

# The Agriculturalist Lawyer



A publication of the Agriculture Law Section, State Bar of Georgia

Vol. 1, Issue 3

June 2006

## Defining Actionable “Unfairness” Under the Packers and Stockyards Act

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The Packers and Stockyards Act (PSA), 7 U.S.C. §§ 181-229, makes it unlawful for packers, swine contractors, or live poultry dealers to engage in any “unfair, unjustly discriminatory, or deceptive practice or device.” What constitutes unfair, discriminatory or deceptive conduct sufficient to violate the PSA was, until last summer, an open question in the Eleventh Circuit. But in a series of four PSA cases decided last summer, the Eleventh Circuit addressed the issue and, joining other circuit courts, held that a plaintiff bringing a PSA claim must show that the defendant’s alleged unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition in order to succeed on the claim.

### **London v. Fieldale Farms Corp., 410 F.3d 1295 (11th Cir.), cert. denied, 126 S. Ct. 752 (2005).**

In the first of last summer’s decisions, *London*, the Eleventh Circuit resolved an issue of first impression in the circuit and held that a plaintiff bringing a PSA claim must show that the defendant’s unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition. The court rejected the notion that a federal case under the PSA exists every time a dealer commits simple breach of contract. The court held that, unless the competitive injury requirement existed, dealers would be subjected to PSA liability for a simple breach of contract or for terminating a grower’s contract with justification if a grower had failed to perform as promised.

In *London*, poultry growers brought an action against an integrated poultry company contending that the defendant violated the PSA by terminating their grower contracts without sufficient economic justification. In determining whether the termination constituted a prohibited unfair, unjustly discriminatory, or deceptive practice under the PSA, the Eleventh Circuit noted that the PSA does not define these terms and, accordingly, looked to (1) the purposes Congress sought to serve when enacting the statute, (2) how other courts have dealt with the issue, and (3) policy issues.

First, as to the purposes of the PSA, the court noted that the PSA was enacted to combat a monopoly the meatpackers were believed to have in the 1920s. “The primary purpose of the PSA was to ‘assure fair competition and fair trade practices in livestock marketing and in the meatpacking industry.’” *Id.* at 1302. “At the time of enactment, the chief evil Congress feared was the monopoly of the packers. The Act was ‘aimed at halting a general course of action for the purpose of destroying competition.’” *Id.* at 1302 (citations omitted).

Second, with respect to how other courts had dealt with the issue, the *London* court noted that other courts addressing the issue have also found that an adverse effect on competition was required. Other courts “have held that only those unfair, discriminatory or deceptive practices adversely affecting competition are prohibited by the PSA.” *Id.* at 1303 (citing *Farrow v. Dep’t of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985); *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976); *Armour & Co. v. United States*, 402 F.2d 712, 722-23 (7th Cir. 1968); *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824, 827 (E.D.Va. 2002); *Philson v. Cold Creek Farms, Inc.*, 947 F. Supp. 197, 200 (E.D.N.C. 1996)).

Finally, the court cited policy considerations as further support for its holding. The court noted that Congress had given the Secretary of Agriculture

. . . no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged . . . [E]liminating the competitive impact requirement would ignore the long-time antitrust policies which formed the backbone of the PSA’s creation. Failure to require a competitive impact showing would subject dealers to liability under the PSA for simple breach of contract or for justifiably terminating a contract with a grower who has failed to perform as promised. *Id.* at 1303-04.

Shortly after issuing the *London* decision, the Eleventh Circuit applied its requirement that PSA plaintiffs show either a competitive injury or a likelihood of competitive injury to reject poultry grower claims in two other cases, *Mims v. Cagle Foods JV, LLC*, 148 F. App'x 762 (11th Cir. 2005), and *Adkins v. Cagle Foods JV, LLC*, 411 F.3d 1320 (11th Cir. 2005). In both cases, the court noted that the plaintiff failed to present sufficient evidence of an adverse effect on competition or a likelihood of an adverse effect on competition to make out a PSA claim.

**II. *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005), cert. denied, 126 S. Ct. 1619 (2006).**

The Eleventh Circuit decided the *Pickett* case two months after the *London* decision and shortly after *Mims* and *Adkins* were decided. In *Pickett*, cattle producers brought a nationwide class action against a meatpacker alleging that the packer's shift from buying cattle on the cash market to buying cattle through marketing agreements depressed the price of the cash market cattle and was therefore a violation of the PSA. Relying on the just-released *London* decision, the *Pickett* court affirmed the trial court's grant of the defendant's motion for judgment as a matter of law, which had set aside a jury's verdict of more than one billion dollars in favor of the producers.

In doing so, the *Pickett* court noted that "[t]he *London*

decision settles in this circuit that by 'unfair' practice, PSA § 202(a) means a practice that does or is likely to adversely affect competition." *Id.* at 1280. The court found that the packer's asserted justifications for its conduct to be valid and supported by sufficient evidence, and were therefore not pretextual and not a PSA violation.

Specifically, the *Pickett* court found that the following three justifications of the packer were valid and supported by the evidence - (1) that the use of marketing agreements provided the packer with a reliable and stable supply of cattle for its packing plants; (2) that the use of marketing agreements reduced the packer's transaction costs by eliminating the need to negotiate for each individual pen of cattle, as it was required to do on the cash market; and (3) that the marketing agreements allowed the packer to pay for each head of cattle in a pen individually based on the quality of the meat, rather than paying for the variable quality contained in the entire pen.

**Conclusion**

The Eleventh Circuit has joined other circuit courts and concluded that, in light of the purposes for which the PSA was enacted, the treatment of the PSA by other courts, and policy considerations, more than a simple breach of contract is required to make out a PSA violation. An adverse effect on competition, or at least a likelihood of an adverse effect on competition, is required.

## Section Closes Out Successful Bar Year

By Allen H. Olson, Section Chair  
aolson@mcdm-law.com

Congratulations to all section members! Your interest in agricultural law and your hard work have paid off. The State Bar has awarded the Agriculture Law Section an Award of Achievement for its activities over the past months. These include increasing section membership from 43 to 60, conducting a successful CLE in Tifton, organizing a panel of Southeastern Ag Commissioners and General Counsel for the American Agricultural Law Association conference this coming October, and launching this newsletter. Let's keep our enthusiasm and good ideas working.

I strongly encourage all section members to attend the AALA conference on Oct. 13 and 14 in Savannah. The conference schedule and registration information are below. As you can see, the conference provides something for everyone. Excellent speakers will address a wide variety of agricultural law topics, the social activities are great, and you can't beat the Savannah location. The section has been instrumental in getting Sen. Chambliss to give the conference keynote address on the future of federal farm pro-

grams. In their panel, Commissioner Irvin from Georgia, Commissioner Weathers from South Carolina and their general counsel will talk about "hot button" agricultural policy and legal issues in the Southeast. I hope to see you there.

This issue of the newsletter also includes an excellent article on recent Eleventh Circuit decisions interpreting the federal Packers and Stockyards Act by section member Nowell Berreth. Many thanks to Nowell for putting this article together.

Since our last election was in November, the executive committee decided to put off the next election until after the AALA conference. In the meantime, a nominating committee consisting of section members Anthony Thomasson, Nowell Berreth, and Truitt Martin will come up with a slate of candidates for the positions of chair, vice chair, and secretary/treasurer, plus two additional members of the executive committee. Please feel free to suggest candidates to the nominating committee. Nominations will close on Oct. 31.

# **AAALA 27th Annual Agricultural Law Symposium**

## **Serving 21st Century Agriculture**

### **An Excellent Learning Opportunity**

For more than 26 years the American Agricultural Law Association (AALA) has provided lawyers, educators, students and those in the agribusiness community with the very latest information on relevant matters dealing with agriculture. The 2006 conference will continue this tradition of excellence at a time when so much is happening in Washington and around the world that impacts every aspect of agricultural law.

The 2006 conference will include updates on commercial law, environmental law, bankruptcy, and tax law. There also will be sessions on farm and ranch estate tax, current food law issues, protection of farm land and farm cooperatives. A special session is planned in which several regional commissioners of agriculture will discuss major policy and legal issues for the southeastern United States. There will also be a special session for law students and new lawyers addressing career opportunities involving agriculture and law and a panel discussion on international aspects of food identification and traceability.

There is something for just about everyone involved in agricultural law. The agricultural professional today needs to stay abreast of new developments, and the AALA Annual Conference is the best place to obtain this education. It will provide an excellent learning opportunity. We look forward to seeing you in Savannah, "America's First City!" Register today. Registration materials and the most current schedule of events is also available online at [www.aglaw-assn.org](http://www.aglaw-assn.org).

-Steve Halbrook, AALA President-Elect

#### **Thank You!**

The AALA appreciates the generous support of the Farm Foundation. As it has in many years, the Farm Foundation's grant to the AALA for the annual conference has allowed the AALA to offer student attendees a greatly reduced registration fee which is instrumental in giving the students the chance to participate in broadening their educational experiences.

#### **You Can Help Too!**

The AALA has been fortunate in the generosity of its members through service and financial support. Each annual conference brings yet another opportunity for members and their firms to help offset the many expenses associated with the annual conference. Please contact Robert Achenbach, [RobertA@aglaw-assn.org](mailto:RobertA@aglaw-assn.org), if you or your firm would like to sponsor or help sponsor any aspect of the 2006 conference in Savannah. Contributions may be made in monetary form or in the form of services, such as lending us the use of your LCD video projector and/or laptop.

#### **CONFERENCE SCHEDULE**

Schedule is subject to changes. For the most recent schedule, see [www.aglaw-assn.org](http://www.aglaw-assn.org)

#### **Friday, October 13, 2006**

7:00-8:30 Conference Registration and Continental Breakfast

7:30-8:30 ABA Business Section: Ag Finance Subcommittee

8:30-9:00 AALA Annual Business Meeting

*Donald Uchtmann, AALA President*

*Robert P. Achenbach, Jr., AALA Executive Director*

9:00-10:10 Session 1:

#### **Annual Update of Developments in Agricultural Law**

2006 Update: Tax Law

*Phil Harris, University of Wisconsin*

2006 Update: Environmental Law

Theodore A. Feitshans, North Carolina State University

10:10-10:25 Break

10:25-11:35 Session 2:

**Annual Update of Developments in Agricultural Law (continued)**

2006 Update: Commercial Law

*Keith G. Meyer, University of Kansas School of Law*

2006 Update: Bankruptcy

*Susan A. Schneider, University of Arkansas School of Law*

11:35-12:10 Session 3:

**"New Rural Development Initiatives"**

*Tom Dorr, Under-Secretary for Rural Development, USDA*

12:10-1:00 Session 4: Lunch Special Speaker: Senator Saxby Chambliss

1:00-3:00 Session 5:

**"Current Legal Issues for Southeast Agriculture"**

Moderator and organizer: *Allen Olson and the Georgia Bar Agricultural Law Section*

*Tommy Irvin, Commissioner, Georgia Department of Agriculture*

*David B. Gunter, General Counsel, Georgia Department of Agriculture*

*Hugh E. Weathers, Commissioner, South Carolina Department of Agriculture*

*Ann E. Crocker, General Counsel, South Carolina Department of Agriculture*

3:00-3:15 Break

3:15-5:00 Session 6: Concurrent Sessions:

**Concurrent A:**

**"Issues of Food Law"**

**Moderator: Michael Roberts**

*Michael T. Roberts, National Agricultural Law Center*

*Nancy Bryson, Venable, L.L.P.*

*A. Bryan Endres, University of Illinois*

**Concurrent B:**

**"Estate Planning"**

**Moderator: Phil Harris**

"I.R.C. § 199 Developments"

*Phil Harris, University of Wisconsin*

"Choice of Farm Business Arrangements"

*Roger McEowen, Iowa State University*

"Terminating Business Entities"

*David Bibler, Bibler, Buchanan & Gabor*

**Concurrent C:**

**"Land Use - Government Controls and Agricultural Production"**

**Moderator: Terrance J. Centner**

"Forest and Farm Land Preservation"

*Ted Feitshans, North Carolina State University*

"Beyond Fairness: What Really Works to Protect Farmland"

*Jesse J. Richardson, Virginia Tech*

"Protecting Manure Application from Nuisance Claims through Anti-Nuisance Legislation"

*Terence J. Centner, The University of Georgia*

6:00-7:00 Reception for all Participants and Guests

**Saturday, October 14, 2006**

7:00-8:30 Continental Breakfast

*Sponsored by Alston and Bird, L.L.P., Atlanta, GA*

**Breakfast Discussion Groups:** The main meeting room will be divided into sections for Practitioners; Educators; Government Attorneys; Corporate Counsel. Students are encouraged to attend any of the above sessions to discuss issues in the field of most interest to them.

8:30-10:00 Session 7:

**Concurrent A:**

**"A View from the Trenches:**

**Current Developments in Production Contracts and Animal Waste Litigation."**

*Moderator and organizer: Janie Hipp, University of Arkansas*

Counsel for both sides of the hotly contested *State of Oklahoma ex rel. Edmondson v. Tyson Foods, Inc. et al*, will be present to offer a lively discussion of case at hand, legal theories involved, scientific frameworks within which decisions are being made, history of the litigation and the ongoing water wars between Oklahoma and Arkansas. The impact of production contracts on the legal issues and the destiny of animal waste for the region will be discussed.

**Concurrent B:**

**"Cooperatives and other Business Structure Issues. Case studies of transforming cooperatives into publicly-traded corporations"**

**Organizer: Nowell Berreth, Alston & Bird LLP**

*William Scott Ortwein, Partner, Corporate Transactions and Securities Group, Alston & Bird LLP*  
*Brian M. Callaci, Managing Director, Merrill Lynch Private Banking and Investment Group*

**Concurrent C:**

**"Perspectives on the Next Farm Bill"**

**Organizer: Anne Hazlett**

*David Grahn, Assoc. General Counsel, Rural Development, USDA*  
*Michael Knipe, Assist. General Counsel, Legislative Liaison, USDA*  
*Doug O'Brien, National Agricultural Law Center*  
*Bill Gillon, Butler, Snow, O'Mara, Stevens & Cannada*

10:00 - 10:15 a.m. Break

10:15 a.m. - 12 noon Session 8:

**Concurrent A:**

**"Second Annual Bock Chair Mini-Symposium Animal Identification and Traceability in a Global Context"**

**Moderator and organizer: Margaret Grossman**

"NAIS: What? Why? When?"

*John F. Wiemers, Director NAIS*

"Animal Traceability: Regulatory Background and Legal Issues"

*Margaret Rosso Grossman, University of Illinois*

"Animal Identification and Traceability in Europe"

*Bernd van der Meulen, Wageningen University*

**Concurrent B:**

**"Career Opportunities in Agricultural Law: Is the Grass Really  
That Green on the Other Side of Law School?"**

**Moderator and organizer: *Pat Dillon***

*Shannon L. Ferrell, Hall Estill PC*

*Jennie Williams, Clerk, Eighth Circuit Court of Appeals*

*Pat Dillon, Dillon Law PC*

*Trent Hilding, Smith, Martin, Powers & Knier PC*

*Bill Even, South Dakota State Energy Director*

**Concurrent C:**

**"Farmers and Energy - Legal issues of energy production and risk"**

12:00 noon Session 9 Lunch - Presidential Address and Awards Program

2:00 - 3:00 p.m. Session 10

**"Ethics"**

*Richard Morrison, Arizona Dairy Company*

3:00 - 3:15 p.m. Break

3:15 - 5:00 p.m. Session 11

**"Agricultural Law in the 21st Century"**

"Managing Client Relationships in 21st Century Agriculture"

*Dan Dooley, Dooley and Herr, LLP*

"Emerging Issues of 21st Century Agricultural Law"

*Neil Hamilton, Drake University Law School*

"Public Service and 21st Century Agriculture, the Food System and Rural America"

*Charles Stenholm, Olsson, Frank and Weeda*

5:00 p.m. Adjourn

**CONTINUING LEGAL EDUCATION CREDIT**

Be sure to indicate on your registration form the state(s) for which you wish to apply for CLE credit. Continuing Legal Education Credit (CLE) accreditation will be requested in states requiring accreditation. This program will include 820 minutes of legal education plus one hour (60 minutes) of legal ethics. In most cases, all costs associated with CLE pre-accreditation are prepaid. In a few states, attorneys may be required to submit additional fees when applying for their individual credit. Each attendee will be provided with a Certificate of Attendance in triplicate, a copy of which will be submitted to the state CLE boards which require reporting of attendance and a copy kept in our records.

If you wish to receive educational credit for another profession, please indicate your interest on the registration form and send us information on requesting accreditation for the conference.

\* \* \* \*

## CANCELLATIONS

To cancel your registration, contact the AALA office at (541) 485-1090 by 5 p.m. Pacific Time on October 6, 2006. Prior to October 7, registration fees, minus a \$10 processing fee, will be refunded. No refunds will be given after October 7, 2006; however, we will send your handbook to you.

## CONFERENCE HOTEL

Hyatt Regency Savannah  
Two West Bay Street, Savannah, GA 31401  
[www.hyattregencysavannah.com](http://www.hyattregencysavannah.com)

The hotel is located on the Savannah River historical riverfront.

The Hyatt is about 20 minutes from the Savannah International Airport via shuttle at \$17 per person one-way. Taxi is approximately \$18 + \$3 for additional passengers. These prices are currently in flux due to gas prices. Valet parking at the hotel is \$15 per day. Guest rooms for attendees are available at \$170+tax for singles and doubles, \$195+ for triple occupancy and \$220 for four people. The conference rate is also available for three days before and after the conference. For reservations, call 800-233-1234 or reserve online at [www.hyattregencysavannah.com](http://www.hyattregencysavannah.com). Be sure to identify yourself as attending the American Agricultural Law Association conference.

## QUESTIONS

For more information about the conference or the AALA, please contact:

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Eugene, OR 97402

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Fax: 541-302-1958

E-mail: [RobertA@aglaw-assn.org](mailto:RobertA@aglaw-assn.org)

Registration: Please use the enclosed registration form to register yourself and any guest who wishes to attend the lunches and Friday evening reception. The form is also available on the AALA web site in a PDF file which may be filled out on your computer.

Conference handbooks: All attendees must choose whether to receive the conference written materials in printed form or on CD. See the registration for selection of your choice.

Printed Handbooks: The printed handbooks are rather large so we will provide a shipping service to send your handbook to you from Savannah after the conference. The books will be sent UPS/FedEx ground. If you want your book sent by a faster method, please bring your UPS/FedEx account number to the conference and your account will be charged for the shipping. Be sure to check at the registration desk for all written materials submitted close to the conference date. Extra printed handbooks are available and can be ordered on the registration form.

CD Handbooks: Each attendee who requests the written materials on a CD instead of the printed handbook will receive a CD at the conference, but because some written materials are submitted close to the conference dates, not all materials may be on the CD at the conference. Therefore, new, complete CDs will be sent after the conference. Extra CD handbooks are available and can be ordered on the registration form.

Physical and food needs: The registration form has a section for you to let us know of any physical needs you may have in order to comfortably attend the conference. You may also make any special requests for food served at the two lunches. These requests must be made before the conference in order to allow the hotel to make suitable arrangements.