The Packers & Stockyards Act of 1921 Applied to the Hog Industry of 1995

by

Douglas J. O'Brien

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I. INTRODUCTION

The number of farmers continues to decline.[1] In particular, the number of hog farmers in the United States has dwindled by fifty percent since 1980.[2] Family farm

1. *See* Dirck Steimel, *Big Drop for Iowa Farm Population*, DES MOINES REG., July 19, 1992, at J1 (reporting that Iowa suffered a 34% loss in farm population during the 1980s; Illinois, Minnesota, Nebraska, and Missouri suffered similar losses).

2. Steve Marbery, *Pork Production 2000: Fewer Farms Doing More*, FEEDSTUFFS, Feb. 28, 1994, at 1

advocates concerned with these shrinking numbers have asked community leaders and policymakers to take a hard look at the 'numbers' and attempt to level the slippery slope which smaller farmers, those most affected by the trend, find themselves sliding down.[3] As advocates of small and middle-sized farms take stock of their arsenal against the impending industrialization[4] of agriculture, they may notice a new arrow in an old quiver: The Packers & Stockyards Act of 1921.[5]

Congress passed the Packers & Stockyards Act to regulate meat packers by prohibiting unfair, discriminatory, or deceptive practices.[6] The Act attempts to assure fair

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(looking at the fast-changing environment of hog production).

3. Barbara Grabner, *The Changing Face of Rural America: Numbers Point to Continued Displacement*, PRAIRIE J., Summer 1992, at 8-9 (laying out the declining numbers of farmers and charging the community to act); *see also* Neil Hamilton, *Agriculture Without Farmers*, SUCCESSFUL FARMING, Apr. 1994, at 28, 29 (listing actions to be taken to change the course of the industrialization of agriculture, including charging land grant universities with finding "innovative solutions to protecting the future of farmers." Hamilton also sees an opportunity for federal farm programs and environmental laws to secure the farmer's position); Rod Smith, *Pork Consolidation, Efficiency Pursuing Dramatic Forward Shift*, FEEDSTUFFS, Apr. 4, 1994, at 44, 44 (noting that herd inventory in the hands of smaller operations has decreased in the past five years while inventory in the hands of larger producers has increased dramatically); *cf.* A.V. KREBS, HEADING TOWARDS THE LAST ROUNDUP: THE BIG THREE'S PRIME CUT (1990) (abridged from THE CORPORATE REAPERS: FROM SEEDLING TO SUPERMARKET (1990)). In an exhaustive examination of the issues surrounding the concentration of the packing industries, Mr. Krebs concludes:

> To view each of these questions and controversies as a singular problem is a mistake, for they are but symptoms of a larger, more complex, and much more ominous issue. That issue, as it is throughout our entire corporate agribusiness structure, is who shall control our food supply and do we want it controlled by a handful of powerful, impersonal, unaccountable corporations?
>
> Or do we want it controlled by a variety of individuals and companies who are governed not by a bottom line that dictates speed and greed, but rather individuals who recognize a reasonable concern for the public interest based on the principles of economic and social justice?

Id. at 67.

4. *See* Thomas N. Urban, *Agricultural Industrialization: It's Inevitable*, CHOICES, Fourth Quarter 1991, at 4, 6 (proposing that within the industrialization of agriculture, the agricultural industry will become more concentrated under the pressures of increasing levels of capital and technology); *see also* Neil Hamilton, *Agriculture Without Farmers?: Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture*, WHITE PAPER, AGRIC. LAW CENTER, DRAKE U. LAW SCHOOL, Feb. 1994, at 3, 3-6. Professor Hamilton lays out "[t]he emerging conflict between industrialization and sustainable agriculture." *Id.* at 3. Professor Hamilton points to an alternative explanation of industrialization as the "separation of ownership from operation." *Id.* (quoting Marty Strange, *The Economic Structure of a Sustainable Agriculture*, *in* MEETING THE EXPECTATIONS OF THE LAND: ESSAYS IN SUSTAINABLE AGRICULTURAL STEWARDSHIP 116 (Wes Jackson et al. eds. 1984)).

5. 7 U.S.C. §§ 181-231 (1988); *see* Anne Fitzgerald, *Power of Packers is Causing Concern*, DES MOINES REG., Aug. 13, 1995, at J1 (reporting that the USDA has recently filed a claim under the Packers and Stockyards Act against a packer, Iowa Beef Packers Inc., for alleged price discrimination; also stating that other cases within the jurisdiction of the Packers and Stockyards Administration are under investigation).

6. Stafford v. Wallace, 258 U.S. 495, 513 (1922) (stating the purpose of the Packers and Stockyards Act).

The Packers and Stockyards Act states in part:

> It shall be unlawful for any packer with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:

trade practices in the livestock marketing and meat packing industries in order to safeguard farmers against receiving less than true market value for their livestock, and to protect consumers from unfair marketing of meat.[7] When Congress passed the Act, it was described as "a most comprehensive measure, [extending] farther than any previous law in the regulation of private business, in time of peace, except possibly in the Interstate Commerce Act."[8]

Part II of this Note provides the factual background of the hog industry. The legal framework of the Packers & Stockyards Act surrounding the issues arising from the contracting between large hog producers and packers is set out in Part III. Part IV then applies the Packers & Stockyards Act to the hog industry of today.

The Packers & Stockyards Act seems to address the decreasing market power of the small farmer since some of the activities between the packers and the large corporate hog farms will likely cause injury to the smaller producers.[9] Advocates for the small farmer, however, may find it very difficult to use the Act against such practices unless they prove those practices are likely to injure the competitive environment.[10] Although it may be difficult to curb the activities directly, the Packers & Stockyards

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(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

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

. . .

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

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

. . .

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

7 U.S.C. § 192 (1988)

7. Bruhn's Freezer Meats of Chicago, Inc. v. USDA, 438 F.2d 1332, 1337-38 (8th Cir. 1971). H.R. REP. NO. 1048, 85th Cong., 1st Sess. 1 (1957), *reprinted in* 1958 U.S.C.C.A.N. 5212, 5213.

8. Current Legislation, *The Packing Industry and the Packing Act*, 22 COLUM. L. REV. 68, 70 (1922) (quoting SENATE AGRICULTURAL COMM., REP. NO. 77, 67th Cong., 1st Sess. 2 (1921)); *see also* 61 CONG. REC. 1805 (1921) (showing that Congress understood the Packers & Stockyards Act to be broader in scope than the antecedent legislation).

9. *See* discussion *infra* part IV.A.1 (explaining how contracts between packers and large corporate hog farms can injure the competitive environment).

10. *See* discussion *infra* part IV.B.2 (explaining the difficulties of proving that contracts between packers and large corporate hog farms are likely to injure competition).

Administration[11] may utilize regulations to monitor the activities to ensure that the contracts are not increasing the concentration of the packing industry and fixing prices paid to the smaller producer below true market value.[12]

II. FACTUAL BACKGROUND

A. The Environment of the Hog Industry

To understand the possible legal implications of the Packers & Stockyards Act on the hog industry, one must first understand the industry environment. Since 1974, the number of hog producers has fallen from almost three-quarters of a million to 256,000.[13] "The average size of those remaining has more than tripled since 1974, and their power in the marketplace has greatly increased as well. In fact, ultra-large producers (those marketing over 50,000 head per year) have increased their output by fifty-six percent in just the past three years."[14]

A recent report predicts that the thirty largest pork operations in the nation will produce one-fourth of the pigs marketed in 1995.[15] To perpetuate this movement toward larger hog farms, large producers enjoy many advantages over smaller indepen-

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11. Generally, the Packers and Stockyards Administration is:

> [a]n agency within the U.S. Department of Agriculture [which] has authority over individuals and firms that buy and sell livestock. . . .
>
> Under the Packers and Stockyards Act, [the administration] is responsible for monitoring for anticompetitive practices, such as colluding to manipulate prices or apportion territory in order to force sellers to accept prices that are less than those resulting from free competition.

Oversight, *infra* note 26, at 2.

12. *See infra* notes 115-123 and accompanying text (explaining how the Secretary of Agriculture could use his power under the Packers and Stockyards Act to monitor the contracts between packers and large farms to ensure that the activity would not cause harm to the competitive environment and to small farmers). Recently, four members of the House of Representatives "asked President Clinton to order the USDA to report financial details of transactions involving so-called 'captive' supplies of livestock and to seek an anti-trust rollback of market dominance by large packers." George Anthan, *Low Livestock Prices: Who's to Blame?*, DES MOINES REG., Sept. 24, 1995, at J1-2. The President could utilize the Packers and Stockyards Administration in the type of investigation called for. *See* discussion *infra* part IV.B.1 (explaining how the Packers and Stockyards administration could either use existing regulations or promulgate new regulations to investigate contracts between packers and large hog producers).

13. PRAIRIEFIRE RURAL ACTION, HOG TIED: A PRIMER ON CONCENTRATION AND INTEGRATION IN THE U.S. HOG INDUSTRY 5 (1993) [hereinafter PRAIRIEFIRE] (citing Chris Hurt et al., *Industry Evolution*, FEEDSTUFFS, Aug. 24, 1992). Some analysts predict a further drop to just over 100,000 by the year 2001. *Id.*; *see also Big Farms' Hog Market Share Grows*, DES MOINES REG., Jan. 1, 1995, at J3 (reporting the recent statistics given by the Department of Agriculture).

14. PRAIRIEFIRE, *supra* note 13, at 5 (citing The Agricultural Statistics Board, NASS, USDA Crop Reporting Board; Economics, Statistics & Cooperatives Service, USDA; Jim McNabney & Marlys Miller *Predicting the Independent Producers' demise is Premature*, PORK'92, Oct. 1992, at 26); *see also* V. James Rhodes & Glenn Grimes, *Small Survey Indicates Large Producers Growing Rapidly*, FEEDSTUFFS, June 6, 1994, at 26 (finding the marketing of the very large producers (over 50,000 head) grew 25% between 1992 and 1993, and predicting that by 1996 twice the number of hogs will be marketed by these producers as compared to the number of hogs marketed in 1993); Betsy Freese, *Pork Powerhouses*, SUCCESSFUL FARMING, Oct. 1994, at 20 (listing the 30 largest pork producers in the United States).

15. Freese, *supra* note 14, at 20 (surveying the biggest of the big pork producers).

dent producers,[16] including a better price received for livestock.[17] This increasing concentration in the pork industry will most adversely affect the average independent producer.[18] Experts forecast that one or two packers will eventually attain regional domination, having the net effect of eliminating the competitive market system.[19]

B. Packers Contracting With Large Hog Producers

A relatively new phenomenon in the hog industry is long-term contracting between packers and large hog operations.[20] For instance, Smithfield Foods, a Virginia packing firm, has a long-term contractual relationship with some of the nation's largest producers, including its largest producer, Murphy Farms.[21] Smithfield acquires half of its slaughter hogs through such contracts.[22]

This linking-up of different components of the packing industry, a relationship called vertical integration, is the goal of Smithfield.[23] Vertical integration, or more specifically in this case, long-term contracts between packers and large growers, provides the large producers with a consistent market.[24] This in turn means a lack of open mar-

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16. *See* Steve Marbery, *Toward a New Productivity Threshold*, FEEDSTUFFS, July 18, 1994, at 26-27 (pointing out that the huge producers will have an absolute advantage in technologies; for example, as hog production becomes more efficient, genetic engineering will become very important, a technology in which large producers have a decided advantage); *see also* ROBERT MCELROY & CHARLES DODSON, COMMERCIAL HOG FARMS: FINANCIAL STRUCTURAL CHARACTERISTICS, 1987-1991 (Agric. Info. Bull. No. 700, May 1994). "Hog farms with greater than $500,000 in annual sales, displayed a distinct advantage in profitability, with returns on assets exceeding those of all other sales classes by as much as 12 percent." *Id.* at 4.

17. Steve Marbery, *Pork Industry Specialization Created Solid Production Core*, FEEDSTUFFS, Aug. 15, 1994, at 14 [hereinafter *Specialization*] (stating that larger operators appear to have a "clear competitive advantage . . . in price received for their hogs. . . . The largest [hog operations], for instance, would receive $2.10 more for a 250-lb. hog than the 200-sow unit . . . .").

18. *Id.*

19. *See id.* (comparing the hog industry with the cattle industry where the market domination occurs on a national level); *see also* PRAIRIEFIRE, *supra* note 13, at 9 (predicting that one or two packers will eventually dominate at the regional level). As an example of the continued concentration of the packing industry, Smithfield Foods, Inc. recently signed a letter of intent to acquire John Morrel & Co. Anne Fitzgerald, *Morrell Packing Plants to Be Sold*, DES MOINES REG., Oct. 7, 1995, at A1. The deal will make Smithfield the nation's second largest pork processor, right behind Iowa Beef Processors, Inc. *Id.*

20. Letter from Joseph W. Luter, III, President and CEO of Smithfield Foods, to stockholders, *reprinted in* SUCCESSFUL FARMING, Oct. 1994, at 23 [hereinafter Luter letter] (explaining actions taken to further the goal of vertical integration); *see also* Rod Smith, FEEDSTUFFS, Aug. 22, 1994, at 8 (reporting contractual relationship between a packer and two large hog operations); PRAIRIEFIRE, *supra* note 13, at 21-22 (giving an overview of the major players in the hog industry, including two which have a contractual relationship: Murphy Farms, the United State's largest hog producer, and Smithfield Foods, a Virginia packing firm).

21. Rod Smith, FEEDSTUFFS, Aug. 22, 1994, at 8 (reporting that Smithfield, a Virginia packing firm, contracts for hogs with Murphy Farms, Prestage Farms, and Carroll's Foods); *see also Hog Industry Insider*, FEEDSTUFFS, Aug. 15, 1994, at 22, 23 (reporting Carrol Foods' joint venture with Murphy Farms and Smithfield).

22. PRAIRIEFIRE, *supra* note 13, at 22 (citing Steve Marbery, *Smithfield Foods Brainstorms Western Venture*, FEEDSTUFFS, Nov. 16, 1992).

23. *Id.* (claiming that integration is the only way to consistently acquire top-quality hogs).

24. *See* Urban, *supra* note 4, at 4 (touting vertical integration as a means of supplying consistent markets).

kets to other independent producers. And open markets are a key to the survival of other independent producers.[25]

C. The Packers & Stockyards Administration Needs to Increase Industry Oversight

A report by the United States General Accounting Office (GAO) states that, because of the relatively recent changes in the meat packing industries, the oversight of competitiveness needs to be enhanced.[26] An Associate Director of Food and Agricultural Issues warned that the concentration of the livestock industry has increased in the past two decades.[27] This trend will likely continue, given the probability of more and more hog packing plant closings.[28] The GAO report further states that "[b]ecause the meat packing industry is now highly concentrated, packers are more able to engage in anticompetitive behavior to depress prices paid to livestock producers."[29] The supervision procedures of the P&S Administration are inadequate because the Administration compares statistical data dealing with livestock procurements on a national level; live-

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25. *See Hog Industry Insider*, FEEDSTUFFS, Aug. 15, 1994, at 22, 23 (explaining that closed markets may present a large hurdle to hog producers); *cf.* 4 PHILLIP AREEDA AND DONALD TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1011 (1980). The authors conclude that raised entry barriers will have significant adverse effects on competition only if: 1) the barriers lead to near total vertical integration of the different markets, 2) both markets have their own substantial entry barriers, and 3) each market is already substantially non-competitive. *Id.* ¶ 1011g.

26. *Testimony Before the Subcommittee on Livestock, Dairy, and Poultry, Committee on Agriculture, House of Representatives, Livestock Marketing, USDA's Oversight of Competitiveness Needs to Be Enhanced*, (Jan. 1992) [hereinafter *Oversight*] *microformed on* GAO 1.13: RCED-92-19 (statement of William E. Gahr, Associate Director, Food and Agricultural Issues).

27. *Id.* at 3; *see* PRAIRIEFIRE, *supra* note 13, at 9 (explaining the concentration of pork processors and predicting that "regional domination will develop by one or two packer/processors that obtain their live hogs through integrated production systems"). A study by the University of Nebraska found that "10 percent of the hog slaughter is controlled by the packers. Control is highest among the largest packers and reaches 20 percent among packers on the East Coast." *Id.* (citing *University Estimates Packers May Control 10 Percent of Slaughter*, PORK'92, June 1992).

28. *Oversight*, *supra* note 26, at 15; Rod Smith, *Overcapacity Haunts Packers; Byproducts Steady But Shifting*, FEEDSTUFFS, May 23, 1994, at 10, 10 (stating that packers have experienced long-term overcapacity problems; this overcapacity, along with the construction of many very large, efficient, packing plants will lead to the shutdown of many older, smaller, and less efficient plants); *see also* PRAIRIEFIRE, *supra* note 13, at 10. These shutdowns are explained by the fact that slaughter capacity exceeds supply. "Analysts say the industry will have to lower this unprofitable excess capacity over the next five years by almost 30,000 head/day." *Id.* (citing Rod Smith, *Capacity Management Could Force Plant to Consolidate, Relocate Much Production*, FEEDSTUFFS, May 11, 1992); *see also Here is Cargill's Vision of the Pork Industry by 2000*, SUCCESSFUL FARMING, Apr. 1992 (stating that the vice president and general manager of Cargill's Swine Production Department predicts that packers will consolidate). By the year 2000, the vice president and general manager of Cargill Swine Production Department predicts five slaughter houses will kill 75% of the hogs. *Id.*

29. *Oversight*, *supra* note 26, at 4 (pointing out that the current monitoring system is not "sufficient to identify on an ongoing basis anticompetitive practices such as price manipulation or the apportionment of territory"). Instead the agency relies on complaints, inside intelligence, and special studies to decide which particular activities on which to focus. *Id.*

stock procurements are regional, not national.[30] The report charges the P&S Administration to define and monitor regional livestock markets.[31]

The GAO report could also be used to suggest that the contractual relationships between the packers and large hog producers should be monitored. Some of these contractual relationships may also injure the competitive environment since they may effectively cause the loss of a buyer for the rest of the producers.[32] Such activity may result in increased opportunities for large meat-packing firms to engage in anticompetitive behavior.[33] "[A]nticompetitive behavior by packers in buying livestock could result in an exercise of market power that may be directed at forcing livestock prices lower than the competitive market level."[34]

III. LEGAL BACKGROUND

A. Legislation Prior to the Act

The Packers & Stockyards Act constituted the last of a series of congressional efforts to regulate the packing industry.[35] The first piece of legislation was the Sherman Antitrust Law, which prohibited agreements in restraint of trade.[36] This legislation, however, proved ineffective because it is very difficult to prove an actual contract in restraint of trade.[37] "[M]oreover, the strength of the packers especially, did not lie in practices which could be denominated 'agreements,' but in others which were not touched by law."[38] In 1914 Congress attempted to remedy the shortcomings of the Sherman Law by creating the Federal Trade Commission, which was given the power

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30. *Id.* at 22. "By focusing on calculating national statistics on concentration in the meat-packing industry and not defining regional livestock procurement markets, the [P&S Administration may in its data be understating the potential risks associated with concentration in some areas." *Id.* Since concentration at the regional level is probably higher than concentration at the national level, buyers at the regional markets have a greater influence over prices. *Id.*

31. *Id.* at 5.

32. *See* discussion *infra* part IV.A.1 (explaining how contracts between packers and large hog producers cause a loss of a buyer).

33. *Oversight*, *supra* note 26, at 20 (pointing out that anticompetitive behavior was less likely in the past because packers were less concentrated).

34. *Id.*

> Economic theory suggests that if the buying side of the market for livestock is concentrated, the packer-buyers are more likely to possess market power. In such a case, buyers recognize that their buying decisions affect the market price. Moreover, a high degree of concentration among buyers may increase the large packing firms' ability to engage in anticompetitive behavior with the purpose of reducing the prices paid to livestock sellers below a competitive level.

Id. at 20-21; *see also id.* at 21 (giving an example of a market with many sellers and few buyers, where the buyers could agree not to compete on particular days or in particular geographic markets).

35. *Current Legislation*, *supra* note 8, at 68-69 (outlining legislative developments preceding the Packers & Stockyards Act); *see also generally*, 10 NEIL E. HARL, AGRICULTURAL LAW §§ 71.01, 71.02 (1992) (introducing and giving a history of the Act).

36. *Current Legislation*, *supra* note 8, at 68-69.

37. *Id.*

38. *Id.*

to reach "unfair methods of competition."[39] This legislation reached only competition between members of the same industry. Because of the limited scope of the parties affected, this legislation also failed: the packers did not unfairly compete among themselves; they did not compete at all.[40] Finally, the Clayton Act narrowed "restraint of trade" specifically to include price discrimination, tying leases, sales, and contracts. The Clayton Act, however, failed for many of the same reasons the Sherman Act failed.[41]

At the time Congress finally passed the Packers & Stockyards Act, five firms, known as the "Big Five," dominated the packing industry.[42] The Supreme Court stated that the "chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys."[43] Finally in 1921, Congress granted power to the P&S Administration to regulate the packing industry.[44]

B. Basic Procedures Under the Act

When the Secretary of Agriculture has reason to believe that a packer has violated the Act, the Secretary must serve the packer a complaint stating the charges.[45] The packer must attend a hearing where it is given an opportunity to cross-examine the Government's witnesses and to present its own testimony and witnesses.[46] If the Secretary finds the packer in violation of the Act, he or she must make a written report and must order the packer to cease and desist from continuing the violation.[47] Appeals from the Secretary's order must proceed directly to the circuit court of appeals in which the packer has its principal place of business.[48] If the packer fails to obey the Secretary's order by the time allowed for filing an appeal, it may be fined not less than $500 nor more than $10,000 per day of violation.[49]

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39. *Id.* (citing 38 Stat. 717, U.S. Comp. Stat. § 8836a (1916)).

40. *Id.*

41. *Current Legislation*, *supra*, note 8, at 68-69.

42. *Id.* at 68. A letter from the Federal Trade Commission to the President, dated 1920, states that the "Big Five" "control at will the market in which they buy their supplies, the market in which they sell their products, and hold the fortunes of their competitors in their hands." *Id.*

43. Stafford v. Wallace, 258 U.S. 495, 514-15 (1922) (upholding the Act's constitutionality under the commerce clause).

44. *Id.* Commissionmen and dealers in stockyards complained that the Act could not apply to them because they bought and sold the livestock within the same state; therefore, the practice was not part of interstate commerce. *Id.* at 517. The Court, however, held that the commissionmen were part of the "current of commerce" and, therefore, were susceptible to congressional regulation under the commerce power. *Id.* at 518.

45. 7 U.S.C. § 193(a) (1994); *see generally* Randi Ilyse Roth, *Making Complaints Under the Packers and Stockyards Act-A Poultry Grower's Guide*, FARMERS' LEGAL ACTION REP., Winter 1991, at 3.

46. *Id.*

47. 7 U.S.C. § 193(b) (1994). The Secretary may also choose to assess a civil penalty of not more than $10,000 for each violation. *Id.*

48. 7 U.S.C. § 194(a) (1994). Upon the filing of the record, the court of appeals has exclusive jurisdiction to review, to affirm, set aside, or modify the Secretary's order. 7 U.S.C. § 194(e) (1994).

49. 7 U.S.C. § 195 (1994). The packer may also be imprisoned between six months to five years for each offense. *Id.*

C. The Act Should Be Liberally Construed to Fully Effectuate Its Purpose

In Congress's search for effective market regulation, it has invested certain agencies with broad powers.[50] For instance, Congress granted wide latitude to the Federal Trade Commission (FTC) in assessing unfair trade practices.[51] The FTC can "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."[52]

In enacting the Packers & Stockyards Act, Congress intended the prohibitions to be as rigorous as, if not more than, the Federal Trade Commission Act, the Clayton Act, and the Sherman Antitrust Act.[53] The Act is remedial.[54] It should be liberally construed to fully effectuate its public purpose,[55] which is to protect farmers against receiving less than the true market value for their livestock and to protect consumers from the unfair marketing of meats.[56]

D. Lack of Competition Between Buyers

The Seventh Circuit pointed out that "[t]he lack of competition between buyers, with the attendant possible depression of producers' prices, was one of the evils at which the Packers & Stockyards Act was directed."[57] In *Swift v. United States*, two buyers of top grade hogs agreed that only one of them would bid on the hogs if that bidder agreed to sell the hogs at cost to the other buyer.[58] The Secretary of Agriculture found this practice in violation of section 192 of the Packers & Stockyards Act.[59] Swift argued that for a packer's practice to be unfair under the Act, it must be (1) "contrary to good morals because characterized by deception, fraud, bad faith or repression, or (2) against public policy because of a dangerous tendency unduly to hinder competi-

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50. Central Coast Meats, Inc., v. USDA, 541 F.2d 1325, 1328 (9th Cir. 1976) (Goodwin, C.J., dissenting) (holding that the Secretary of Agriculture could not rule as a per se violation of the Packers & Stockyards Act joint ownership of a meat packing business and a cattle buying business).

51. *Id;* FTC v. Brown Shoe Co., 384 U.S. 316, 321 (1966) ("This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws").

52. *Id.* (quoting FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972)).

53. *Id.* (citing Wilson & Co. v. Benson, 286 F.2d 891 (7th. Cir. 1961); *see Current Legislation, supra* note 8, at 70 and accompanying text; *see also* Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968) (stating that although under the Sherman Act a simple refusal to deal is permissible, the provisions of the Packers & Stockyards Act are broader and more far-reaching).

54. Stafford v. Wallace, 258 U.S. 495, 521 (1922).

55. Bruhn's Freezer Meats of Chicago, Inc. v. USDA, 438 F.2d 1332, 1336 (8th Cir. 1971) (allowing the Secretary of Agriculture to broaden the definition of "packers"); *Swift & Co.*, 393 F.2d at 253.

56. *Bruhn's Freezer Meats*, 438 F.2d at 1337-38; *see also Swift & Co.*, 393 F.2d at 253.

57. *Swift & Co.*, 393 F.2d at 254 (citing *Meat Packer Legislation Hearings Before the House Committee on Agriculture*, 66th Cong., 2d Sess. 22, 229, 250, 303, 1047, 2284 (1920)). In *Swift*, the court prohibited a meat packer's practice of refraining from bidding against a registered dealer for producers' fat lambs and then procuring from that dealer more than 80% of the fat lambs purchased by the packers. *Id.* at 253.

58. Swift & Co. v. United States, 308 F.2d 849, 852 (7th Cir. 1962) (pointing to the fact that the two buyers made an agreement after their own competition at the market had caused the price for hogs to increase).

59. *Id.* at 851 (reciting the judicial officer's decision in which Swift was ordered to cease and desist from such illegal practices).

tion or create monopoly."[60] The court rejected this argument, stating that the scope of the Packers & Stockyards Act is broader than its antecedent legislation.[61] Because of this broad scope, the court implicitly rejected the notion that bad faith or tendency toward monopoly must be present to find a violation. The court ignored the intention of the parties and instead focused on the outcome of the actions: "The essential nature and the necessary result of the arrangement or practice was to eliminate competition."[62]

E. No Need to Prove Actual Injury

Courts have held that the Government is not required to prove actual injury to competition in order to find a violation of the Packers & Stockyards Act.[63] In *Wilson & Co. v. Benson*,[64] Wilson, a packer, cut prices for meat products, but only in the San Francisco area.[65] Wilson petitioned the Seventh Circuit to review the Secretary of Agriculture's order that Wilson cease and desist from price discrimination where the discrimination may substantially reduce competition.[66] Wilson argued that it did not seek to injure competition, but was merely cutting prices to increase customers.[67] The court, however, deferred to the Secretary's finding that Wilson's acts injured the competitive environment.[68] Wilson also insisted that the order be reversed because there was no finding that its price cutting program existed for the purpose of acquiring a monopoly or eliminating a competitor.[69] The court, however, focused on the language of section 192(a) and stated that the "Act does not specify that a 'competitive injury' or a 'lessening of competition' or a 'tendency to monopoly' be proved in order to show a violation of the statutory language."[70]

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60. *Id.* at 853.

61. *Id.* (citing Wilson & Co., Inc. v. Benson, 286 F.2d 891, 895 (7th Cir. 1961) as defining the broad limits of the Act).

62. *Id.*

63. *Wilson & Co.*, 286 F.2d at 895 (pointing out that the language in § 192(a) does not specify that a competitive injury or lessening of competition need be proven for a violation).

64. *Id.*

65. *Id.* at 893-94 (describing a practice of cutting prices by as much as $0.10 per pound when the usual practice was to cut by only $0.02 per pound). "[D]uring the period from April 1 to October 27, 1956, in the San Francisco area, Wilson sold its meat and meat products to hotels, restaurants and ship lines at a loss exceeding $152,000." *Id.* at 894.

66. *Id.* at 894 (reciting the Secretary's order requiring Wilson to cease and desist from price discrimination). The order did allow Wilson to discriminate in pricing in three situations: 1) meeting the low price of a competitor, 2) responding to changing conditions in the marketability of meat, and 3) making allowances for the cost of processing, sale, or delivery to a particular person. *Id.*

67. *Id.* (asserting that such attempts to gain new customers was not an unfair practice within the meaning of § 192(a) of the Packers & Stockyards Act).

68. Wilson & Co., Inc. v. Benson, 286 F.2d 891, 894 (7th Cir. 1961) (recognizing the Secretary's finding that Wilson's price reductions to certain customers "bore no realistic relation to [Wilson's] costs or the prices charged by its competitors in the hotel and restaurant supply business in the San Francisco area"). The Secretary also found that the discriminatory prices were not made in good faith. *Id.*; *see also* David H. Rosenberg, *Vertical Integration in the Cattle Feeding Industry and the Packers and Stockyards Act*, 7 U. TOL. L. REV. 935, 948 (1975-1976).

69. *Wilson & Co.*, 286 F.2d at 895.

70. *See also* Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968) (citing *Wilson*, 286 F.2d at 895, for the proposition that § 192(a) does not require the government to prove injury to competition). In

The Eighth Circuit adopted, then slightly modified, this standard for the Government's burden.[71] In *Farrow v. USDA*, two buyers at an auction market entered into an agreement where one buyer refrained from bidding when the other buyer was present at the cattle auction.[72] The USDA judicial officer concluded that the practice was unfair under the Act.[73] The buyers argued that the Government failed to show injury because it offered no proof that the price of cattle decreased.[74] The court, however, responded:

> [A] practice which is likely to reduce competition and prices paid to farmers for cattle can be found an unfair practice under the Act, and be a predicate for a cease and desist order. We conclude that this is so even in the absence of evidence that the participants made their agreement for the purpose of reducing prices to farmers or that it had the result.[75]

The court went on to say, however, that to establish a violation, the Secretary needs to show a likelihood that the conduct will injure competition.[76]

F. Alleged Activity Must Likely Cause Injury

Other courts have moved away from the simple "no injury" standard and have qualified the standard of proof.[77] In *Central Coast Meats, Inc. v. USDA*,[78] the Secretary of Agriculture ordered Central Coast to cease joint ownership of a packing business

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Swift, the packer was ordered to cease the practice of refraining from bidding against a registered dealer for producer's lambs, and then buying from that dealer more than 80% of the lambs purchased by packers. 393 F.2d at 251.

71. Farrow v. USDA, 760 F.2d 211, 215 (8th Cir. 1985).

72. *Id.* at 212-13 (stating and accepting findings of the USDA judicial officer). Note that since the regulated individuals in *Farrow* were not packers, the practice at issue is actually regulated under 7 U.S.C. § 213, the parallel statute regulating buyers at an auction. The court interprets both sections in the same way. *Id.* at 214.

73. *Id.* at 213 (recalling the judicial officer's conclusion that the conduct violated both § 213(a) and 9 C.F.R. § 201.70). The regulation states: "Each packer and dealer engaged in purchasing livestock . . . shall conduct his buying operations in competition with, and independently of, other packers and dealers similarly engaged." 9 C.F.R. § 201.70 (1995).

74. *Farrow*, 760 F.2d at 215 (attempting to distinguish Swift & Co. v. United States, 308 F.2d 849 (7th Cir. 1962), where Swift and another hog buyer agreed to jointly purchase all top-grade hogs). There was some evidence that the practice depressed prices. The court in *Swift* concluded that the "essential nature and the necessary result of this arrangement or practice was to eliminate competition." *Swift & Co.*, 308 F.2d at 853).

75. *Id.* at 214.

76. *Id.* at 215 (looking to Central Coast Meats, Inc. v. USDA, 541 F.2d 1325 (1976), for the standard of likely injury).

77. *See* Armour & Co. v. United States, 402 F.2d 712, 717, 722-25 (7th Cir. 1968) (reversing the Secretary's order for a packer to cease a bacon promotion plan using coupons because "a coupon program of this nature does not violate § [192(a)], absent some predatory intent or some likelihood of competitive injury." *Id.* at 717); *see also* Denver Union Stockyard Co. v. Producers Livestock Mktg. Ass'n., 356 U.S. 282 (1958) (dealing with a cattle stockyard which prohibited its client marketing agencies from dealing with other stockyards). Although the *Denver Union* Court held that the prohibition on its face violated the Act, the majority emphasized that ordinarily a hearing on the facts is necessary to determine unfairness and unreasonableness. *Id.* at 287. For a discussion of *Denver Union*, see Rosenberg, *supra* note 68, at 946-48.

78. 541 F.2d 1324 (9th Cir. 1976).

and a cattle buying business since this type of joint ownership violated two federal regulations.[79] The judicial officer concluded that joint ownership would reduce the number of bidders and, therefore, adversely affect the prices paid to producers.[80]

The packer/dealer argued that a packer may act as a dealer unless such conduct is shown to restrain commerce, control prices, or create a monopoly.[81] The Secretary replied that given the broad nature of the Act, no actual injury need be shown.[82] The court circumvented the Secretary's suggested standard: "[W]e shall assume, without deciding, that the Secretary's standard applies here. But even under this standard the Secretary must show that the conduct in question is likely to produce the sort of injury the Act is designed to prevent."[83] That injury, the court specified, is the failure to compete, which eliminates a buyer that would otherwise be there.[84] The court found no evidence of an elimination of a buyer or even that such elimination would be likely as a result of the joint ownership.[85] Only if the essential nature of the practice is to eliminate competition will a purchasing agreement violate the Act.

In a survey of Packers & Stockyards Act cases, David Rosenberg stated: "Taken as a group these cases indicate that although the Act is broad and far reaching, proof of intent and competitive injury are still generally required."[86] Only in the most extreme cases, such as agreements not to compete and predatory pricing, may the Secretary circumvent the need to prove likely injury.[87] Otherwise, Rosenberg concludes, the

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79. *Central Coast*, 541 F.2d at 1326 (recalling the administrative law judge's finding that the packer/dealer violated 9 C.F.R. §§ 201.70, 201.68 (1994)). 9 C.F.R. § 201.68 bars ownership of a packer by a dealer and vice versa. "The judicial officer further found that unified operations would enable packers to: (1) monopolize public markets by tying purchasers of slaughter and feeder cattle; and (2) eventually control a large portion of the feeder market." *Central Coast*, 541 F.2d at 1326.

80. *Id.* at 1326.

81. *Id.* at 1327 (pointing to 7 U.S.C. § 192 (c), (d) as suggesting Congress did not intend a per se violation of § 192(a) when a packer acts as a dealer). The sections state in part:

> It shall be unlawful with respect to livestock . . . for any packer . . . to:
>
> . . . .
>
> (c) Sell or otherwise transfer to or for any other packer . . . or buy or otherwise receive from or for any other packer . . . any article for the purpose or with the purpose or with the effect of apportioning the supply in commerce between any such packers, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly in commerce; or
>
> (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce . . . .

82. Central Coast Meats, Inc. v. USDA, 541 F.2d 1325, 1327 (9th Cir. 1976); *see supra* part III.E (explaining that actual injury is not a requirement to find a violation of the act).

83. *Id.* (citing Armour & Co. v. United States, 402 F.2d 712, 717, 722-25 (7th Cir. 1968)).

84. *Id.* (citing Swift & Co. v. United States, 393 F.2d 247 (7th Cir. 1968)).

85. *Id.* at 1327 n.2 Disregarding expert testimony as to the evils inherent in packers acting as dealers, the court stated that "generalized expert testimony as to the mere specter of these evils would allow conduct of the sort involved here to be deemed a violation of the Act without regard to the actual likely effect of such conduct." *Id.* at 1328.

86. Rosenberg, *supra* note 68, at 949.

87. *Id.* at 949-50.

court must examine the facts of a particular situation to determine if a "likely effect of competitive injury exists."[88]

IV. The Packers & Stockyards Act's Application to Contracts Between Packers and Large Hog Farms

A. Competition

1. Contracts as an Injury to Competition

The Packers & Stockyards Act is directed toward market activity which injures the competitive environment.[89] When buyers agree not to compete, this act injures competition because there are not as many buyers to bid in the marketplace.[90] The same type of injury occurs when the buyer refuses to purchase from independent producers because it has fulfilled its demand with one particular contract.[91] Producers in a region can become dependent on a particular packer since it may be the only packer in the region.[92] If that packer chooses to satisfy most of its slaughter needs with a few extremely large producers, the smaller, independent producers will scramble to find a market for their product. It is likely that these smaller producers will be forced to accept lower prices.[93]

Since the Act protects producers,[94] among other groups, the Secretary of Agriculture may be able to use it to curb contracting between large producers and packers. The Secretary could use the existing statute[95] and regulations[96] in controlling the agree-

88. *Id.* at 950 (quoting Armour & Co. v. United States, 402 F.2d 712, 717 (7th Cir. 1968)).

89. Swift & Co. v. United States, 393 F.2d 247, 254 (7th Cir. 1968) ("The lack of competition between buyers, with the attendant possible depression of producers' prices, was one of the evils at which the Packers and Stockyards Act was directed").

90. *Id.* (holding that the practice of two buyers making an agreement in which only one of the buyers will bid on the livestock and the other buyer will then buy the livestock as needed from the first bidder, violates the Act because such practices eliminate the competition between buyers); *see also* 9 C.F.R. § 201.70 (1994) (prohibiting the restriction or limitation of competition between packers and dealers); AREEDA & TURNER, *supra* note 25, ¶ 1004. The authors point out that although injury to competition will be rare in cases of vertical integration, injury may occur when the vertical integration does one of three things: 1) weakens rival suppliers and transforms market structure into a less competitive environment, 2) inhibits competition among customers, or 3) raises barriers to entry into the market. *Id.*

91. *See* Smith, *supra* note 21, at 22-23 (explaining that closed hog markets may present the largest hurdle to the success of independent producers in the future); *cf.* PRAIRIEFIRE, *supra* note 13, at 9-10. The PRAIRIEFIRE report outlines the recent concentration of the packing industry, and concludes that as there are less buyers, the independent producer will suffer from the elimination of a competitive buying market system. *Id.*

92. *Cf. Oversight*, *supra* note 26, at 4 (charging that the Packers & Stockyards Administration must increase monitoring on the regional level since there is now a tendency toward anticompetitive practices in regions with fewer and fewer packers). Implicit in the report's conclusion is that a decreased number of packers in a particular region injures producers in that region.

93. This reality may be compounded by the fact that smaller producers already suffer a competitive disadvantage in terms of price received for their hogs. *See Specialization*, *supra* note 17, at 14 (explaining that the largest hog operations receive over two dollars more per hog than small operations).

94. *See* Swift & Co. v. United States, 393 F.2d 247, 254 (7th Cir. 1968) (describing how one of the Act's intentions is to protect the producer).

95. *See* 7 U.S.C § 192(a), (b), (e) (1988) *supra* note 6 (quoting the language of § 192).

96. *See* 9 C.F.R. § 201.67 (1994) (prohibiting packers from owning marketing agencies); 9 C.F.R.

ments, but may find it difficult to force this new situation into rules which may have never been intended to address it.[97] Therefore the Secretary may find it necessary to tailor new rules to this new type of activity affecting the market.[98]

2. *Contracts as a Sign of Healthy Competition*

Packers and large hog operations will argue that Congress never intended the Packers & Stockyards Act to reach these contracts between them.[99] Indeed, packers and large hog corporations may say contracting between such firms manifests the next step in a truly competitive environment.[100] The more efficient a producer is, the more easily it will find a market.[101] Large scale producers have more capability for controlling the environment in which the hogs are produced, thereby producing hogs with the qualities consumers prefer.[102] Such agreements have not harmed consumers.[103] In fact these agreements make it easier for packers to give consumers what they want.[104]

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§ 201.70 (1994) (prohibiting the restriction or limitation of competition between packers and dealers).

97. The relevant regulations only apply to packers relationships with market agencies and dealers. *See* 9 C.F.R. § 201.67. A large corporate hog farm probably could not be defined as either a market agency or a dealer. Therefore, the regulations could not be used for the large hog farms.

98. *See* discussion *infra* part IV.B.1 (discussing the possibilities for new rules).

99. *See* Central Coast Meats, Inc. v. USDA, 541 F.2d 1325, 1327 (9th Cir. 1976) (stating that the Act may only be applied to situations where the alleged action "actually eliminates a buyer from the marketplace who would otherwise be there"). As the following text suggests, the packers would claim no buyers are eliminated with the long term contracts.

100. *See generally* Rod Smith, *Consolidation 'Changing the Landscape' of Agribusiness, Acquisition Specialists Say*, FEEDSTUFFS, July 11, 1994, at 3 [hereinafter *Changing Landscape*]. Just as consolidation is sweeping the country in every other industry, companies in the agriculture food sector will attempt to consolidate to take advantage of economies-of-scale, better access to capital, and better access to technology. *Id.* at 3. The long-term contracting between packers and large hog corporations is one species of this new wave of consolidation.

101. *But cf. Specialization*, *supra* note 17, at 13 (outlining the performance of different types of hog producers in the more highly industrialized environment). "[T]he data also cast doubt on the notion large units generally are more efficient. Total economic costs actually increased for operations at about the 15,000-head (900 sow) size, according to the survey. Their costs averaged $41.85, well above that for smaller units." *Id.* at 13.

102. *See* Urban, *supra* note 4, at 4-5 (explaining that as increased demands are put on the quality of raw materials, such as hogs, the best way to control the quality is in large-scale, vertically integrated operations).

103. *See Specialization*, *supra* note 17, at 3 (explaining that the industrialization of the hog industry is good for low cost producers and consumers alike).

104. *Cf.* Kristen Allen, *A View of Agriculture's Future Through a Wide-Angle Lens*, CHOICES, 2d Quarter 1993, at 34-35 (pointing out that consumers' concern over personal health will be a potent force in the direction taken in the evolution of agriculture). Ironically, consumers also demand better environmental practices. *Id.* at 35. Large-scale hog corporations may be better able to produce a lean hog, but they are not known for the most responsible environmental practices. *See* Jay P. Wagner, *Hog-farm Limits Pondered*, DES MOINES REG., June 12, 1994, at 13 (reporting on hearings on Iowa's livestock containment debate in which critics of large-scale hog farming say that "big facilities will have a devastating impact on air and water quality in the state").

As Allen points out: "Consumers want cheap food produced by a system that uses fewer chemicals, preserves more resources . . . and produces less waste." Allen, *supra*, at 36.

Consumers now demand leaner meat products from packers.[105] Packers may contend that the only way to consistently purchase leaner hogs is through the larger producers.[106] Large hog farms enjoy advantages in genetics and are able to take advantage of the latest feed technology, two of the most important factors in producing lean hogs.[107] The reason the packers contract with the large farmers is to have a consistent supply of the prime pork.[108] The packers are not trying to harm competition or take advantage of the other producers; they are only meeting the needs of the consumers.

B. Proof of Injury May Be Deciding Factor

1. Proof of Injury in Deciding Whether Rules Will Be Promulgated

As mentioned earlier, the P&S Administration may promulgate rules to curb the anticompetitive effect of long-term contracts between packers and large hog producers.[109] Before the Administration will do this, it must be satisfied that a problem exists.[110] The decision does not occur in a vacuum.[111] The Administration will look at empirical evidence;[112] it will also solicit comments from parties for and against such rules.[113]

If the P&S Administration decides to implement regulations controlling this type of long-term contracting, the regulations could strictly prohibit such practices.[114] More

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105. *See* Rod Smith, *Producers Get Message to Improve Consistency, Quality*, FEEDSTUFFS, Sept. 26, 1994, at 9, 17 (reporting that a spokesperson from the National Pork Producers says that consumers demand more consistency and quality from the pork industry).

106. *See* Urban, *supra* note 4, at 5 (stating that industrialization is the way for the agricultural sectors to provide the higher quality products consumers now demand).

107. *See Changing Landscape*, *supra* note 100, at 3 (outlining the advantages of consolidation for agribusiness companies which include access to technology and access to research and development); Steve Marbery, *Iowa Coop Goes For It*, FEEDSTUFFS, Aug. 1, 1994, at 22, 22-23. A report of farmers joining to create a large hog operation mentions that the co-operative is connecting to a leading hybrid seed stock supplier. One of the facilitators of the venture stated: "This type of enterprise is crucial to long-term success of independent pork production. It helps farmers access the same kinds of technologies and lean genetics available to large corporate operations." *Id.* at 23.

108. *See* Luter letter, *supra* note 20, at 23 (The "drive to improve the quality, consistency and value of agricultural products requires collaborative relationships between producers, processors and marketers").

109. *See supra* notes 93-98 and accompanying text (examining the possibility of the Secretary promulgating rules to deal with the long-term contracting).

110. *See supra* part III.F (discussing courts which refuse to find that a practice violates the Act unless it is likely some competitive injury would result. *E.g.*, Central Coast Meats, Inc. v. USDA, 541 F.2d 1325, 1327 (9th Cir. 1976); Armour & Co. v. United States, 402 F.2d 712, 717 (7th Cir. 1968)).

111. A federal agency is required to go through a public rulemaking process before implementing rules. *See infra* note 113 (citing the statute which controls federal agency rule making).

112. *See* discussion *supra* part II.A (examining the environment of the hog industry and highlighting long-term contracting between packers and large hog operations).

113. *See* Federal Administrative Procedure Act § 553(c), 5 U.S.C. § 553(c) (1994) (requiring a federal agency, when making rules, to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation").

114. The Secretary has been willing to prohibit certain activities. *See, e.g.*, 9 C.F.R. § 201.67 (1995) (prohibiting packers from owning a market agency); 9 C.F.R. § 201.70 (1995) (prohibiting packers and dealers from restricting or limiting competition). Note that regulations promulgated under the Act do not carry the force of law, but rather are only advisory in nature. United States v. Donahue Bros., Inc., 59 F.2d 1019, 1023

likely, however, the Administration could utilize regulations simply to monitor the contracting of the packer.[115] These regulations allow the Administration to acquire business information about the packer or inspect the packer's records pertaining to its business subject to the Act.[116] The Administration could look at data which would indicate whether the contracting is injuring competition in the area.[117]

To carry out section 192 of the Packers & Stockyards Act[118] and to make sure the packers are not injuring competition by long-term contracting with the large hog producers, the P&S Administration must know the contracts exist.[119] Once the P&S Administration knows where the contracts are, it will be able to monitor whether these contracts are encouraging non-competitive factors in the industry such as increased concentration or below market prices for smaller producers.[120] Higher concentration of packers increases the likelihood that packers will have greater market power than the individual producer.[121] This disproportionate market power may result in below fair market prices for producers.[122] Below market prices constitutes one of the evils the Packers & Stockyards Act was created to redress.[123]

(8th Cir. 1932).

115. *See* 9 C.F.R. § 201.94 (1995) ("Each packer . . . shall give to the Secretary . . . any information concerning the business of the packer . . . which may be required in order to carry out the provisions of the Act and regulations in this part within such reasonable time as may be specified in the request for such information"); *see also* 9 C.F.R. § 201.95 (1995) which states in part: "Each . . . packer, . . . upon proper request, shall permit authorized representatives of the Secretary to enter its place of business during normal business hours and to examine records pertaining to its business subject to the Act, to make copies thereof and to inspect the facilities of such persons subject to the Act"); 1 JULIAN JUERGENSMEYER AND JAMES WADLEY, AGRICULTURAL LAW § 16.4 (1982) ("Full and correct disclosure of all transactions involving livestock is essential to accomplish the aims of the Packers and Stockyards Act and is best assured by the act's requirements that accounts, records, and memoranda relative to all business activities are kept" (citing Hyatt v. United States, 276 F.2d 308, 312 (10th Cir. 1960)).

116. *See generally id; see also* George Anthan, *Competition or Monopoly?*, DES MOINES REG., Aug. 13, 1995, at J1 (quoting John Helmuth, an Iowa State University economist and former federal commodities markets regulator: "only [the USDA] 'has the power and authority to gather the telephone records and other data necessary' to determine if there's true competition in [the livestock] industry").

117. *See* discussion *supra* part II.C (outlining the GAO's recommendation that oversight of livestock competitiveness needs to be enhanced).

118. *See supra* note 6 (quoting 7 U.S.C § 192 (1994)).

119. To obtain information on these long-term contracts, the Secretary could utilize 9 C.F.R. § 201.94 (1995) (quoted *supra* note 115), a regulation which requires packers to give to the Secretary business information. Pertinent contract information may include: who is the large producer, how many hogs are subject to the contract, what types of premiums the packer is contracting to pay, and how long the contract lasts.

120. *See supra* note 29 and accompanying text (explaining that with increased concentration comes increased likelihood of anticompetitive behavior and depressed prices for producers).

121. *Id.*

122. *Id.*

123. Swift & Co. v. United States, 393 F.2d 247, 254 (7th Cir. 1968) (stating that "lack of competition between buyers, with the attendant possible depression of producer's prices, was one of the evils at which the Packers and Stockyards Act was directed"); *see supra* part IV.A.1 (discussing long-term contracts as injury to competition).

Packers may argue that the contracts are not subject to the Act.[124] The P&S Administration, however, could say that the practice falls under section 192 of the Act and that the only way to discover if the contract is unfair or gives undue preference is to examine the contract.[125] With such monitoring, the P&S Administration would be able to have a better idea of the market climate and determine whether all of the actors are performing within the scope of the Act.[126]

2. *Proof of Injury in Deciding Whether Rules Will Be Enforced*

If the P&S Administration decides to implement new regulations in an attempt to curb long-term contracting between packers and large hog operations, the Secretary of Agriculture will need to satisfy the appellate court that the practice is likely to cause injury to competition.[127] What proof is required will depend on the particular situation.[128] One situation to which one can point in saying that the practice injures competition is when a loss of a buyer results.[129] Given the loss of a buyer, it is likely that the independent producer's selling power will be lessened.[130] With fewer choices offered to the independent producers, they may be forced to accept a below market price.[131]

Packers may be quick to point out that the market has not lost a buyer; rather the buyer simply chooses to buy from one particular seller. Packers choose to buy from the large hog operations because such operations are the only producers able to supply the desired product.[132] To violate the Act, a packer must engage in or use undue or unreasonable preference for a particular person.[133] Packers would point out that buying the best quality meat and assuring that such supply would be consistently available would not constitute an undue preference.[134]

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124. *See supra* note 99 and accompanying text (arguing that the Act was never intended to reach activities such as long-term contracts between packers and large hog corporations).

125. *See supra* note 6 (quoting 7 U.S.C. § 192(b) (1988)).

126. *Cf. Oversight, supra* note 26, at 25. The testimony before the USDA concluded that because the packing industry has become more concentrated, competition is injured. Therefore, the Packers and Stockyards Administration should more closely monitor livestock market activities at a regional level. *Id.* at 2. In the contracting situation, because there is one less buyer for the smaller producers, competition is effectively injured. *See supra* IV.A.1 (discussing the long-term contracts as injury to competition). Once again, increased monitoring is called for, but this time the monitoring should focus on those contractual relationships and their effect on the market.

127. *See* discussion *supra* part III.F (discussing how proof of injury may be a deciding factor in whether the Packers and Stockyards Administration will be able to curb the long-term contracts).

128. *See* Central Coast Meats v. USDA, 541 F.2d 1325, 1327 n.2 (9th Cir. 1976) (not allowing an expert's generalized conclusions to take the place of specific evidence relating to the case at hand).

129. *See* discussion *supra* part IV.A.1 (explaining how a long-term contract between a packer and large hog operations results in a loss of a buyer for other independent producers and, therefore, injures competition).

130. *See* Swift & Co. v. United States, 308 F.2d 849, 854 (7th Cir. 1962) (pointing out that the lack of competition between buyers may depress the producer's prices).

131. *Id.*

132. *See supra* notes 106-08 and accompanying text (explaining that the best place for packers to acquire the type of meat that consumers demand is from large hog corporations).

133. *See supra* note 6 (quoting 7 U.S.C. § 192(b) (1988)).

134. The packers would say they are only making a good faith effort to fulfill consumer demand. *See*

Packers choose to buy from these particular sellers because consumers now demand leaner cuts of meat from the packer.[135] The packers' best alternative for acquiring the leaner meat is to buy livestock from the larger operations, as these operations are best able to take advantage of the latest in technology and genetics.[136] Because of this legitimate reason, the packers would argue, long-term contracts do not constitute "undue preference" or an unfair practice under the Act.[137]

C. Comparison of Cattle Feedlots and Corporate Hog Farms[138]

Although no courts have rendered decisions concerning contracts between large hog operations and packers, courts have reached decisions concerning an analogous situation: the link-up of beef packers and custom feedlots.[139] The major difference between large hog operations and custom feedlots is that feedlots sometimes serve as marketing agencies for the owners of cattle[140] while the large hog operations serve as their own marketing agent. Therefore, the Packers & Stockyards Act sometimes applies directly to the custom feedlot.[141]

While it is more difficult to place the large hog operations under the Act, many of the same policy concerns are present in both the custom feedlot situation and the large hog corporation situation.[142] Just as a link-up of custom feedlots and packers injures

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supra text accompanying notes 106-108 (explaining that large hog corporations provide the best supply to the packers).

135. Luter letter, *supra* note 20, at 23 (explaining "the drive to improve the quality, consistency and value of agricultural products requires collaborative relationships between producers, processors and marketers").

136. *See Changing Landscape*, *supra* note 100, at 3, 6 (outlining the advantages of agribusiness consolidation); Steve Marbery, *supra* note 107, at 22, 23 (explaining that large corporations have an advantage in technology and genetics).

137. *See supra* note 6, (quoting 7 U.S.C. § 192 (1988)).

138. *See generally* KREBS, *supra* note 3. Krebs warns of the dangers of the concentration of the beef packing industry: The great increase in concentration harms the producer since the lack of competition will create lower prices, and also harms the consumer since such an oligopoly can arbitrarily raise prices at the meat counter. *Id.*

139. *In re* Walti, Schilling & Co., 39 Agric. Dec. 119, 164 (1978) (ordering a packer to cease and desist from owning, contracting with, receiving financing from, or managing dealer, market agency, or custom feedlot). A custom feedlot is a large cattle operation in the business of commercially feeding cattle for others. *Id.* at 120.

140. *Id.* at 164 (stating that the feedlot in question was engaged in the business of a market agency and/or dealer). *But see* Solomon Valley Feedlot, Inc. v. Butz, 557 F.2d 717, 721 (10th Cir. 1977), (limiting the reach of the Act by excluding custom feedlots). The *Solomon* court pointed out that, as a rule, custom feedlots make their profits from feeding cattle, not purchasing or selling cattle. *Id.* The court conceded that if the feedlot somehow profited from the actual transactions of buying or selling the cattle, the feedlot may be defined as a dealer. *Id.* at 720.

141. *See* 9 C.F.R. § 201.67 (1995) (restricting a packer from ownership in a market agency); 9 C.F.R. § 201.70 (1995) (requiring each packer and dealer to conduct buying operations independently of each other). For a discussion on the Act's reach to custom feedlots, see generally KEITH G. MEYER ET AL., AGRICULTURAL LAW CASES & MATERIALS, 420-30 (1985).

142. *In re* Walti, Schilling & Co., 39 Agric. Dec. 119, 123 (1978) (describing the results of the rulemaking process under which the Packers & Stockyards Administration promulgated rules concerning unified ownership of custom feedlots and packers). In promulgating the custom feedlot regulations, the P&S Administration found that:

other livestock producers because the packer would have no demand on the day it chooses to call in its own cattle,[143] small to mid-size hog producers would be injured by the contracts between packers and large producers. Either way, the result is the loss of a buyer in the marketplace.[144]

V. CONCLUSION

Long-term contracting between packers and large hog corporations will likely injure independent producers.[145] Even so, it may be difficult for the Packers & Stockyards Act to reach such activity since it may not be unreasonable for packers to engage in such contracts.[146] To use the Act to curb directly the contracting between packers and large hog operations, the Secretary of Agriculture must prove that the contract is likely to cause injury to competition.[147] The Secretary may find this burden of proof difficult. Nevertheless, the Packers & Stockyards Administration could still use its power under the Act to increase its monitoring of these types of business relationships to at least be on guard for any signs of injury to competition.[148]

> [P]ackers are beginning to expand into the business of custom feeding livestock on a large scale . . .
>
> This relative fewness of buyers means that the buying side of the market has more market power than the selling side. A decision on the part of single buyer to buy or not to buy may have an effect on price. A similar decision on the part of a single seller has no price effect at all. This means that the market for fed cattle is not fully competitive — that there are some tendencies toward monopolistic price making already present in the system.

Id.

143. *Id.* at 134 (quoting testimony from the 1974 rulemaking hearing on the relationship of packers and custom feedlots).

144. *See supra* note 89 and accompanying text (discussing loss of buyer as proof of injury).

145. *See* discussion *supra* part IV.A.1 (stating that since the contracts effectively remove a buyer for the smaller independent producers, the competition for the purchase of the hogs of the smaller producers is damaged). *But see* Rosenberg, *supra* note 68, at 959-60 (concluding that some combinations of custom feedlots and packers should be allowed since some combinations do not injure competition).

146. *See* discussion *supra* part IV.A.2 (pointing out that the contracts may be simply a manifestation of increased competition in the purchasing of hogs for butcher).

147. *See* discussion *supra* part III.F (outlining the court's standard in Central Coast Meats, Inc. v. USDA, 541 F.2d 1324 (9th Cir. 1976)).

148. *See* discussion, *supra* notes 115-23 (explaining how the Act could be used to require packers to give the Packers and Stockyards Administration information regarding the contracts; this information could be used along with other market data to detect whether the contracts are injuring competition or causing lower prices for independent producers).