instead, the USDA allows integrators to abuse growers even though it is within their authority to ban integrators from using it.[91]

88. Michael Sainato, *'I Can't Get Above Water': How America's Chicken Giant Perdue Controls Farmers*, THE GUARDIAN, (Mar. 14, 2020, 4:00 AM), https://www.theguardian.com/environment/2020/mar/14/i-cant-get-above-water-how-americas-chicken-giant-perdue-controls-farmers [https://perma.cc/SX3U-PRHK] ("On average, we have to kill 6-8,000 chickens per flock because they're not growing, but we don't get compensated for it. We shouldn't have to pay for birds that are given to us sick and it's been getting worse over the past year"); *see also* The Week Staff, *The Ugly Economics of Chicken*, THE WEEK (Jan. 11, 2015), https://theweek.com/articles/447911/ugly-economics-chicken [https://perma.cc/VC2X-US7D]; RENA STEINZOR ET AL., CTR. FOR PROGRESSIVE REFORM, INTEGRATOR LIABILITY: LEGAL TOOLS TO HOLD THE BIGGEST CHICKEN COMPANIES RESPONSIBLE FOR WASTE 1 (2015), https://cpr-assets.s3.amazonaws.com/documents/Integrator_Liability_IssueAlert_1502.pdf [https://perma.cc/B77A-AHUU] ("The only thing the growers own is the waste, and they are legally responsible when it is not handled properly. This astoundingly unfair arrangement, which allows the integrators to escape liability for all pollution, is the result of years of successful lobbying efforts by the nationally powerful and well-heeled farm lobby.").

89. Joe Fassler, *A New Class-Action Lawsuit Claims Poultry Processors Conspire to Keep Farmers Trapped and Dependent*, THE COUNTER (Feb. 1, 2017, 11:06 AM), https://thecounter.org/chicken-farmer-collusion-suit/ [https://perma.cc/V6PE-596Z] ("'At first, they told me that I had it. But when they found out I was only going to do four houses, then it came back that I wasn't going to get my money,' she says. 'Tyson and Farm Credit have a meeting every month to discuss their growers and what they're going to do with them. So if Tyson needs six houses in production, Tyson's going to get six houses in production.'").

90. De Jong Packing Co. v. USDA, 618 F.2d 1329, 1331 (9th Cir. 1980).

91. *See* Fassler, *supra* note 89.

III. CURRENT TREND OF CONSOLIDATION UNDER LACKLUSTER ANTITRUST ENFORCEMENT

A. Excessive Consolidation Under the PSA

Despite passage of the PSA in the early twentieth century, the poultry industry has become more concentrated than ever.[92] While some have argued that contract production has improved the lives of growers as well as efficiency and quality of broiler production,[93] horizontal and vertical consolidation of the poultry industry threatens meaningful contract negotiation between integrators and growers.[94] The USDA has the authority under the PSA to regulate integrator activity but has yet to take advantage of that authority to expressly ban or regulate integrator abuse in poultry contracting through the tournament system.[95] At best, the number of poultry integrators available for growers to contract with constitutes an oligopsony.[96] At worst, only one buyer exists in each market, making them monopsonies.[97] Because of this limited competition between sellers, consolidation of integrator contractors have all but entirely removed mutual assent from the contracting system.[98] Instead, the consolidation of buyers has forced growers to

92. *Big Chicken Companies Own or Control Everything Except the Farm, But Why?,* RURAL ADVANCEMENT FOUND. INT'L (July 14, 2016) [hereinafter RAFI], https://www.rafiusa.org/blog/big-chicken-companies-own-and-control-everything-except-the-farm-why/ [https://perma.cc/M83G-Y97K].

93. *Myth-Busting "The Meat Racket"*, NAT'L CHICKEN COUNCIL (Oct. 2, 2022, 4:10 PM), https://www.nationalchickencouncil.org/wp-content/uploads/2014/02/Meat-Racket-Myths-2.pdf [https://perma.cc/X2VT-7EMK].

94. RAFI, *supra* note 92.

95. *See* Claire Kelloway, *Trump's USDA Sides with Corporate Meatpackers Over Farmers, in Latest GIPSA Proposal*, OPEN MKTS. INST. (Jan. 16, 2020), https://www.openmarketsinstitute.org/publications/trumps-usda-sides-corporate-meatpackers-farmers-latest-gipsa-proposal [https://perma.cc/VHY5-Q5PD].

96. Will Kenton, *Oligopsony*, INVESTOPEDIA (Apr. 23, 2022), https://www.investopedia.com/terms/o/oligopsony.asp [https://perma.cc/E7Z6-WLRU] ("An oligopsony is a market for a product or service which is dominated by a few large buyers. The concentration of demand in just a few parties gives each substantial power over the sellers and can effectively keep prices down.").

97. Julie Young, *Monopsony: Definition, Causes, Objections, and Example*, INVESTOPEDIA (Feb. 20, 2023), https://www.investopedia.com/terms/m/monopsony.asp [https://perma.cc/ECQ3-77J6] ("A monopsony is a market condition in which there is only one buyer, the monopsonist. Like a monopoly, a monopsony also has imperfect market conditions. The difference between a monopoly and a monopsony is primarily in the difference between the controlling entities. A single buyer dominates a monopsonized market while an individual seller controls a monopolized market. Monopsonists are common in areas where they supply most or all of the region's jobs.").

98. Fassler, *supra* note 89.

accept unequal and unbalanced terms by forcing them to take on insurmountable debt while attempting to recoup their costs through these unfair contracts.[99]

B. The USDA's Power to Clarify and Enforce the PSA Under Chevron Deference

In the wake of a weakening Sherman Act, Congress enacted the PSA to give the USDA the regulatory power to break up huge meatpackers.[100] After an FTC report detailing how these meatpackers had engaged in unfair and deceptive practices, operating essentially unchecked in the market, Congress began steps to enact further regulations that would correct the inordinate power meatpackers held in the market.[101] Even though the PSA was "one of the most comprehensive regulatory measures ever enacted," the USDA has so far failed to utilize its power through the legislation to adequately enforce those regulatory measures against meatpackers.[102] Furthermore, the doctrine of Chevron Deference gives the USDA power to fully enforce the PSA and create rules and regulations aligning with that goal, but the courts have incorrectly imputed a harm-to-competition standard—making it nearly impossible for growers to succeed when they bring action against integrators in court.[103] Finally, even though the USDA has proposed rules promoting competition in poultry growing systems multiple times in the past 25 years, they have thus far failed to realize the full potential of the PSA by enacting any of the proposed rules that would have made chicken production more fair for growers.[104]

The USDA has so far failed to exercise their full discretionary power under the PSA as an agency through Chevron Deference. In 1984, the Supreme Court

99. *Id.*

100. KADES, *supra* note 35, at 3–4.

101. *Id.*

102. KELLEY, *supra* note 60 (quoting Donald A. Campbell, *The Packers and Stockyards Act Regulatory Program*, *in* 1 AGRICULTURAL LAW § 3.01 (John Davidson ed., 1981)).

103. KADES, *supra* note 35, at 63–64.

104. *See* Transparency in Poultry Grower Contracting and Tournaments, *supra* note 39. The USDA has proposed rulemakings that would have overhauled the poultry production system and effectively changed the imbalance of power between integrators and growers in 1997 (WORC Rule) and 2016 following a series of workshops in 2010 demonstrating grower difficulties. However, the USDA withdrew the proposals instead of enacting them. *See also* Poultry Grower Ranking Systems, 86 Fed. Reg. 60779 (proposed Nov. 4, 2021) (to be codified at 9 C.F.R. pt. 201); Filing of a Petition for Rulemaking: Packer Livestock Procurement Practices, 62 Fed. Reg. 1845 (proposed Jan. 14, 1997) (to be codified at 9 C.F.R. pt. 200); Kelloway, *supra* note 95 ("Trump's USDA introduced new criteria to determine whether a meatpacker violated the Packers and Stockyards Act, after withdrawing an Obama-era proposal two years ago. This latest proposal omits several critical farmer protections from the previous rule and introduces new language that could codify abusive industry practices.").

decided in *Chevron v. Natural Resources Defense Council* that government agencies have the authority to interpret statutes and issue regulations in service of those statutes.[105] In doing so, the analysis surrounds two issues to decide whether they should defer to an agency's interpretation of a statute: first, they will determine whether Congress has directly addressed the precise question at issue; if not, then the court will decide whether the agency's interpretation of that statute is permissible based on its construction.[106] If Congress has granted an agency authority to speak on the statute and the statute itself is silent on the issue, then courts will permit the agency's interpretation of the statute.[107]

While some circuit courts have imputed a harm-to-competition standard upon PSA claims that growers bring against integrators, the USDA has long decreed that competitive injury is not a prerequisite to bringing a claim under the PSA for various reasons.[108] Michael Kades notes that courts would typically give deference to an agency's interpretation of ambiguous words such as those in Sections 202 (a) and (b): "unfair," "unjust," and "discriminatory."[109] The USDA was unsuccessful in convincing courts in both *London*[110] and *Wheeler*[111] that bringing a case under 202 (a) and (b) does not require a grower to show that an integrator's action harmed industry-wide competition.[112] Overall, however, the

105. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

106. *Id.* at 842–43.

107. *Id.*; *see also* Fournier v. Sebelius, 718 F.3d 1110, 1119 (9th Cir. 2013) ("Under *Mead*, we will give *Chevron* deference to an agency's interpretation of a statute [] when: (1) 'it appears that Congress delegated authority to the agency generally to make rules carrying the force of law,' *and* (2) 'the agency interpretation claiming deference was promulgated in the exercise of that authority.'").

108. KADES, *supra* note 35, at 36 ("The U.S. Department of Agriculture has long taken the position that Sections 202 (a) and (b) do not require proof of harm to competition. The agency is responsible for administering the Packers and Stockyards Act, has authority to issue regulations, and adjudicates violations by packers and swine contractors.").

109. *Id.*

110. London v. Fieldale Farms Corp., 410 F.3d 1295, 1304 (11th Cir. 2005) ("In conclusion, we hold that in order to prevail under the PSA, a plaintiff must show that the defendant's deceptive or unfair practice adversely affects competition or is likely to adversely affect competition.").

111. Wheeler v. Pilgrim's Pride Corp., 591 F.3d 355, 358 (5th Cir. 2009) ("In reply to [Plaintiff's] argument that its price-cutting was not for the purpose of acquiring a monopoly or eliminating a competitor, and that the PSA did not prohibit a mere competitive injury or lessening of competition, the court said that the legislative history of the PSA supported a wider power to prohibit unfair methods of competition than did antecedent anti-trust legislation.").

112. KADES, *supra* note 35, at 34–36.

circuit courts do not agree on the rule of harm-to-competition in proving a violation to Section 202.[113]

Not only have courts misinterpreted Sections 202 (a) and (b) in applying it to each case, but they have failed to recognize that the conduct of each of the integrators is part of a bigger poultry tournament system that effectively limits competition as a whole. Rather than examining one aspect of their actions, the courts should be looking at the entire contracting system through poultry tournament compensation as unlawful because of what the *Swift* court defined as a "scheme" restraining trade.[114]

C. The Sherman Act Definition of Monopsony

Determining whether an integrator satisfies the definition of monopsony or oligopsony requires a description of the relevant market.[115] Currently, poultry integrators in relevant product and geographic markets indicate that there may be only one or two buyers in a given area for broiler poultry.[116] Fewer integrators puts growers at risk for abuse from integrators once they have entered into their first contract and invested in infrastructure required to grow broilers long-term.[117] Typically, growers invest in all of the infrastructure they need to house the poultry, enter into the contract with the integrator, and then must attempt to renegotiate subsequent contracts.[118] These two contracting situations differ from one another and the role of the concentrated integrator market changes depending on which process a grower is at.[119]

Analysis of relevant geographic and product markets indicate contract poultry production operates within a monopsony or oligopsony.[120] To determine whether poultry integrators and growers exist within a monopsony or oligopsony, the relevant product and geographic markets must be defined.[121] An integrator's

113. *Id.* at 38 (courts have disagreed on when and where to apply the harm-to-competition standard. In some cases, they explicitly find that a plaintiff must show that a defendant's actions and conduct harmed overall competition. Alternatively, some courts have found that it is unnecessary to show that harm for a violation of the PSA).

114. Swift & Co. v. United States, 196 U.S. 375, 395 (1905).

115. *See, e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018) (explaining that a plaintiff must define a relevant market with respect to proving anticompetitive conduct).

116. KADES, *supra* note 35, at 22.

117. *Id.* at 19.

118. *Id.*

119. *Id.* at 22.

120. *Id.*

121. *See, e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018).

power in a monopsony situation requires analysis consisting of competing buyers.[122] Those competing buyers, who would be "reasonably good substitutes," are the only ones who should be included in a relevant market analysis.[123] A monopsony, in the relevant market, is one in which only one buyer exists.[124] Under the Sherman Act, analysis of whether an alleged integrator holds a monopoly or a monopsony focuses on the following two elements: (1) whether the entity possesses monopoly or monopsony power in the relevant market; and (2) whether the entity willfully acquired or maintained their monopoly or monopsony power, having not acquired it through mere consequence, particularly successful business acumen or "historic accident."[125] Only slightly more competitive is the oligopsony, which describes a market in which only a few buyers exist, and each of those buyers controls a substantial portion of the market share.[126]

Both geographically and product-based relevant markets are exceedingly limited. Even though the poultry integrator market may be defined not only by topographical or political boundaries, but also by the area which sellers may turn to for alternatives, [127] only five companies make up the majority of the market.[128] In this way, the product market and the geographic market combine as integrators serve all purposes of contracting with growers.[129] Not only are they the only means of providing inputs, but they are the only means of providing payment to growers as well.[130] Even if they wanted to, individual poultry growers could not sell broilers in an open market because vertical integration of the poultry industry has all but

122. Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1118 (10th Cir. 2008) (citing Todd v. Exxon Corp., 275 F.3d 191, 202 (2d Cir. 2001)).

123. *Id.* ("If the market described in the complaint fails to include 'reasonably good substitutes' then the plaintiff has not adequately alleged a relevant market.").

124. *Id.*

125. *In re* Se. Milk Antitrust Litig., 801 F. Supp. 2d 705, 724 (E.D. Tenn. 2011) (citing Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992)).

126. James Murphy Dowd, *Oligopsony Power: Antitrust Injury and Collusive Buyer Practices in Input Markets*, 76 B.U. L. REV. 1075, 1077 (1996) ("Economists recognize such attempts to use buying power to depress the market price of an input good below competitive equilibrium as oligopsony.").

127. *In re* Se. Milk Antitrust Litig., 801 F. Supp. 2d at 724–25 (citing Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999)) ("A geographic market is 'an area of effective competition.' The area is not defined by 'metes and bounds,' but 'is the locale in which consumers of a product or service can turn for alternative sources of supply.'").

128. Amanda Covaleski, *The 10 Largest Poultry Companies in the United States*, ZIPPIA (Apr. 24, 2023), https://www.zippia.com/advice/largest-poultry-companies/ [https://perma.cc/U5FN-4E6K].

129. *In re* Se. Milk Antitrust Litig., 801 F. Supp. 2d at 724–25.

130. *See id.*

eliminated the cash spot market since the 1950s.[131] Because of the scale of the grower-integrator relationship, a grower cannot hope to enjoy competitive pricing that would have otherwise existed through "spot markets."[132] A spot market, also known as a "cash market," is different from futures market because cash and commodity trade happens immediately.[133] When spot markets disappear, as they have from the poultry industry, then competitive bidding is also eliminated, allowing integrators to keep their payments to growers low.[134] In this way, anticompetitive effects of the unequal beef cattle spot markets can be analogized to the poultry production system.[135] Although, sometimes meatpackers manipulate spot markets because they are both buyers and sellers in the market.[136] In the poultry industry, however, integrators own the poultry from start to finish, eliminating the need for competitive bidding through contract production.[137]

As of 2019, "Tyson Foods, Pilgrim's Pride, Sanderson Farms, Koch Foods and Perdue control about 60% of the US chicken market."[138] Tyson alone held 21.27% of the market share of poultry integrators in 2018,[139] and their sales only increased during the COVID-19 pandemic.[140] In 2022, one analysis estimated that

131. C. ROBERT TAYLOR, THE MANY FACES OF POWER IN THE FOOD SYSTEM 7 (2004) [hereinafter THE MANY FACES OF POWER], https://www.justice.gov/sites/default/files/atr/legacy/2007/08/30/202608.pdf [https://perma.cc/B6EM-SQR2].

132. *Id.*

133. Tim Smith, *Spot Market: Definition, How They Work, and Example*, INVESTOPEDIA (Sept. 29, 2021), https://www.investopedia.com/terms/s/spotmarket.asp [https://perma.cc/BE3D-8QKB].

134. KADES, *supra* note 35 (explaining that spot markets are competitive because meatpackers had to bid on livestock against each other, but with the increased integration of the market, competition has been reduced and meatpacker manipulation has increased. "Not long ago, spot markets dominated the industry—multiple meatpackers competed to buy cattle at feedlots on a weekly basis. Now, less than a third of all cattle transactions occur in those cash-negotiated spot markets.").

135. *See id.*

136. THE MANY FACES OF POWER, *supra* note 131, at 4–5 (explaining how livestock growers are at a disadvantage if buyers hold all the power in noncompetitive cash markets because they can manipulate growers into accepting "a lower price than [they] would in a competitive market with a tightly strung fence between buyers and sellers.").

137. *Id.* at 7.

138. Sainato, *supra* note 88.

139. Kim Souza, *Tyson Foods Maintains Its Top Ranking in Poultry Production,* TALK BUSINESS & POLITICS (Mar. 20, 2019, 9:54 AM), https://talkbusiness.net/2019/03/tyson-foods-maintains-its-top-ranking-in-poultry-production/ [https://perma.cc/Y434-FGN9].

140. Chris Casey, *Tyson's Sales Climb to $13B as Meat Industry Profits Are Scrutinized*, FOOD DIVE (May 10, 2022), https://www.fooddive.com/news/tysons-sales-13b-meat-profits/623470/ [https://perma.cc/T3UK-7564].

Sanderson Farms alone held 15% of the poultry market.[141] Regardless of which multi-national company holds the majority of the market share, the statistics ultimately show that only a few large integrators control the majority of a very small market.[142] Regionally, growers may have smaller integrators who contract with them, but vast numbers of poultry growers across the United States report having only one or two integrators in their area.[143] Since integrators are effectively the only "buyers" in the poultry contracting market, most of these markets constitute a monopsony or oligopsony situation.[144]

Poultry production contract integrators have willfully acquired and maintained their monopsony power through anticompetitive conduct.[145] Proving a violation under Section 2 of the Sherman Act requires not only that the companies have monopsony power within the relevant market, but that they are using that power to engage in conduct which allows them to maintain their monopoly or monopsony power, by suppressing competition.[146] Intent—similar to the concept in criminal law—must be specific as well.[147] A plaintiff must prove that the company intended to take the action, and that the specific intent of the action was to exclude competitors.[148] In the seminal case *United States v. Aluminum Co. of Am.* ("Alcoa"), the court examined the conduct element of a Sherman Act Section 2 violation.[149] They found that Alcoa's anticompetitive practices allowed it to monopolize a market and grow to such a dominant position that it would not have otherwise done so "had it been retained only by 'natural growth.'"[150] The court then distinguished between a company that would have become dominant through the natural means of business management and a company that takes

141. Chloe Sorvino, *Higher Chicken Prices Expected After $4.5 Billion Poultry Merger Wins U.S. Approval,* FORBES (Aug. 5, 2022, 7:15 AM), https://www.forbes.com/sites/chloesorvino/2022/08/05/higher-chicken-prices-expected-after-45-billion-poultry-merger-wins-us-approval/?sh=72b17dca67b9#open-web-0 [https://perma.cc/A6V2-87DX].

142. *See generally* JAMES M. MACDONALD, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV., TECHNOLOGY, ORGANIZATION, AND FINANCIAL PERFORMANCE IN U.S. BROILER PRODUCTION 30 (2014), https://www.ers.usda.gov/publications/pub-details/?pubid=43872 [https://perma.cc/H723-AJ5T].

143. RAFI, *supra* note 92; *see also* MACDONALD, *supra* note 142, at 35.

144. MACDONALD, *supra* note 142, at 37.

145. RAFI, *supra* note 92.

146. United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945).

147. *Id.* at 431.

148. *Id.* at 432.

149. *Id.*

150. *Id.* at 423.

anticompetitive steps to achieve that dominance.[151] The court held that Alcoa was the latter of the two.[152]

However, the Supreme Court has not yet ruled on anticompetitive conduct in large companies based on size alone.[153] As such, to determine whether an entity's conduct was anticompetitive without any procompetitive justifications, the court may employ a rule of reason approach, which does not require an in-depth analysis.[154] Originated by Chief Justice White in *Standard Oil Co. of N.J. v. United States*, the rule of reason remains important to antitrust analyses long after its initiation in 1911.[155] Essentially, the rule of reason asks a court to distinguish between an "assailed combination" that has spent "its entire career . . . carrying out of such wrongful intents" allowing "vast accumulation of property which it owns or controls"[156] and a business that "was but the result of lawful competitive methods, guided by economic genius of the highest order, sustained by courage, by a keen insight into commercial situations, resulting in the acquisition of great wealth, but at the same time serving to stimulate and increase production."[157] There is a difference between businesses that operate with great acumen and those that engage in anticompetitive conduct to obtain their power and monopoly status.[158]

As explained in the previous section, only a small number of poultry integrators make up the majority of the market, establishing their monopsony power.[159] On August 9, 2021, two of those companies—Sanderson and Cargill—announced their intention to merge and become a "Leading U.S. Poultry Company."[160] As recently as August 2022, the Department of Justice lost their challenge to the proposed acquisition of Sanderson Farms by Cargill and Continental Grain.[161] Within the merger, Sanderson also acquired Wayne Farms, creating the combined company of Wayne-Sanderson Farms that controls 15% of

151. *Id.* at 441.
152. *Id.* at 425.
153. United States v. U.S. Steel Corp., 251 U.S. 417, 438 (1920).
154. Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911).
155. *Id.*
156. *Id.* at 47.
157. *Id.* at 48.
158. *See id.* at 52.
159. RAFI, *supra* note 92.
160. *Cargill and Continental Grain Company to Acquire Sanderson Farms for $203 per Share in Cash and Create a Leading U.S. Poultry Company*, CARGILL (Aug. 9, 2021), https://www.cargill.com/2021/cargill-and-continental-grain-company-to-acquire-sanderson-farms [https://perma.cc/K2U2-S5TH].
161. Sorvino, *supra* note 141.

the poultry market alone[162] and constitutes the third-largest United States poultry processor after Tyson and Pilgrim's Pride.[163]

In addition to market power, poultry integrators use the tournament compensation system to suppress competition in violation of both the Sherman Act and the PSA.[164] Although these poultry integrators are vertically integrated and by all accounts, enormous, their size is not necessarily what makes them bad. As explained above, it is the integrators' conduct that may only create liability under current antitrust law when they use their monopsony power to suppress competition.[165] In addition to having colossal market power, integrators use that power to suppress competition through the poultry tournament Sherman Act for monopsony conduct, but also the PSA, specifically created to address meatpacker issues in the early twentieth century.[166]

Under the PSA of 1921,[167] which will be discussed in further detail below, Congress attempted to address horizontal consolidation in the meatpacking industry by banning specific unlawful practices.[168] Congress banned meatpackers from engaging in "unfair, unjustly discriminatory, or deceptive practice or device . . . mak[ing] or giv[ing] any undue or unreasonable preference or advantage to any particular person or locality."[169] Congressional reports indicate that the purpose of the PSA was to level the playing field and address the Big Five meatpackers' extraordinary power over the country's meat supply.[170]

162. *Id.* ("The new company will control an estimated 15% of the chicken market and push the market share of the top four competitors to more than 60% from about 50%.").

163. Christopher Doering & Chris Casey, *Cargill and Continental Grain Close $4.5B Purchase of Sanderson Farms*, FOOD DIVE (July 22, 2022), https://www.fooddive.com/news/cargill-and-continental-grain-complete-45b-sanderson-farms-purchase/627910/ [https://perma.cc/46JA-9EHC] ("In poultry, the top four processing firms—Tyson, Pilgrim's Pride, Sanderson and Perdue—control 54% of the market, according to the administration.").

164. Comment on *Poultry Growing Tournament Systems: Fairness and Related Concerns* from Aaron Johnson et al., Rural Advancement Found. Int'l - USA, to S. Brett Offutt, Packers and Stockyards Div., U.S. Dep't of Agric. Agric. Mktg. Serv. Fair Trade Pracs. Program (Sept. 26, 2022) [hereinafter Comment on *Poultry Growing Tournament Systems*], https://www.rafiusa.org/wp-content/uploads/2022/09/RAFI-USA-Comment-on-Poultry-Growing-Tournament-System-Fairness.pdf [https://perma.cc/G87E-EQ68].

165. *Id.*

166. *Id.*

167. 7 U.S.C. §§ 181–231.

168. 7 U.S.C. § 192 (a)–(d).

169. *Id.*

170. COLVER ET AL., *supra* note 58.

Proponents of the tournament compensation system proffer its value as an incentive-driven compensation system, terming it "performance-based" compensation.[171] Articles touting the system state that "[a]ll farmers are provided the same quality of chicks, the same feed, and access to veterinary care."[172] However, numerous reports,[173] USDA comments,[174] first-hand accounts,[175] and video footage[176] demonstrate this argument to be untrue. Instead of providing the same quality inputs to every farmer so that they only compete with each other for payment based only upon their knowledge and skills, integrators discriminately deliver the best inputs to certain growers while providing low-quality inputs to others.[177]

IV. MUTUAL ASSENT AND THE CURRENT MONOPSONY CONDITIONS OF CONTRACT GROWER-INTEGRATOR RELATIONSHIPS

Mutual assent, or a valid offer and a valid acceptance, between parties underlies the foundation of valid legal contracting.[178] Between poultry growers and integrators, not one, but a series of contracts, develops the relationship between the parties.[179] A grower must first be invited to contract with the integrator after meeting certain requirements, and following that initial contract, then the

171. *A Bird's Eye View of How Chicken Farmers are Paid*, *supra* note 81.

172. *Id.*

173. *See, e.g.,* Madeline Perry & Sky Chadde, *Amid Price-Fixing Indictment for Poultry Processors, Growers Say They Continue to Struggle*, INVESTIGATE MIDWEST (July 10, 2020), https://investigatemidwest.org/2020/07/10/amid-price-fixing-indictment-for-poultry-processors-growers-say-they-continue-to-struggle/ [https://perma.cc/6HEG-WWPE] (poultry grower Mike Weaver, founder of the Contract Poultry Growers Association of the Virginias, who spent 18 years growing for Pilgrim's Pride explains that integrators do not consistently deliver good inputs. "'If they give you bad chicks or bad feed, there's nothing you can do about it,' he said. 'Either bad input makes it impossible to make a good chicken.'").

174. *See, e.g.,* Comment on *Poultry Growing Tournament Systems*, *supra* note 164 (including numerous accounts from poultry growers of receiving inadequate, bad, or below-quality inputs).

175. *See, e.g.*, Sainato, *supra* note 88 ("It doesn't matter what I do, I can't get above water. I do the same thing every time and the payout per flock can vary by as much as $8,000. Our output depends on their input.").

176. *Watch Under Contract: Farmers and the Fine Print*, *supra* note 1, at 23:48.

177. Aaron Johnson, *USDA's New Poultry Industry Transparency Rule*, RURAL ADVANCEMENT FOUND. INT'L (June 23, 2022), https://www.rafiusa.org/blog/usdas-new-poultry-industry-transparency-rule/ [https://perma.cc/TT2A-P7MD].

178. RESTATEMENT (SECOND) OF CONTS. § 17 (AM. L. INST. 1981).

179. *See generally* Transparency in Poultry Grower Contracting and Tournaments, 88 Fed. Reg. 83210 (Nov. 28, 2023) (to be codified at 9 C.F.R. pt. 201).

integrator delivers a new contract with each flock to the grower.[180] Thus, under monopsony or oligopsony conditions, poultry growers cannot control their contracts with integrators because of the extraordinary power imbalance.[181] At every step, the integrator knows that a grower who has invested hundreds of thousands of dollars in poultry growing infrastructure has no other integrator in the area to turn to and will have no choice but to accept terms that are not ideal.[182]

A. Mutual Assent's Role in Contract Chicken Production

Currently, between poultry growers and integrators, mutual assent cannot exist because meaningful negotiation cannot take place between parties where such a fundamental imbalance of power exists between them.[183] To understand how monopsony conditions impact contracting in poultry-growing systems, it is important to separate the action of initial contracting from subsequent flock-to-flock contracts between growers and integrators.[184] Therefore, each contracting situation is unique.[185]

Underlying poultry production contracts is the essential doctrine forming the basis of all valid contracts: the notion of mutual assent.[186] Requiring a valid offer and acceptance, mutual assent forms the underpinning that contracting parties intend to be bound.[187] Even though parties may enter into contracts based on whatever terms and conditions they agree to regardless of whether they have a negative impact upon the contracting parties, when parties are at such an unequal power imbalance that they may not make decisions willingly, their contracts become unconscionable.[188] Increasing horizontal concentration has removed available integrators with which chicken growers may choose to contract, making

180. *See generally id.*

181. *See generally* Transparency in Poultry Grower Contracting and Tournaments, 88 Fed. Reg. at 83210.

182. *Id.*

183. *Id.*

184. *Id.*

185. *See id.*

186. MacDonald & Burns, *supra* note 29.

187. JACK GRAVES & HENRY ALLEN BLAIR, LEARNING CONTRACTS 47 (3rd ed. 2022) ("[M]utual assent hinges on the intent of both parties to engage in a consensual legal relationship. Parties voluntarily choose their contractual commitments.").

188. Been v. Okla. Indus., Inc., 495 F.3d 1217, 1237 (10th Cir. 2007) (citing Hancock v. Tri–State Ins. Co., 858 S.W.2d 152, 154 (1993) ("[P]arties are free to make contracts based on whatever terms and conditions they agree upon, provided it is not illegal or tainted with some infirmity such as fraud, overreaching, or the like.").

forced agreements between growers already laden with insurmountable debt unconscionable.[189]

Mutual assent requires both parties to a contract to objectively intend to be bound by the confines of that contract.[190] Mutual assent refers not only to the understanding between parties that they intend to be bound by an agreement, but that one has made a valid offer and the other rendered a valid acceptance.[191] Under the current monopsonistic and oligopolistic conditions, mutual assent cannot exist between growers and integrators.[192] Growers do not assent to the general contract itself nor the specific and individual terms within the contract.[193]

1. Initial Offer and Acceptance Between Integrators and Growers

First, to even be invited to contract with the integrator, a chicken grower must make investments and secure loans for integrator-mandated infrastructure and housing for the chicks.[194] Integrators do not typically compete for growers, instead the growers compete for the waiting list to contract with the integrator or to expand existing production quantities.[195] Initial investments for growers are

189. *See* JAMES M. MACDONALD, U.S. DEP'T OF AGRIC. ECON. RSCH. SERV., THE ECONOMIC ORGANIZATION OF U.S. BROILER PRODUCTION 4–5 (2008), https://www.ers.usda.gov/webdocs/publications/44254/12067_eib38_1_.pdf?v=2152.4 [https://perma.cc/5YH4-V9CE] ("Because production is so localized, most producers have few integrators to choose from. Nearly a quarter (24.7 percent) reported that only a single integrator served their area, while another 28.7 percent reported two and 21.7 percent reported three.").

190. *Need for Objective Manifestation of Assent*, *in* 1 WILLISTON ON CONTRACTS § 4:1 (4th ed. 2023) ("However, the fundamental basis of contract in the common law is reliance on an outward act (that is, a promise), as may be seen by the early development of the law of consideration as compared with that of mutual assent.").

191. GRAVES & BLAIR, *supra* note 187.

192. *See generally* Transparency in Poultry Grower Contracting and Tournaments, 88 Fed. Reg. 83210 (Nov. 28, 2023) (to be codified at 9 C.F.R. pt. 201).

193. Commonwealth. Sch., Inc. v. Commonwealth. Acad. Holdings LLC, 994 F.3d 77, 85 (1st Cir. 2021) (citing Quint v. A.E. Staley Mfg. Co., 246 F.3d 11, 14–15 (1st Cir. 2001)); Casa Del Caffe Vergnano S.P.A. v. Italflavors San Diego, LLC, 816 F.3d 1208, 1212 (9th Cir. 2016) ("Federal common law on contract formation requires mutual assent as to all material terms in order for a valid contract to be formed.").

194. Taylor, *supra* note 14 ("You become a contract poultry producer by invitation only, which . . . is a restriction on economic freedom.").

195. *Contract Chicken Growers: What is a Contract Grower? How and Why do Farmers and Chicken Companies Partner to Raise Chickens?*, NAT'L CHICKEN COUNCIL (Feb. 12, 2024, 12:01 PM), https://foodservice.chickencheck.in/faq/chicken-contract-growers/ [https://perma.cc/L9DR-3VM6] ("On average, almost 95% of all contract farmers are retained

substantial and depend on land, costs of construction, chick breeds, feeding, labor costs, electricity, marketing, security, insurance, and the required technology for infrastructure that housing an integrator requires.[196] At the initial offer and acceptance state of contracting, chicken growers enter into contracts with integrators believing they will not only recover the costs of their investment, but also that they will turn high profits.[197]

At the time a grower initially contracts with an integrator, the power imbalance is extraordinary.[198] These imbalances, along with information asymmetry between integrators and growers within the poultry production system, affect a grower's ability to assent to the terms within integrator contracts.[199] Courts in varying jurisdictions describe valid offers in different ways.[200] In Texas, for example, "[t]he offer [to contract] must be clear and definite[.]"[201] In New York, whether an offeree understands that they are party to a contract depends on whether the contract terms were presented in a "clear and conspicuous" manner.[202] In the Second Circuit, "[i]t is a basic tenet of contract law that, in order to be binding, a contract requires a meeting of the minds and a manifestation of mutual assent."[203] The intent to contract between parties must be measured objectively—not subjectively.[204] Historically, this "meeting of the minds" as referenced by the Second Circuit referred to the subjective test—that is, what two parties have in

year over year by the same company, and most companies have waiting lists for farmers wanting to enter a partnership, as well as waiting lists for existing chicken farmers looking to increase capacity by building more houses.").

196. Patricia M. Harpole, *How to Start a Broiler Chicken Farm? A Complete Guide*, FARM AND CHILL (Jan. 8, 2023), https://farmandchill.com/how-to-start-a-broiler-chicken-farm/ [https://perma.cc/N6BU-97HG] (explaining that "a large-scale chicken farm will need at least $750,000 to kick off farming activities.").

197. Marcia Brown*, The Chicken Farmers Are Pushing Back*, MOTHER JONES (Oct. 6, 2021), https://www.motherjones.com/environment/2021/10/the-chicken-farmers-are-pushing-back/ [https://perma.cc/CMH5-5NKP] (explaining that while the integrator advertises to potential growers that they will be able to turn a profit, in truth, their final pay is usually much lower. "The typical US grower has over $1 million in loans and the take-home pay is often a far cry from what the company advertises during recruitment.").

198. *See generally id.*

199. *See generally id.*

200. Engelman Irrigation Dist. v. Shields Bros., Inc., 960 S.W.2d 343, 352 (Tex. App. 1997); Zachman v. Hudson Valley Fed. Credit Union, 49 F.4th 95, 102 (2d Cir. 2022).

201. *Engelman Irrigation Dist.*, 960 S.W.2d at 352.

202. *Zachman*, 49 F.4th at 102.

203. *Id.* (citing Starke v. SquareTrade, Inc., 913 F.3d 279, 288 (2d Cir. 2019)).

204. *Id.* at 103 (citing Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 28 (2nd Cir. 2002)).

their minds with regard to intent.[205] Courts are not readily able to discern the intent from two parties within their minds, and as such, the subjective test does not prove workable for most courts.[206]

On the other hand, the objective test, based on "outward manifestation" of the parties may provide a better test for parties' intent.[207] The Second Restatement of Contracts provides perhaps the most basic explanation of how a valid offer operates in contract law.[208] In *Cea v. Hoffman*, the Second Restatement is quoted saying "[a]n offer is [the] 'manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'"[209] In the seminal contracts case, *Lucy v. Zehmer*, the subjective and objective examinations of the parties' intent to contract were considered to find that there was, indeed evidence of the intent to be bound by the simple terms sketched out on the back of a blank bar check.[210] The written offer, solicited at a bar, and created on the back of a scrap piece of paper, nevertheless constituted a valid intent to be bound because an objective reasonable person would understand that there was a "good faith offer and a good faith acceptance" based on the actions of both Lucy and Zehmer.[211]

Furthermore, those terms cannot be said to have the requisite specificity to even constitute a valid offer. Regardless of the high level of regulation, integrators still do not provide growers with enough information so that they may make a financially-sustainable decision on whether to accept an offer from an integrator because integrators do not disclose all of the information that may affect growers'

205. GRAVES & BLAIR, *supra* note 187 at 49 ("In short, a rule requiring a "meeting of the minds" fails as a workable, practical measure of party intent to contract. It also fails to protect parties' reasonable understandings of each other's respective communications. The manifold problems with the subjective test for intent led courts to abandon it. Instead, courts today focus on the objective manifestations of parties' intentions.").

206. Aaron D. Goldstein, *The Public Meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation*, 53 SANTA CLARA L. REV. 73, 102 (2013).

207. *Id.* at 104.

208. RESTATEMENT (SECOND) OF CONTS. § 24 (AM. L. INST. 1981).

209. Cea v. Hoffman, 276 P.3d 1178, 1185 (Utah Ct. App. 2012).

210. Lucy v. Zehmer, 84 S.E.2d 516, 522 (Va. 1954) (explaining that the court is not trying to examine the inner workings of a party's mind, but instead, the outward acts of the parties to determine the intention behind the alleged contract. "The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Restatement of the Law of Contracts, Vol. I, § 71, p. 74.").

211. *Id.*

final payment.[212] When growers first decide whether they should enter contracts with integrators, they are faced with a multitude of considerations.[213] However, for the most part, growers cannot obtain adequate information to be able to make a sound business decision, as evidenced by the USDA's proposed rulemaking on Transparency in the Poultry Tournament System.[214] Information growers can acquire prior to the initial contract with an integrator does not currently provide the maximum and minimum amount they may be paid under a tournament compensation system.[215] Because prospective growers are not able to access the information they need that explains how they will be paid through the tournament system, they decide to enter contracts with integrators without the requisite knowledge of payment structures.[216] The tournament payment system for broiler production deceptively pits growers against each other in such a way that they are unable to deduce what their final payment will be at the time of contracting.[217]

Even with the proposed enhanced disclosures, more information may still be insufficient to create any real change to such a consolidated market power due to the monopsonistic conditions within the market.[218] In fact, it may only serve to

212. Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. 34980, 35006 (proposed June 8, 2022) (to be codified at 9 C.F.R. pt. 201).

213. *Id.*

214. *Id.* at 34980–81 ("Over the past several years, the [USDA] has received numerous complaints from poultry growers about poultry growing contracting in general and tournament systems particularly. . . . AMS agrees many production *contracts do not provide enough information* for growers to assess their expected value, and important information relating to live poultry dealer obligations and practices should be better illuminated. The purpose of this proposed rule is to provide growers with this type of relevant information. This proposal reflects AMS's desire to build on existing [PSA] disclosure concepts to ensure poultry growers have the tools and information they need to be successful in their pursuits." (emphasis added)).

215. *See id.* at 34981.

216. *Id.* at 34980.

217. *Id.* at 34986.

218. *Id.* at 34982; Comments on USDA's Proposed Rule on Transparency in Poultry Grower Contracting and Tournaments from The Open Mkts. Inst. to S. Brett Offutt, Agric. Mktg. Serv., U.S. Dep't of Agric. (Aug. 10, 2022), https://www.openmarketsinstitute.org/publications/open-markets-institutes-comments-on-usdas-proposed-rule-on-transparency-in-poultry-grower-contracting-and-tournaments [https://perma.cc/BLK9-5KUL] ("Requiring additional disclosures without addressing consolidated market power or restricting the use of unfair business practices can have perverse outcomes.").

bless these unfair contracts.[219] While growers do not currently possess the necessary information to make sound financial decisions when deciding whether to initially contract with an integrator, having more information will only serve to validate unfair terms and bad contracts that may put growers at a disadvantage.[220] Furthermore, information that integrators do currently provide to growers often misleads or deceives them into believing that their final contract settlement payouts will be far larger than what they actually are.[221] Hannah Packman, writing for the National Farmers Union, writes that "[i]ntegrators promise generous profits to coax growers into contracts."[222] "The reality, however, is far more grim."[223] Not only do integrators use their monopsonistic position to suppress information for growers to make sound financial decisions, growers have little to no choice with respect to which integrator they can contract.[224] This puts them at an extraordinary disadvantage because they have no power to negotiate.[225]

In terms of the manner in which growers and integrators actually go about contracting with one another, the integrator's monopsonistic position gives them all of the bargaining power while the grower has none.[226] In fact, the integrator's control over a grower's operation begins before the integrator even delivers any

219. Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. at 34982; Comments on USDA's Proposed Rule on Transparency in Poultry Grower Contracting and Tournaments from The Open Mkts. Inst. to S. Brett Offutt, *supra* note 218 (arguing that franchising disclosure rules have only served to allow bad actors and unfair contracts in vertically restrained markets to persist, rather than having any meaningful impact that would restore balance).

220. Comments on USDA's Proposed Rule on Transparency in Poultry Grower Contracting and Tournaments from The Open Mkts. Inst. to S. Brett Offutt, *supra* note 218.

221. Hannah Packman, *Poultry Growers Seek Fairness, Basic Protections in Highly Concentrated Sector*, NAT'L FARMERS UNION (Dec. 15, 2016), https://nfu.org/2016/12/15/poultry-growers-seek-fairness-basic-protections-in-highly-concentrated-sector/ [https://perma.cc/2QFP-7QCW].

222. *Id.*

223. *Id.*; Charles, *supra* note 84 ("But after making payments on that loan, the brochure estimates a farmer can clear $60,000 in profits. 'That looks really good,' Bunting says. Then you get into the business, he says, and you discover that there are expenses the brochure didn't really mention, such as repairs, a tractor and additional labor. That can eat up your profit.").

224. Comments on USDA's Proposed Rule on Transparency in Poultry Grower Contracting and Tournaments from The Open Mkts. Inst. to S. Brett Offutt, *supra* note 218.

225. *Id.*

226. Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. 34980, 34986 (proposed June 8, 2022) (to be codified at 9 C.F.R. pt. 201).

chicks.[227] The integrator will only agree to deliver any poults[228] to a grower after that grower agrees to secure funding and build production poultry houses and infrastructure to support the growout process.[229] This infrastructure must be built to the integrator's standards and exactly to their specifications.[230] At the outset, a chicken grower may invest nearly $500,000 to set up their chicken houses, utilities, and equipment.[231]

Since growers base their intent to contract with integrators upon (1) misleading specific knowledge regarding how much they will be compensated, and (2) without the necessary information about how tournament compensation operates in their area, any offers integrators make to growers are invalid.[232] What is not at issue here is whether the growers and integrators intend to be bound in contract with one another.[233] Objectively, the growers' agreement to invest nearly $500,000 to build infrastructure that will induce an integrator to deliver them flocks of chicks for the purposes of broiler growout demonstrates their intent to be bound.[234] What growers do not intend is to undertake all of the extra expense and lower pay than what they initially understood.[235] "Modern broiler contracts," writes Tomislav Vukina, Department of Agricultural and Resource Economics professor at North Carolina State University, "are written by the integrator and offered to prospective growers on a *take-it-or-leave-it* basis."[236] Terms of an integrator's offer, then, even if they are misleading, are essentially non-negotiable.[237] Neither the integrators' offers made with misleading information, nor the growers' acceptance based on misleading information are valid.[238]

227. *Id.*

228. *Poult*, CAMBRIDGE DICTIONARY (Feb. 8, 2024, 2:34 PM), https://dictionary.cambridge.org/dictionary/english/poult [https://perma.cc/3XGZ-N73U] ("poult" refers to a young chicken, turkey, or other bird that is kept for food).

229. *Guide for Prospective Contract Broiler Producers*, THE POULTRY SITE (May 3, 2006), https://www.thepoultrysite.com/articles/guide-for-prospective-contract-broiler-producers/ [https://perma.cc/P8Q9-E95M] ("An agreement with a poultry company to grow chickens will be necessary before financing or building of production houses can begin.").

230. *Id.*

231. Moodie, *supra* note 12.

232. *Id.*

233. *See id.*

234. *Id.*

235. *Id.*

236. Tomislav Vukina & Porametr Leegomonchai, *Political Economy of Regulation of Broiler Contracts*, 88 AM. J. OF AGRIC. ECON. 1258, 1258 (2006).

237. *Id.*

238. *Id.*

Moreover, only because the integrators are so highly concentrated may they act in this manner.[239]

2. Subsequent Contracts Between Growers and Integrators

After the initial contracts, subsequent offers and acceptances become boilerplate between growers and integrators, putting growers at a further disadvantage.[240] Once a grower invests nearly half a million dollars in infrastructure setting up chicken houses according to integrator specifications, they cannot easily renegotiate subsequent contracts with integrators because they are at an extraordinary negotiating disadvantage.[241] Setting up the basic infrastructure that they need to complete the growout process—including housing, utilities, equipment, etc.—requires growers to take on debt loads requiring at least 15-year mortgages or longer.[242]

However, even when a grower has no meaningful choice between integrators, the court has been generally reluctant to find a contract was unconscionable.[243] To find a contract unconscionable, the court has explained that they will examine all factors surrounding the transaction between parties.[244] Regarding specific terms, an aggrieved party must have not been able to discern how important the terms were because they existed within "a maze of fine print" or they were minimized by sales practices seen as deceptive.[245] Finally, the court says that (1) "if there is a gross inequality of bargaining power[,] and [(2)] the aggrieved party signs a 'commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.'"[246] In all, the court tends to consider the "totality" of the circumstances around contracting between

239. Packman, *supra* note 221.

240. *See* Comments on USDA's Proposed Rule on Transparency in Poultry Grower Contracting and Tournaments from The Open Mkts. Inst. to S. Brett Offutt, *supra* note 218.

241. *Id.*

242. Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. 34980, 34986 (June 8, 2022) (to be codified at 9 C.F.R. pt. 201) ("Growers typically make investments in long-term assets—poultry houses that can last 20 years or more, and they typically take on long-term liabilities, in the form of 15-year mortgages, to finance those assets.").

243. Been v. Okla. Indus., Inc., 495 F.3d 1217, 1237 (10th Cir. 2007).

244. *Id.*

245. *Id.*

246. *Id.*

integrators and growers but has failed to recognize that monopsony power is a "gross inequality of bargaining power."[247]

Where an integrator is a monopsonist and where a grower has already invested in a 15 or 20-year mortgage, the grower cannot meaningfully negotiate their contract with the integrator at all.[248] When only one integrator controls a geographically isolated area, they may have undue influence over growers in their ability to negotiate contracts or seek justice when they document abuses in the system.[249] "Unconscionability," as described by the *Been v. O.K. Industries* court, "has generally been recognized to include an absence of meaningful choice on the part of one of the parties, together with contractual terms which are unreasonably favorable to the other party."[250] While the *Been* court ultimately denied poultry growers' claims that their contracts were unconscionable, the circumstances under which they would have found in the affirmative are analogous to many poultry farmers trapped in the tournament system today.[251] Farmers are locked into an unfair system, compelling them to work with integrators who abuse them because of lack of choice.[252] When the company retaliates against them, they are driven to contemplating suicide to save their families and their farms.[253]

The tournament system routinely utilizes contracts which purport to be years-long contracts but are only flock-to-flock and could be construed as

247. *Id.*

248. DAMONA DOYA ET AL., OKLA. COOP. EXTENSION SERV., BROILER PRODUCTION: CONSIDERATIONS FOR POTENTIAL GROWERS 2, https://extension.okstate.edu/fact-sheets/print-publications/agec/broiler-production-considerations-for-potential-growers-agec-202.pdf [https://perma.cc/2SGQ-M236].

249. *Id.* at 1.

250. *Been*, 495 F.3d at 1236.

251. *Id.* at 1237–38 (citing Jordan v. Diamond Equip. & Supply Co., 207 S.W.3d 525 (Ark. 2005) and arguing that a contract's unconscionability depends on if there is a "gross inequality of bargaining power" and if "the aggrieved party was made aware of and comprehended the provision in question." Many poultry growers do not have a choice of integrators and after investing hundreds of thousands of dollars in chicken houses to start up, remain trapped in flock-to-flock contracting with their integrator to survive)).

252. Kelly Lester, *The Poultry Grower Fairness Act: Striking a Balance or Federal Overreach?*, THE JOHN LOCKE FOUND. (Aug. 11, 2023), https://www.johnlocke.org/the-poultry-grower-fairness-act-striking-a-balance-or-federal-overreach/ [https://perma.cc/4EGM-2MSM].

253. *See* Alana Semuels, *'They're Trying to Wipe Us Off the Map.' Small American Farmers Are Nearing Extinction*, TIME (Nov. 27, 2019, 1:16 PM), https://time.com/5736789/small-american-farmers-debt-crisis-extinction/ [https://perma.cc/YW7E-7KDX].

unconscionable.[254] An unconscionable contract is one in which, "at the time of making of the contract, and in light of the general commercial background and commercial needs of a particular case, clauses are so one-sided as to oppress or unfairly surprise one of the parties."[255] Even when growers read the contract, much of the language is confusing. As Valerie Ruddle describes, the front page of the contract indicated that it was meant to be a five year agreement, but she later found out that "five year contract" only referred to a flock-to-flock delivery system.[256] In other words, a company can determine the timing of flock delivery so that between flock times are increased to such a degree that the grower does not receive as many flocks as they think they will. Instead of every eight weeks, for example, perhaps a grower might have to wait three or four weeks to get their next flock. This system greatly reduces their ability to generate revenue because they are entirely at the mercy of the integrator. Software lock-ins are similar to the lock-in structure of the farmer housing structures. Once a grower has invested hundreds of thousands of dollars required to enter into a contract with an integrator, they are essentially bound to using that integrator from then on making their ability to freely contract entirely null.[257]

After growers have that infrastructure built and have taken on loans, then the grower must continue to contract with an integrator or risk bankruptcy.[258] Extraordinary power imbalances and information asymmetry between growers and integrators disallows growers from entering into initial contracts with integrators willingly. In a series of recent proposed rulemakings, the USDA attempted to rebalance this contractual relationship by returning power to the grower through increased disclosures and information.[259]

V. PROPOSED SOLUTIONS TO CORRECT FUNDAMENTAL IMBALANCES IN POULTRY CONTRACTING TO RESTORE MEANINGFUL CONTRACT NEGOTIATION

While the following suggestions are by no means exhaustive, they do present feasible and effective solutions for the problems set out in this Article. First, the USDA should employ existing regulations under the PSA to break up monopsony

254. Poultry Growing Tournament Systems: Fairness and Related Concerns, 87 Fed. Reg. 34814 (proposed June 8, 2022) (to be codified at 9 C.F.R. pt. 201).

255. *Been*, 495 F.3d at 1236 (citing Barnes v. Helfenbein, 548 P.2d 1014, 1020 (Okla. 1976)).

256. *Watch Under Contract: Farmers and the Fine Print*, *supra* note 1, at 21:10.

257. *See* discussion *supra* Sections IV.A.1–2.

258. *Id.*

259. *See* Johnson, *supra* note 177.

integrators.[260] Second, to protect their rights, chicken growers should be reclassified as employees rather than independent contractors. Third, the USDA should reconsider the captive supply rule as set out by the Western Organization of Resource Councils (WORC) to enhance fair competition around broiler contracting.[261] Finally, any or all of these proposals should be integrated into sessions on the 2023 Farm Bill, especially and specifically the latest proposed rulemaking on Inclusive Competition and Market Integrity as proposed by the USDA.[262]

A. Solution 1: Enforce Existing Regulations to Break Up Big Integrators

Regardless of whether they are comprehensive, contract reforms attempting to restore mutual assent between poultry growers and integrators will have little effect in a highly concentrated market (such as the broiler production market).[263] Even the current presidential administration acknowledges that poultry markets are exceedingly concentrated and backs the new USDA rules including the Inclusive Competition and Market Integrity Rules Under the Packers and Stockyards Act announced September 26, 2022.[264] The USDA itself asserts the need for the new proposed rules in the introductory paragraphs to 2022 proposed rulemakings.[265]

260. *See generally* KELLEY, *supra* note 60, at 1.

261. Gilles Stockton, *There is a Solution*, W. ORG. OF RES. COUNCILS (Mar. 6, 2017), https://www.worc.org/cattle-market/ [https://perma.cc/MH3T-ZZRM].

262. *USDA Extending Comment Period on Proposed Rule to Support Equitable Access and Competition, Prevent Retaliation and Deception*, U.S. DEPT. OF AGRIC. (Nov. 22, 2022), https://www.ams.usda.gov/content/usda-extending-comment-period-proposed-rule-support-equitable-access-and-competition#:~:text=The%20Inclusive%20Competition%20and%20Market%20Integrity%20proposed%20rule,producers%20in%20the%20livestock%2C%20meat%2C%20and%20poultry%20markets [https://perma.cc/55XP-952H].

263. *See* Johnson, *supra* note 177.

264. *See, e.g.,* Press Release No. 0205.22, U.S. Dep't. of Agric., Biden-Harris Administration Announces Major Actions to Spur Competition, Protect Producers and Reduce Costs (Sept. 26, 2022), https://www.usda.gov/media/press-releases/2022/09/26/biden-harris-administration-announces-major-actions-spur [https://perma.cc/62L3-G5MR] ("'Highly concentrated local markets in livestock and poultry have increasingly left farmers, ranchers, growers and producers vulnerable to a range of practices that unjustly exclude them from economic opportunities and undermine a transparent, competitive, and open market—which harms producers' ability to deliver the quality, affordable food working families depend upon,' said Agriculture Secretary Tom Vilsack, who is a member of the White House Competition Council.").

265. *See, e.g.* Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. 34980 (proposed June 8, 2022) (to be codified at 9 C.F.R. pt. 201); Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 Fed. Reg. 60010,

First, the Department of Justice and the USDA could employ both the Sherman Act and the PSA to break up vertically integrated broiler integrators. Correctly interpreted, the entire poultry tournament compensation system is inherently anticompetitive and should be investigated as both a violation of the PSA and the Sherman Act. A multitude of deceptive practices make up the tournament compensation system[266] and its use prevents would-be competitors from entering the market and competing on any meaningful level.

The USDA should not only adopt the proposed rules that they have already written and solicited comments on, but they should continue to propose new rulemakings under the PSA that expand growers' ability to bring legal action against integrators for unfair practices, undue preference, deceptive practices, and other unlawful conduct as defined by the PSA. While the current proposed rule on Inclusive Competition and Market Integrity prohibits disadvantages and prejudice against "market vulnerable" individuals, the proposed rule does not define what types of individuals may be at a "disadvantage" broadly enough for those growers to sue under the new proposed rules.[267]

For example, the proposed rule specifically defines market vulnerable individuals as those who are at a disadvantage "in relevant markets," but does not define exactly what those markets are, or the market conditions that exist which may put a producer at a disadvantage outside of the producer's own genetic qualities.[268] This Article proposes that a market vulnerable individual should be defined as not only who and what the producer is, but how the producer fits into

60039 (proposed Oct. 3, 2022) (to be codified at 9 C.F.R. pt. 201) ("Heightened market concentration implies that livestock producers and poultry growers face fewer marketing and contract options compared to less concentrated markets.").

266. *See* Transparency in Poultry Grower Contracting and Tournaments, 87 Fed. Reg. at 34980; *see* Comments on USDA's Proposed Rule on Transparency in Poultry Grower Contracting and Tournaments from The Open Mkts. Inst. to S. Brett Offutt, Agric. Mktg. Serv., U.S. Dep't of Agric., *supra* note 218.

267. *See* Inclusive Competition and Market Integrity Under the Packers and Stockyards Act, 87 Fed. Reg. 60010, 60013 (proposed Oct. 3, 2022) (to be codified at 9 C.F.R. pt. 201) ("Racial and ethnic minorities are arguably more exposed to market abuses, as evidenced by their participation in the agricultural sector having declined sharply over the last many decades. The most recent data from the 2017 Census of Agriculture . . . indicate that non-white racial and ethnic groups constitute a very small share of contracted livestock and poultry producers—a trend likely due in part to historical discrimination against these groups.").

268. *Id.* at 60010, 60016 (explaining that "proposed § 201.304(a)(1) would prohibit prejudice, disadvantage, or the denial or reduction of market access by regulated entities against covered producers based on their status, as defined in the regulation, of being 'market vulnerable' producers. This term is defined as membership in a group that has been subjected to, or is at heightened risk of, adversely differential treatment in the marketplace.").

the broader poultry production system. If the market only consists of one buyer or a few buyers each holding a majority of the market share, then a producer in that market should be considered at a disadvantage and specifically vulnerable to market abuses. This is especially true if a producer has invested in setting up infrastructure to grow broilers but then faces monopsonistic or oligopsonistic market conditions.

In broadening their definition of a market vulnerable individual, then, the USDA may propose and adopt further contract reforms that "assure that the processor-producer relationships serves as a fair partnership, rather than a dictatorship."[269] If the USDA finds that a producer exists in a non-competitive market with only one or two buyers for their broilers, then they may deem that producer a market vulnerable producer and enforce stricter protections for that producer as compared with one who may have the benefit of many competitors. Even in the case that the USDA broadens their definition of market vulnerable individuals to allow for more civil action against integrators, this solution does not address the concentrated market issue.

B. Solution 2: Re-classify Growers as Employees Rather than Independent Contractors

One of the solutions for the imbalance of power between growers and integrators stems from growers' labor classification. Growers should be reclassified as employees, rather than independent contractors because every aspect of the growing relationship is controlled by the contractor. Recently, broiler chicken growers brought a class action against an integrator for misclassification of their employee status.[270] Chicken growers Michael Diaz, Jean-Nichole Diaz, and collectively, Diaz Family Farms, LLC, filed a complaint against Amick Farms, LLC alleging that the farm controlled so many of their inputs that they should be classified as employees rather than independent contractors.[271] The complaint alleges that Defendant Amick Farms, LLC uses their Grower's Contract and "Grower Guidelines" to control "nearly every aspect of Plaintiffs' work" including the schedule, approved brands and mixtures of drugs, chemicals, insecticides, and

269. Steven D. Etka, *Comments from Campaign for Contract Agriculture Reform,* CIVIL EATS (Oct. 12, 2009), https://civileats.com/wp-content/uploads/2010/05/255200.pdf [https://perma.cc/LD9E-4S9K].

270. Erin Shaak, *Amick Farms Broiler Chicken Growers Misclassified as Independent Contractors, Lawsuit Alleges*, CLASSACTION.ORG (Apr. 19, 2022), https://www.classaction.org/news/amick-farms-broiler-chicken-growers-misclassified-as-independent-contractors-lawsuit-alleges [https://perma.cc/3UKK-8WRW].

271. Complaint at 1, 14, Diaz v. Amick Farms, LLC, No. 5:22-cv-01246-SAL, 2022 WL 18584352 (D.S.C. July 7, 2022).

specifically prescribes how chickens are to be raised.[272] Disallowing producers from classifying themselves as employees prevents them from pursuing protections under United States labor laws specifically designed to protect employees.[273]

C. Solution 3: Implement Recommendations from the Western Organization of Resource Councils to Allow Bidding for Production Contracts on the Open Market

In 1996, the WORC made recommendations through proposed rulemaking to the Grain Inspection, Packers and Stockyards Administration of the USDA.[274] WORC argued, and continues to argue, that the following three recommendations would substantially improve an open market for livestock growers:

> Restrict packers from using forward contracts (forward contracts are agreements between two parties to buy or sell something at a specified price on a future date). Under the WORC rule, forward contracts would only be allowed with a firm base price and bidding in an open market.
>
> Bidding in an open market would also establish a truly value-based price discovery for both domestic and imported cattle.
>
> Finally, the WORC rule would also restrict packers from owning cattle and feeding cattle.[275]

Originally, the WORC rule was proposed to regulate the imbalance between livestock cattle growers and meatpackers.[276] However, the same approach may be applied to poultry markets to correct the imbalance of power dynamics currently at play. Spot markets are defined as cash markets, and their existence has been nearly wholly blotted out by big integrators.[277] In fact, the poultry industry is one of the first livestock markets that has almost become fully vertically integrated.[278] Restoring spot cash markets through the WORC captive supply rule would return

272. *Id.* at 7.

273. *See id.* at 6.

274. Filing of a Petition for Rulemaking: Packer Livestock Procurement Practices, 62 Fed. Reg. 1845 (proposed Jan. 14, 1997) (to be codified at 9 C.F.R. pt. 200).

275. Anna Straus, *A Guide to the Farmer Fair Practices Rules*, FARM ACTION (Feb. 24, 2021), https://farmaction.us/2021/02/24/a-guide-to-the-farmer-fair-practices-rules/#:~:text=Under%20the%20WORC%20rule%2C%20forward,both%20domestic%20and%20imported%20cattle [https://perma.cc/32ZA-EW36].

276. *See generally id.*

277. Smith, *supra* note 133.

278. *See generally* Sorvino, *supra* note 141.

ownership of chicks to the farmers and remove them from integrators' full control. The purpose of this would be to force integrators to bid for contracts with growers in the open market and restore their ability to negotiate the terms of those contracts.

Even if the USDA implements the WORC rule to try and amend the issues with poultry production contracting, they still face a concentrated market. Regardless of whatever steps they take to amend the issues within contracting itself, if the market only has one or very few buyers, the USDA may not make substantial changes without breaking up those companies. On the other hand, reducing captive supply in concert with disallowing integrators from owning more than one processing plant may considerably increase competition, which will increase the ability for growers to meaningfully negotiate with integrators.

D. Integrate Any or All Recommendations Through the 2023 Farm Bill

As of April 29, 2022, the Senate Agriculture Committee commenced hearings to bring attention to issues needing reform during the 2023 Farm Bill reauthorization process.[279] The Farm Bill, as the public generally terms it, is an omnibus piece of legislation passed every five years that reauthorizes funding for public nutrition programs such as SNAP, farm subsidies through crop insurance, regulates loan limits, trade, credit and forestry as well as provides a host of other declarations and program funding to support farmers and food production.[280]

Legislators have a unique opportunity through the 2023 Farm Bill to address rampant meatpacker and integrator abuse as demonstrated by a multitude of comments to the USDA during each proposed rulemaking process.[281] The USDA continues to propose rules containing enough background information describing

279. *Digging into the 2023 Farm Bill: Senate Hearings Kick-off the Long Road to the 2023 Farm Bill,* NAT'L SUSTAINABLE AGRIC. COAL.: NSAC'S BLOG (July 22, 2022), https://sustainableagriculture.net/blog/digging-into-the-2023-farm-bill-senate-hearings-kick-off-the-long-road-to-the-2023-farm-bill/ [https://perma.cc/33CG-KCWW].

280. *What is the Farm Bill?,* NAT'L SUSTAINABILITY AGRIC. COAL. (Feb. 13, 2024, 12:08 PM), https://sustainableagriculture.net/our-work/campaigns/fbcampaign/what-is-the-farm-bill/ [https://perma.cc/39KX-SQ9H].

281. *See, e.g.*, Comment on *Poultry Growing Tournament Systems, supra* note 164, at 7 (sharing stories direct from farmers, like a poultry grower from Georgia: "I was given sick birds, and I finished so poorly that I could not even make a bank payment. My integrator acknowledged they gave me sick birds and that was the reason for my poor performance, but they still took over half of my check to offset their losses. When I asked about my losses I was told that this is how the business works. I had to get an extra loan to pay for my gas and electricity. In another example, I was brought a bad batch of feed 3 days before my flock was picked up. The birds stopped eating and drinking. My integrator acknowledged the mistake. My birds were the lightest I ever grew. They died a lot towards the end. The company did nothing to offset my losses.").

the inequal balance of power that exists in poultry integrator-grower relationships, but has failed to pass both the 2010 and 2016 proposed rules that would have directly addressed these problems.[282] Given the direction of increased consolidation and mergers on the horizon, it is absolutely essential that these provisions pass as part of the 2023 Farm Bill.

VI. CONCLUSION

Regardless of how much the production contract industry has changed over the past 70 years, how increasingly automated it has become, or how different it will become in the future, one thing is clear: big chicken wields the big stick and individual growers suffer for it every day. Without the ability to negotiate with integrators, growers are entirely at the mercy of the huge, vertically integrated companies controlling our domestic food supply. Not only is this kind of power abusive for growers, but it also threatens our national security, water quality, and environmental sustainability. The 2023 Farm Bill, along with the USDA's proposed rules, are our best chance for fundamentally correcting the power imbalance between growers and integrators so that they may meaningfully negotiate contract terms that are fair and reasonable. Lawmakers must act as soon as possible because it is our food that is at stake in this fight.

282. *See* Poultry Growing Tournament Systems: Fairness and Related Concerns, 87 Fed. Reg. 34814 (proposed June 8, 2022) (to be codified at 9 C.F.R. pt. 201) ("The first proposed rule, in 2010, would have required live poultry dealers—when paying growers under poultry grower ranking systems—to pay growers the same base pay for growing the same type and kind of poultry. . . . The 2016 proposed rule would have identified criteria that the Secretary could consider when determining whether a live poultry dealer's use of a system for ranking poultry growers for settlement purposes is unfair, unjustly discriminatory, or deceptive or gives an undue or unreasonable preference, advantage, prejudice, or disadvantage. The 2016 proposed rule was formally withdrawn in 2021.").