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An Agricultural Law Research Article

**Broiler Contracting in the United States—A
Current Contract Analysis Addressing
Legal Issues and Grower Concerns**

by

Neil D. Hamilton

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BROILER CONTRACTING IN THE UNITED STATES— A CURRENT CONTRACT ANALYSIS ADDRESSING LEGAL ISSUES AND GROWER CONCERNS

*Neil D. Hamilton**

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Author's Note

This article was originally written as a chapter for a study conducted by the Farmer's Legal Action Group under a research grant from the USDA Fund for Rural America. The research premise was the vertically integrated nature of the poultry industry has contributed to increasing tensions between contract growers and poultry companies. This tension has led to increased litigation, proposals for state and federal grower protection legislation, and pressure for increased administrative scrutiny. The goal of the project was to provide an information resource to examine the current state of poultry contracting in the United States. In particular, the study was designed to provide a detailed examination of the attitudes of growers, the nature of the contracts in use, and the current body of law relating to poultry contracting. One of the most significant aspects of the study was a survey instrument designed to assess the economic and sociological impacts of poultry company practices on growers. The survey was mailed to a statistical sample of growers and the answers received from over 1400 growers in ten states provided the grist for analysis. As readers will see, one portion of this article involves reviewing the survey results to determine the poultry contracting practices which are of greatest concern to growers and then examining the actual contract language used for these issues. The basis for the contract analysis set out in this article was a detailed examination of poultry production contracts used by eighteen different U.S. companies, including contracts from many of the largest.

I. INTRODUCTION

A. *Examining Broiler Contracts—the Basics*

To consider the legal implications of the terms commonly found in a broiler growing contract it is important to first consider the nature of the activity contemplated in the agreement. In essence, the relation is fairly simple and straightforward. The integrator, or company, owns the baby chicks and delivers them to a grower, or producer, who agrees to care for the birds until they reach a size where

the company decides to collect and take them for processing. The integrator generally agrees to provide not just the birds but also the feed, medicine, and professional supervision for the grow-out operation. The grower agrees to provide the physical facility, the utilities, and the labor and management to feed and care for the birds until they are removed for processing.

Most contracts are written for only one growing period, generally seven weeks for broilers, with provisions to allow for continuation or cancellation. The birds remain the property of the company, the contract is for provision of services rather than sale of goods, and invariably the legal relationship between the parties is described as being between independent contractors. The grower is compensated after the birds are removed, typically on the basis of a formula calculating his or her production efficiency: the number and weight of chickens harvested compared to the number of chicks and pounds of feed delivered. In most situations the grower's compensation is adjusted based on a comparative ranking with a group of other poultry growers in the same geographic area whose birds were also processed by the company during the same time period. The contracts are exclusive with growers only raising birds for one company, which may be the only one operating in the area.

B. *Examining Broiler Growing Contracts—the Analytical Approach Used*

The issue of how to analyze broiler contracts collected for review is an important consideration in determining how best to discuss the nature of the contract relations typically used to produce broilers in the United States. While there are many similarities in approach, each contract may contain unique provisions, and in some instances alternative methods for structuring the relations are found. As a general observation, the contracts examined fall into two main categories, the first can be described as traditional or typical in which, for the most part, no special contract language is used which could be described as favorable to the grower on identified issues of concern. The second group of contracts can be described as "grower friendlier" which means, that while still falling within the traditional structure of broiler contracting, as described in Part II.A, the contracts include provisions that appear to provide some level of protection or assurance to growers. Many of these contracts, while still the minority, are of more recent vintage, which may indicate a trend toward contracts that are more responsive to grower concerns or the willingness of companies to compete for growers by offering more favorable terms.

In addition to the variation in contracts, there is also the variation in perspective one may bring to the relations. Most importantly, the concerns that an experienced contracts attorney may identify about the agreements will be different than the practical concerns that growers might identify from their own experience. The analysis discussed here is done from the perspective of a lawyer considering the legal implications for growers who sign the agreements.

Based on these distinctions, the following analysis takes a three-pronged approach. First, contracts used by two of the nation's largest poultry contractors are reviewed in some detail. These contracts are analyzed and contrasted for the purposes of identifying three different categories of contract provisions: 1) those common to most relations, 2) provisions which can be described as "grower friendlier," and 3) provisions which present more serious legal concerns for growers. This three-part characterization is used to identify specific contract provisions, which are then discussed and analyzed. One purpose of this analysis is to provide a common understanding of the nature of poultry contracting and the legal implications of the contract language typically used. The two contracts used prove particularly valuable for this contrast because the contracts adopt distinctly different approaches in the relations with growers, with the one contract incorporating a range of "grower friendlier" terms not found in the other.

Second, the ten issues identified as grower concerns in the survey¹ are reviewed in relation to common current contract language.² For the analysis in this section, the terms of broiler contracts either currently or recently used by eighteen different poultry integrators were reviewed and characterized. This analysis, using specific provisions from these agreements, is used to present a description of how the grower concerns identified in the survey are typically addressed in actual contract relations.

In terms of the review of actual contracts, it is important to recognize that the language of the contract offered by any company can change—and experience shows that contracts are amended. One possible limitation on a study of this type is the ability to obtain a current set of contracts from across the industry. The contracts studied for this section were obtained from a variety of sources. The contracts reviewed for this analysis have all been used in recent years and are believed to still be in use. The broiler contracts reviewed were offered by the following companies: Case Farms, Cagle's Farms, ConAgra Poultry, Gold Kist, Pacific Northwest Poultry

1. See *ASSESSING THE IMPACT OF INTEGRATOR PRACTICES ON CONTRACT POULTRY GROWERS* Chapter 2, Appendix C 2-8 (Farmers' Legal Action Group 2001) (discussing at length the results of the survey). The complete study can be found at the Farmers' Legal Action Group website at www.flaginc.org/pub/poultry.

2. These are: (1) concern about use of the ranking system to determine grower pay; (2) concern that grower pay is most affected by matters outside their control, namely the quality of inputs provided by the company; (3) confusion among a substantial number of growers regarding their settlement sheets; (4) higher than expected condemnation rates and inadequate explanations of condemnations; (5) concern about the dispute resolution procedures available to growers under grow-out contracts; (6) the disconnect between many growers' negative perceptions of the value of improvements suggested by the companies and their belief that their contracts will not be renewed if the improvements are not made; (7) concerns and uncertainty about the accuracy of feed weighing and prompt weighing of birds; (8) the large majority of growers who receive no assistance from their company with the disposal of litter or dead birds; (9) the high percentage of growers earning less than expected and high percentages perceiving the causes to be related to chick quality, required improvements, and rising operating costs; (10) growers being left without flocks long enough to suffer financially.

and Farming, Marshall Durbin Farms, Sanderson Farms, Choctaw Maid Farms, Townsend Farms, Mountaire Farms, Perdue Farms, Tyson Foods, Wampler Foods, Sylvest Farms, Arcadia, MBA Poultry, Piedmont Poultry Farms, and Wayne Farms.³ In order to keep the focus of this analysis on the terms of the contracts per se and not on the company offering a particular contract provision at the time this analysis was done, this article does not use company names. The article will refer to companies only by arbitrarily assigned but consistently used letters, for example: "Company X."

Third, these various broiler contracts are used to identify other contract provisions that may not have been addressed in the survey or identified as concerns by the growers but that are worthy of comment from the perspective of an attorney considering the legal implications for growers who sign the agreements.

The study ends with a set of observations or conclusions about the current state of broiler contracting which might be of value to policy makers and others considering the need for action on this topic.

II. UNDERSTANDING COMMON TERMS IN BROILER CONTRACTS: COMPARING TWO WIDELY USED AGREEMENTS

At first glance, poultry growing contracts give the impression that the relations between company and grower are highly standardized. Even though the contracts may be of differing lengths or be organized and captioned differently, most of the same issues are addressed and in much the same manner, regardless of the company offering the contract. This section of the analysis establishes, as a background for the later discussion, the categories of terms generally found in broiler contracts. This is done through comparison of two specific contracts and consideration of how each addresses the general contractual categories.

A. *General Categories of Broiler Contract Terms*

The Company A contract has forty-eight different substantive clauses (some of which may address multiple legal issues) in addition to a separate payment schedule. The Company B contract has approximately thirty-eight separate legal clauses, many of which address multiple issues, as well as an attached payment schedule. In addition, both contracts incorporate by reference an additional document that establishes specific standards for the grower's conduct and performance.

It is interesting to note that approximately forty percent of the written content of the Company B contract deals with the procedure for the resolution of complaints

³ The Drake Journal of Agricultural Law staff reviewed copies of all the contracts used in the analysis for this article to verify the provisions quoted in the text are accurate. Copies of the contracts are on file in the *Journal* offices.

and arbitration of disputes. In contrast, the Company A agreement includes no specific reference to either a complaint resolution procedure or arbitration of disputes.

The Company A contract incorporates by reference and makes part of the grower agreement, a separate document known as the “Company’s Broiler Growing Guide.” While the Company B contract does not specifically mention incorporating additional materials by reference (and in fact, specifically rejects inclusion of “representations or statements” not in the written agreement) it does refer to “Company B’s established procedures” which are apparently used to establish standards for evaluating grower performance.

While the actual number and order of the terms found in the contracts may vary, there is much similarity in the agreements, and for that matter, in all of the poultry growing contracts reviewed for this study. Upon review, it appears there are at least sixteen major legal issues or aspects of contracting relations addressed in both contracts in roughly the same way. In the following paragraphs, provisions from the Company A and Company B contracts are reprinted to illustrate and explain how the sixteen provisions are actually addressed by companies and what the legal and practical implications are for growers.

1. *Duties of the company*

Every broiler contract will include, and typically begin with, a provision that sets out the duties or commitments of the company. The purpose of this clause is to specify—and thus limit or constrain—the exact obligations being made. For example, the Company B contract provides:

[Company] Agrees:

- A) To consign available chicks to Producer to be raised for [Company].
- B) To provide and deliver to Producer or arrange for the provisions and delivery to Producer, feed, fuel, medications, vaccinations, and other supplies which are necessary for raising the chicks consigned to Producer by [Company].
- C) To provide Producer with an accounting of the chicks consigned and supplies provided under the terms of this Agreement.
- D) To compensate Producer for services provided herein as provided for in the attached “Producer Payment Schedule.”

2. *Duties of the grower*

The contract provision listing the duties of the grower can be rather extensive, for example the Company B contract lists thirteen separate clauses under “Producer Agrees” while the Company A contract includes ten clauses. While the exact wording of these provisions varies, the duties or expectations are fairly standard. These relate to providing the physical growing facilities, the utilities, and the labor necessary to care for the birds, and ensure that the company has access to the houses in all types of

weather for purposes of delivering feed and removing the birds. For example, the Company A contract provides in part:

The Producer agrees to furnish labor, utilities, bedding, supplies and well maintained housing and equipment as required by the Company specifications described in the Company's Broiler Growing Guide.

The Producer will supply sufficient help at the time of delivery of new chicks to assist in the expeditious unloading and placement of the new chicks. When the poultry is caught, the Producer or his agent shall be present and have prepared each house for the catching crews in accordance with the schedule provided by the Company.

The Producer will maintain all-weather roads to the poultry houses and keep the feed bins free of any overhanging wires or other obstacles. The Producer will provide adequate space to turn vehicles where necessary. Failure to provide such roads and turning areas will make the Producer liable for wrecker or towing charges in addition to any other damages the Company may sustain.

One obligation or duty placed on growers by all broiler contracts is the obligation to promptly remove and dispose of dead birds. For example, the Company B contract provides that the grower agrees, "[t]o provide for prompt and proper disposal of all dead and cull poultry resulting from normal mortalities and/or catastrophic loss in a manner meeting the requirements of federal, state, and local regulations and codes."

Another grower obligation relating to the death of birds is the duty to maintain mortality records. Presumably, the purpose of such records would be not only to reflect both the number and timing of bird deaths but also to provide evidence that the grower did not otherwise transfer them. The Company A contract provides, "[t]he Producer will be responsible for maintaining accurate mortality charts."

3. *The grower's independent contractor status*

One term that is found in all broiler growing contracts, and most production contracts used in the United States regardless of the commodity being produced, is a clause making clear that the relation between the parties is that of an "independent contractor" and not something else, such as an employee or partner, that might create potential liability for the company. The manner in which this provision is addressed can vary from a simple statement of the relation to a more detailed expression of the grower's obligations and the company's rejection of possible liability. For example, the Company A contract provides in part:

Independent Contractor—it is understood that the Producer is engaged in and is exercising independent employment. The Producer is an independent contractor and is not a partner, agent, or employee of the Company.

Contrast that provision with the more detailed expression found in the Company B contract, which provides in part:

Producer's Independent Contractor Status

A. This is a service contract and not a contract of employment and [Company] and Producer are each independent contractors. Neither party, nor their agents or employees, shall be considered to be the employees of the other for any purpose whatsoever.

B. Producer is exclusively responsible for the performance of Producer's obligations under this Agreement. The employment, compensation, and supervision of any persons by Producer in the performance of such obligations is a matter of Producer's sole discretion and responsibility.

C. Producer accepts full and exclusive liability for payment of any and all applicable taxes for worker's compensation insurance, unemployment compensation insurance, or old age benefits or annuities imposed by any governmental agency, as to Producer and all persons as Producer may engage in the performance of this Agreement. Said taxes shall be paid directly by Producer and shall not be chargeable to [Company]. Producer agrees to hold [Company] harmless from any liability with respect to any such taxes or other charges.

4. *Incorporation of an attached payment schedule subject to change by company*

From a grower perspective, the issue of how his or her payment or compensation will be calculated is perhaps the most important issue addressed by the contract. For most poultry contracts, the actual payment method is set out in a schedule that is incorporated by reference into the contract and usually attached to it. Both the Company A and Company B contracts make use of such attached schedules.

One aspect of the payment calculation that may seem obvious but can present an area for concern or disputes is that the grower's payment is generally based on documents and determinations made solely by the company. For example, under its contract, Company A has the sole authority to determine the payment and the grower agrees to accept the company's determination. The contract provides, in part:

The Producer agrees to accept as compensation for this Contract and the Company agrees to pay as compensation to the Producer as determined by Schedule A attached hereto. Payments will be made to the Producer no later than ten (10) days following the week of slaughter.

In addition to agreeing to accept the company's determination of the payment, most broiler contracts also include a provision that lets the company make unilateral changes in the methods and amounts used to make the calculations. In the Company A contract, the implied ability to alter the payment method is reflected in the provision which reads, "[a]ny payment method changes or pay rate changes that are periodically implemented by the Company will be conveyed to the Producer at such time, and

Schedule A will be modified to reflect said changes.” In other words, regardless of what payment rates might be communicated at the time a contract is entered, the rates or methods for determining payments can be unilaterally changed, presumably in either direction, whenever the company determines to do so.

5. *Term or length of the contract*

As discussed in more detail later, the “term” or length of the contract is an important element in establishing the nature of broiler contract relations. For most contracts the term is typically for one flock, or approximately seven weeks. However, it is not uncommon to find contracts that include provisions making the relations continuous until terminated or which even provide set periods of years during which the contract may operate. However, it is important to recognize that the fact the contract provides that the relation may last for a certain period does not mean there is any guarantee that the grower will be provided a certain number of flocks during that period. As discussed in the next section, this issue, the control over the timing and frequency of flocks provided to the grower, is generally addressed separately and is uniformly left to the sole discretion of the company.

The Company B contract does not contain a provision specifically listing its term or length. Instead, the contract states, “[f]or the convenience of not having to initiate a new Agreement after each flock, this Agreement shall be continuous until the Agreement is terminated by either [Company] or Producer.” The Company A contract includes a provision in which the parties can write in a specific period. The clause reads, “[t]he terms and conditions of this Contract will begin on ____ and shall remain in effect for _____ (years) unless terminated pursuant to this Contract.”

6. *Timing, frequency, and number of flocks at company’s discretion*

The number of flocks a grower is given to raise per year is an issue more critical to the economic performance of a poultry contract than its length. The more flocks a grower obtains during a year, the greater the potential for earning income and realizing a return on investment in buildings and equipment. Most broiler contracts do not include terms relating to the frequency or number of flocks, in part because the contracts are for only one flock of birds and there is no legal expectation of additional flocks. For example, even though the Company B contract contains a provision making it continuous unless terminated by either the company or the grower, there is no provision addressing the frequency or number of flocks, the implication being that there is no obligation for the company to ever provide a flock beyond the one being grown.

When decisions concerning the timing and frequency of flocks are addressed in broiler contracts, the determinations are given to the sole discretion of the company. For example, the Company A contract provides, “[t]he Company reserves the right to

determine the number, frequency, and type of broiler chicks to be placed in the Producer's houses."

7. *Timing of removal and processing of birds at company's discretion*

Just as the contracts make it the company's decision whether to provide additional flocks, the issue of when the current flock of birds being grown in a facility are ready to be removed for processing is also reserved to the discretion of the company. It must be recognized that the timing of this decision in the growth cycle of the birds is significant because it will affect both the final live weight and the feed conversion calculations which are the most important determinants of the grower's payment. In general, if removal of the birds is delayed past the optimum growth period, the birds will continue consuming feed with little or no growth. This can result in a significant drop in total feed conversion numbers for the flock. Delays in getting the birds processed once they have been removed from the facility can dramatically reduce the birds' live weight value, which also reduces feed conversion numbers. The Company A contract addresses this issue directly by providing that, "[t]he Company or its designee at its sole discretion shall have the right to schedule the broilers for processing."

8. *Grower to be present or represented during catching or accept risk*

Broiler contracts generally require the grower to be present or have a representative be present during the catching of the birds. As part of this obligation, the contracts also require the grower take steps to prepare the houses for catching. The purpose of these provisions is two-fold. First, by having the grower present, any disputes about which birds were dead before the catching crews began and which were killed or injured during catching can be more easily addressed. Second, when the grower is required to prepare the house for catching, such as by removing feeders and locking personal property, the catching can proceed expeditiously and disputes over damaged or lost equipment can be minimized.

The Company A contract addresses these issues in several provisions. Under the duties of the grower, the contract provides, "[w]hen the poultry is caught, the Producer or his agent shall be present and have prepared each house for the catching crews in accordance with the schedule provided by the company." Under the provision titled "scheduling and catching" the company agrees to notify the grower in advance of the scheduled time for the pick up of the birds. Under this provision, "[d]amage to the Producer's equipment or facilities or equipment stolen from the Producer's facilities will be reimbursed or replaced by the Company upon prompt verification that said damage or theft was caused by the catching crew." Another provision in the Company A contract relating to the process of catching states:

In order to insure that all dead birds have been removed from the house the Producer or his authorized agent agrees to walk the houses with the catching foreman before catching the chickens begins. All chickens smothered during catching will be loaded on the truck and weighed as provided . . . below. In the event the Producer or his authorized agent is not present, the Producer agrees to accept the determination of the catching foreman between dead and smothered birds.

9. *Title to the birds with the company and prohibition on grower liens*

Another legal issue that can arise given the nature of the broiler contracts concerns the legal rights of the grower to the birds that are on the farm. Understandably, the companies have no intention of relinquishing legal title to the birds or having to fight with creditors of the growers concerning who owns them. This issue is addressed in the Company B contract, which reads, “[Company] shall have the right to sell each flock consigned under this Agreement at any time without any liens, distraint proceedings, or charges whatsoever of creditors of Producer.” This language is representative of the terms companies use to address this issue. The Company A contract addresses this with a sentence that reads, “[t]he Company bears the cost of and retains title to these chicks.”

Contracts often include other provisions that relate to the issue of ownership and title to the birds. For example, the Company B contract consistently uses the legal term “consignment” to refer to the relation between the grower and the company, apparently in an attempt to clarify its intent that the title to the birds does not pass. In addition, contracts which include lists of grower actions which are treated as conditions of default or breach of the contract often include any action of the grower which attempts to create a lien on the birds for the interest of another party.

10. *Prohibition against keeping other fowl on grower's property*

Broiler contracts uniformly include a provision designed in part to reduce the potential for health problems with the company's birds. These provisions restrict the grower from maintaining any other fowl on the property. The provisions also have the, perhaps unintended, effect of making it impossible for a grower to contract with two different companies at the same time. An example of such a provision is found in the Company B contract, where the grower agrees, “[t]o keep no other fowl, wild birds, exotic or domestic pet birds, caged or free running, on the premises and to rid the farm of all birds left on the farm on the same day of the final movement of birds.”

11. *Prohibition against using supplies not provided by company*

Under most broiler contracts, the company provides most if not all of the supplies used by the grower. In fact many contracts include provisions specifically

prohibiting growers from using supplies not provided by the company. For example, the Company A contract includes a provision which states:

The Producer warrants that he will not use or allow to be used during the period of this Contract any feed, medication, herbicides, pesticides, rodenticides, insecticides or any other item except as supplied or approved in writing by the Company. In no way limiting any default provision herein, the Producer agrees that any breach of this section will result in immediate default by the Producer of this Contract and the Company may take action so provided for [] herein.

One purpose of a provision like this would be to limit the possibility of a grower using an unapproved medication in the feed that might affect the marketability or safety of the product. However, the provisions can also be seen as restricting the ability of growers to obtain items for use in their facilities

12. *Company's right of access to the grower's facility*

Because the birds belong to the company, contracts uniformly include provisions that reserve for the company an unlimited right to have access to the grower's facilities to inspect the birds. For example, the Company B contract provides, "[Company] may enter upon the premises of the Producer where the flock is or shall be located to inspect the flock or facilities." The Company A contract provides, "[t]he Company shall have the right of access at all times to the premises in which the poultry is grown for the purposes of inspecting birds, delivering feed, chicks, or supplies and removal of birds."

13. *Company's right to take over the grower's facility or remove the birds*

Because the birds remain the property of the company, which has an interest in their health and performance, broiler contracts uniformly include provisions which allow the company to take action if the company determines that the grower is not properly caring for the birds or the birds are somehow endangered. Typically these provisions allow the company to take over the control and operation of the grower's facilities until such time as the birds are ready for processing, or, in the alternative, to remove the birds. The determination of when such action is needed is at the sole discretion of the company. For example, the Company B contract provides that:

If Producer is not satisfactorily performing Producer's obligations under this Agreement to care for, treat and maintain the flock, or do such other thing or things with reference to the flock as outlined by [Company's] established procedures, [Company] may remove the flock, or may undertake the maintenance, treatment, feeding and care of the flock on the Producer's property and Producer shall assume the costs for any necessary disbursement to accomplish such purposes.

The Company A contract includes a similar provision titled “Remedies of Company on Default of Producer.”

14. *Grower actions considered by company to be a default of the contract*

No matter how well a contract is drafted it cannot anticipate all of the events that might arise and impact the nature of the parties’ relationship. As a result, it is not uncommon for broiler contracts to include terms that might be called “catch-all” provisions, which reserve to the company the right to take whatever action it feels is necessary to protect its financial interest in the contract and the flocks. The Company A contract includes an example of such a clause in the paragraph listing the “Events of Default.” This list of default events includes, “[t]he occurrence of any event which in the opinion of the Company endangers or impairs the Company’s property.” This clause is in addition to an earlier provision in the same section that covers, “[f]ailure of the Producer to properly care for and protect any of the Company’s property including, but not limited to, the care commonly defined as good animal husbandry practices.” While the inclusion of these provisions may be understandable, the concern from the perspective of a grower is whether they establish clear standards for identifying when conduct in fact creates a risk, or alternatively whether they present flexible opportunities for the company to create reasons to terminate an agreement.

One specific default item often included in broiler agreements relates to the grower’s relationship with company employees. The authority and decision making ability given to the company representatives under broiler contracts to make determinations on such issues as the quality of a grower’s performance or the adequacy of facilities or equipment create the potential for conflict. Understandably, the companies are eager to avoid subjecting their employees to potential threats or abusive treatment. As a result, it is not uncommon to find language in the contract that makes such actions by a grower a condition of default. Under the Company A contract, one listed “Event of Default” is “[u]se of abusive language, threat of physical harm, or in any way impeding the Company or its authorized representatives from inspecting or examining the Producer’s facilities or flocks.”

15. *Only written contract terms applicable with no modification unless in writing*

A classic legal provision found in all broiler contracts is what is known as the “entirety clause.” The purpose of this provision is to establish that all of the terms of the parties’ agreement are present in the written contract and that any oral communications or other modifications are not enforceable unless reduced to writing. In the broiler-growing context, these provisions are intended to prevent growers from arguing that company employees approved certain actions or stated that provisions of the contract would be enforced in a manner other than as written. These clauses may also include language repealing or superseding any previous agreements entered into

between the parties, so that there is only one current agreement to be interpreted. The following example of an entirety clause is from the Company A contract:

This contract supersedes all prior agreements between the parties hereto. This broiler Contract, any amendment thereto, and the Company's Broiler Growing Guide constitute the entire agreement between the Producer and the Company regarding the production of broilers.

In a provision relating to the length of the agreement, the Company A contract also states, "[t]he Producer understands and agrees that no agent, servant, or employee of the Company has authority to make any oral modification to this Contract. Modification of this Contract may only be accomplished by written instrument fully executed by the Producer and an authorized representative of the Company." The Company B contract includes a similar provision but adds a clause that "[n]o representations or statements made by either party or their agents not contained herein shall be in any way binding on either party."

16. *Assignment of contract only with approval of the company*

One issue that can arise for growers, especially those who may be interested in selling their farms and broiler houses, is whether such a sale would include the opportunity to continue producing broilers for the company. Broiler contracts uniformly address this issue of assignment by providing that the company has the right to assign the contract without any limitation, but that growers can assign the contract only with the written approval of the company.

For example, Company B's contract reads, "[t]his Agreement shall be freely assignable by [Company], and shall be assignable by Producer only with [Company's] prior written consent." While the company's desire to control assignment of the contract may be understandable, from the perspective of the grower the reservation by the company of the right to assign its contract at will creates a lack of symmetry in the relations and means that growers might find themselves dealing with a different company if, for example, the company sells or merges operations.

B. *"Grower Friendlier" Provisions in the Contracts*

For the purposes of this study, contract terms that can be characterized as addressing growers' fairness concerns are described as "grower friendlier" provisions. These terms may include contract provisions that incorporate grower protections mandated by state or federal law. Although the contracts do not cite statutory or regulatory protections, nor indicate that the provision is legally required, the grower friendlier contracts do include the legally mandated provision, thus providing the growers with notice through the contract of their legal rights.

The best way to understand the possible effects of the inclusion of the grower friendlier terms is to review the exact language of each such provision. The following discussion uses the language of the Company A contract to explore the implications of grower friendlier provisions. In contrast to the Company A agreement, a reading of the Company B contract reveals no evidence of a similar “grower friendlier” orientation. For the ten Company A grower friendlier contract terms listed below there is no equivalent in the Company B contract.

1. *Right to join any organization or association*

Under the independent contractor term, the Company A agreement states, “[t]he Producer may join or assist any organization or association of their choice with no effect on this contract in any way.” The provision would appear most likely to address the concerns of growers that joining a state or national contract poultry grower organization might place them in jeopardy of retaliation. The term is also likely an attempt to demonstrate the company’s compliance with the Federal Agricultural Fair Practices Act, which prohibits company’s from taking certain actions against growers because of the growers’ involvement with a producer association.⁴

2. *Prompt weighing of live birds*

The Company A contract provides that the “[g]ross weight will be determined, on a certified scale normally used for such purpose, as promptly as possible after the poultry is loaded on the vehicle, and the Producer may witness this weighing.” As noted in the discussion of grower concerns identified in the survey, the issue of delays in when birds are weighed after loading and the resulting issue of shrinkage and weight loss, can be a significant issue. The promise to conduct such weighing promptly is an attempt to recognize this concern and also reflects the company’s legal obligations under the Federal Packers and Stockyards Act.⁵

3. *Chick placement from hatchery is random*

The number of birds still alive at the end of a growout period and their weight is directly influenced by the quality of chicks placed in a house. Many growers have expressed concerns about the quality of chicks they receive, with some growers even worrying that chick quality can be adjusted by the company and as used as a mechanism to “discipline” growers who raise concerns. The Company A contract is

4. See 7 U.S.C. § 2303 (2000); see also ASSESSING THE IMPACT OF INTEGRATOR PRACTICES ON CONTRACT POULTRY GROWERS, *supra* note 1 at chapter 4 (containing a detailed analysis of federal laws and regulations applying to poultry contracts, as well as state laws applicable to production contracts).

5. See Regulations Under the Packers and Stockyards Act, 9 C.F.R. § 201.82 (2001).

one of the only contracts reviewed that contains any language relating to these concerns. It states, “[t]he Company agrees to furnish the Producer with chicks, randomly placed from the hatchery’s production.”

4. *Payment possible if birds die due to an Act of God*

Under most broiler contracts, the company as owner of the birds bears the risk of their death. However, the grower also is at risk when birds die because the grower loses any ability to be paid for the work done. The issue of the risk to growers of receiving compensation for the “effort” to raise birds can be especially significant in situations where some event, such as a heat wave, results in the loss of most or all of the flock. The Company A agreement provides some possibility that growers will be compensated in some circumstances of loss. The provision reads, “[t]he Company will pay the Producer for the time the birds were in the Producer’s houses on a pro-rata basis in event an Act of God destroys the birds during the grow-out cycle.” As discussed in the next section however, the types of loss covered by this provision may be quite limited based on the contractual definition of “Act of God” and a term providing that risk of loss from catastrophes that are *not* Acts of God remains with the grower

5. *Grower can view feed weighing and live bird weighing*

The payment a grower earns under a broiler contract is directly determined by the weights of the birds and the amount of feed they consumed. For that reason the ability of growers to view such weighing, in order to have confidence in the manner in which the weighing is done, can be an issue. The Company A contract provides, “[t]he Company will bear the cost of delivering feed to the Producer’s farm. The Company will allow the Producer to witness the weighing of the feed.” Of course, to have a meaningful right to view the weighing there would have to be a process where by growers had advance notice of when and where the weighing was to occur.

Similarly, the issue of the weighing of the live birds is also a concern. As noted above, the Company A contract includes language noting that “the Producer may witness this weighing.” This right is provided for growers in the Federal Packers and Stockyards Act.⁶

6. *Company agrees to use certified scales for weighing*

Another aspect of the weighing issue concerns the actual equipment and personnel used to conduct the weighing. The Company A contract provides, “[t]he Company agrees to provide certified scales to be used to weigh live broilers and feed.

6. See *id.* § 201.108-1(e)(4).

The Company shall employ qualified persons to operate these scales. The Company will make provisions for alternate certified scales in the event the primary scale is inoperable.” This language acknowledges federal law that requires companies to maintain accurate scales and employed qualified people to operate them.⁷

7. *Delivery of weigh tickets and records*

A final aspect of the weighing issue concerns the documentation created to record the weights. Access to copies of these documents is necessary for a grower to independently verify the payment calculations used to determine the final settlement or payment and is required by federal law. Under the Company A contract, “[t]he Company shall provide the Producer with a legible copy of the chick delivery ticket and feed delivery ticket at time of delivery. The Company will provide the Producer with a live bird scale ticket and a USDA condemnation certificate (form 9061-2) upon flock settlement.”

8. *Assistance program for growers with poor performance*

It is common under most broiler growing arrangements for the contract to provide that growers who consistently perform below average, or have higher costs, are at risk for not having their contracts extended. For example, the Company A contract provides that “[f]ailure of the Producer to consistently produce broilers in an efficient competitive manner, as provided . . . herein (the Performance Improvement Procedure)” is a condition of default by the grower. Several contracts, including the Company A contract, incorporate programs designed to assist such lower performing growers in order to increase their returns and reduce the risk that they will be terminated. The Company A contract establishes a detailed “Performance Improvement Procedure” which provides that, “[p]roducers whose performance is not consistent with the Company’s Broiler Growing Guide, may be placed on “Intensified Management” Status” If this happens, it requires the grower to meet with the company’s technical advisor and broiler manager and respond to specific written recommendations for improving the grower’s performance.

9. *Incorporation of a written “Broiler Grower’s Guide” establishing standards*

Another issue that can cause growers concern is knowing in advance the standards against which their conduct or performance will be measured. One method for addressing this uncertainty is for the company to reduce to writing the guidelines that will be used to evaluate or measure a grower’s actions. The Company A contract

7. See *id.* § 201.108-1.

addresses this issue by providing for technical advice and the use of the company's Broiler Growing Guide. The provision states:

The Company agrees to provide technical advice at no cost to the Producer. The Company Technical Advisors shall visit the Producer periodically to give advice and assistance as required. The company will provide the Producer with a written guideline of recommended practices that optimize broiler performance, known as the Company's Broiler Growing Guide. This guide is not a guarantee of successful results or profits, but contains those management practices that, in the Company's opinion will prove most effective.

A later provision in the Company A contract specifically incorporates the terms of the guide and makes it a part of the contract.

10. *Company employees excluded from the payment pool*

The typical poultry contract provides for payment based on a pooled ranking system in which each grower's performance is measured against an average for a period. One issue that can cause concern on the part of growers arises when company employees or their families also raise birds. The concern is whether the employees are somehow given a preference when it comes to the delivery and quality of inputs, the length of layout time, and the timing of the sell out of the birds. One way for a company to eliminate such fears is to take the employees out of the ranking system with other growers. The Company A payment schedule provides in part:

Producers who are Company management employees or their immediate family (including but not limited to spouse, parents, parents-in-law, brothers, sisters, brothers-in-law, sisters-in-law, sons or daughters, sons-in-law or daughters-in-law or stepchildren) shall be settled with all Producers, then removed from the calculation of the Average Efficiency Point Factor for the purpose of settling all remaining Producers.

C. *Contract Provisions That May Raise Grower Concerns Beyond the Norm*

While the analysis presented thus far indicates that the Company A contract has a more favorable grower orientation, this does not mean that the contract is balanced on all issues. In fact, it is important to remember when considering poultry contracts that in most situations the relations are inherently unequal, the growers have very little bargaining power, little or no autonomy of decision-making, and few alternatives as to other contractors or marketing outlets. The reality of the true nature of broiler contracting relations is reflected in the sixteen core categories of contract provisions discussed earlier, the effect of which is to place near total and unilateral decision making authority with the company while at the same time leaving with the growers significant risks and responsibilities relating to the performance of the birds and the disposal of dead birds.

Even when starting from the basis of a relation that is demonstrably one-sided, many poultry contracts include additional provisions that further amplify the nature of the relations. The following list of provisions from the Company A and/or Company B contracts may either raise concerns for growers or evidence the use of unequal contracting power to allocate risk or responsibility with the grower.

1. *Grower bears risk of loss if a catastrophe occurs*

One risk in broiler contracting is what happens to a grower if a catastrophe results in the death of a sizeable number of birds. While the Company A contract does include language that would require the company to pay a grower for the time the birds were in the houses on a pro-rata basis if the birds are lost through an "Act of God," the contract also includes another provision which seems to counter this. The contract states, "[t]he Producer will bear the risk of loss of his own property. The Producer bears the risk of his compensation in the event of any catastrophe while birds are in his possession." The distinction may be that a loss caused by a catastrophe, such as fire, would rest with the grower, while the risk of an "Act of God" such as a hurricane may qualify for compensation. The use of these two provisions may require growers to use a dispute resolution process to determine the scope of the "Act of God" protection.

2. *Possible delay in grower's right to terminate contract*

The only effective response a grower might have to a negative company action, such as an amendment to the payment schedule reducing the payment, would be to utilize whatever provision is in the contract allowing for termination (or to refuse to sign a new contract). In the Company A contract, this provision, titled "Producer's Right to Terminate" reads, "[t]he Producer shall have the right to terminate this Contract with no less than sixty (60) days notice prior to scheduled flock removal from the Producer's farm. This notice must be given to the Company's Broiler Manager in writing." The timing required in this provision is somewhat peculiar in that most production periods are about seven weeks or fifty days. To require a sixty-day notice prior to scheduled flock pick up would appear to mean the notice might not be effective until another flock has been placed.

3. *Special concerns where company arranges for supplies to be provided by another party*

As discussed above, under a typical broiler contract the company is responsible for providing the feed, chicks, medications, and certain other supplies and the grower is prohibited from using supplies not provided or approved by the company. Under most contracts the responsibility for providing those supplies rests

with the company directly. The Company B contract, however, allows Company B to either “provide and deliver” the supplies to the grower or to “arrange for provision and delivery to Producer, feed, fuel, medications, vaccinations, and other supplies” As a result, Company B may not actually be the source of the inputs. This language can be contrasted with the Company A contract, which says that Company A will deliver the inputs and it will be at “no cost.” While it may be assumed in the Company B contract that the supplies are provided at no cost to the grower, there is at least the possibility that a supply company could charge the grower for items.

A related issue that can arise concerning inputs supplied by an outside party is the quality or efficacy of the supplies and, more specifically, what happens if the supplies are defective or perform poorly. The Company B contract is silent on the topic of limiting any claims of warranties for supplies. The Company A contract includes a provision that is a limitation of warranties and thus a limitation on the potential liability of the company for defective supplies provided by an outside party that it recommends. It provides, “[t]he Company does not warrant quality, merchantability, fitness for purpose or otherwise warrant any product delivered by or recommended by it to the Producer that is not manufactured or produced by the Company.”

4. *Grower liability for excess use of supplies*

The Company B contract contains a provision that states that the grower is required, “[t]o pay for supplies used in excess of usage programs when such excess usage is caused by improper management practices of the Producer. Payment shall be made by off-set against amounts due to Producer.” While the concern about the waste of supplies may be understandable, the issue from the grower’s perspective is how to determine when the use is excessive and what the standard is for determining when management practices have been “improper.” Company B, like some other companies, provides fuel and litter for the grow-out cycle in addition to chicks, feed, and medication. Where this is done, growers’ pay can be affected not only by feed conversion but also by the amount of fuel used.

5. *Grower to hold the company harmless from liability*

In the Company B contract the independent contractor clauses are quite detailed and include specific provisions relating to the grower’s accepting responsibility for all employees, insurance, and taxes. The provision also requires the grower to hold Company B harmless from liability that might arise for any of these issues. The contract reads in part, “Producer agrees to hold Company B harmless from any liability with respect to any such taxes or other charges.” This clause isn’t unexpected but its inclusion is just another example of how this particular contract is more detailed in allocating risk to the grower and, therefore, more severe.

6. *Failure to meet unspecified performance standards as a basis for takeover*

As discussed above, most broiler contracts, including the Company A and Company B agreements, allow the company to take over the grower's facility if the company believes the grower's performance has violated the standard of care or the flock is in jeopardy. The Company B contract provides:

If Producer is not satisfactorily performing Producer's obligation under the Agreement to care for, treat and maintain the flock, or do such other thing or things with reference to the flock as outlined by [Company's] established procedures, [Company] may remove the flock, or may undertake the maintenance, treatment, feeding, and care of the flock on the Producer's property, and Producer shall assume the costs for any necessary disbursements to accomplish such purposes.

As noted, the inclusion of such a "takeover" clause is not uncommon, but what is interesting about the Company B provision is that it includes the first and only reference "[Company B's] established procedures." Perhaps the most significant issues in this regard are whether these standards have been reduced to writing and whether they have been communicated to growers in advance. The contract does not specifically note how this other document, if it exists, is incorporated by reference into the agreement, in contrast to the Company A contract, which clearly incorporates the "Company Broiler Growers Guide."

7. *Nondisclosure by grower of information*

The Company B contract includes a somewhat unusual provision that relates to the ability of the grower to share information about the broiler growing arrangement, both as to compensation formulas and the contract terms. The contract states, in bold print:

Producer shall not disclose or disseminate to any third party any information or materials or knowledge gained by Producer's relationship with [Company] including, but not limited to, information concerning [Company's] contracts, compensation formulas, operation procedures, and poultry management practices. Disclosure or dissemination of such information shall be considered as a material default of this Agreement.

8. *Grower issues related to specific dispute resolution procedures*

The Company B contract incorporates a binding arbitration procedure for resolving disputes. While the arbitration mechanism is somewhat typical, it is slanted against the grower in several ways. First, the contract sets out specific, short time periods in which the grower must make an arbitration claim or waive his or her right to seek any review of the company's action. The contract provides in part, "[a]ny

Party which fails to utilize the Complaint Resolution Procedure described in V, or the Arbitration Procedure described in VI, within the express time limits identified in each section waives its right to request arbitration and otherwise have the dispute heard before any court of law.” Also, the contract specifically provides that arbitration can only involve the company and a single grower, with multi-party arbitration only allowed if Company B agrees.

Further, the Company B contract requires growers to serve as members of the first-level dispute resolution body, called a “Peer Review Committee.” By signing the Company B contract, a grower agrees, “[t]o participate as a Peer Review Committee member, as described below in the Complaint Resolution Procedure, to resolve disputes regarding settlements or payments pursuant to settlements involving Company B Producers situated in close geographical proximity to Producer.” While using peer review’s can create a readily available and somewhat informal method to respond to grower concerns, it is not without limitations. A survey of poultry growers in the Delmarva indicated that they have serious concerns about the potential for retaliation if they are perceived as acting against the interests of the company when serving on a dispute resolution committee. The question then becomes how likely it is that a grower forced to serve on a peer review committee would feel free to rule against Company B in a dispute.

III. POULTRY GROWER SURVEY—HOW GROWER CONCERNS RELATE TO CONTRACT TERMS

A significant portion of this project relates to the grower survey that was conducted to discover growers’ perceptions about a range of issues concerning broiler contracting. In this section the discussion will focus on three issues. First, the survey responses will be used to make a series of general observations about the nature of broiler contracting and, in particular, the growers’ perceptions of the relations and their understanding of the legal aspects of the contracts. Second, the specific survey responses are examined for the purposes of identifying which aspects of the broiler contracting relations appear to cause the most concern for growers. Ten main issues emerge from this discussion of grower concerns. Third, the contract provisions used in broiler contracts offered by eighteen different poultry contractors are reviewed to determine how, if at all, each of these ten issues is addressed. In this section, examples of the typical contract language used to address each issue is highlighted and discussed.

A. *General Observations From the Grower Survey*

In reviewing the information obtained by the survey, both the general responses and the more detailed analysis that has been conducted, there are several important observations that can be made.

1. *Observations about the growers and their operations*

First, most growers have been doing this for some time, with the average length of experience being sixteen years. This means that many of the growers surveyed have considerable experience with poultry contracting, many have dealt with several companies, and most have been at it long enough to see any changes which might be taking place in the nature of contracting relations.

Second, for most growers broiler contracting is their main form of employment, with sixty-three percent having no off-farm job and more than half receiving over fifty percent of their family income from raising poultry.

Third, as to the reasons why most got into the business, the survey indicates the main reason was "to make more money" or some related financial desire such as to "provide more financial security" and to have something to retire on. Very few got into poultry production because it had been in their family, so it is not a "tradition", but a surprising number, more than seventy percent, got into the business to be their own boss.

Fourth, as to the number of houses that each grower has in production, the average is 3.6 houses. The average cost of a new house is over \$140,000. It would cost well over \$500,000 to replace the broiler houses for the average respondent. These growers have very large financial interests at stake in their production facilities and reliance on the continuation of the broiler contracting relationship is significant.

Fifth, it is clear that the issue of making improvements to the houses is a common concern, as two-thirds of growers surveyed responded that they have made at least one "substantial improvement" (defined as being over \$3000) to their houses in the last five years. More than forty-four percent of the growers have made at least two improvements. It would appear that many of these improvements might have been made in connection with qualifying for a higher pay schedule because sixty percent of growers indicate that their contract has been altered in the last three years to increase their returns, and several of the contracts reviewed include recent addenda that increase the payment rate in return for the construction of newer houses or other improvements.

Sixth, as to the issue of the potential competition between companies for growers, the survey asked growers how many other companies were operating in their area when they began growing broilers and now. The average number was 2.8 when they began and 2.48 now, showing that there has been some decline in company activity. But it is important to note that close to twenty-eight percent of growers have no other companies active in their area.

Seventh, the survey asked if the growers ever had changed companies. Thirty-one percent responded that they had done so indicating that there is some movement, with forty percent of those saying they did so in part to get better terms. But for almost seventy percent of growers there has been no change, and half of those who have not changed believe the contract terms would be the same elsewhere, indicating

a recognition among growers that the contracts are similar regardless of which company is involved.

Eighth, the survey indicates that, as to performance, the average number of flocks produced a year is around 5.5 and the average age of the broiler houses is 15.5 years. This average house age is somewhat high and indicates houses that have been in production for many years. Because the useful life of a new house is estimated to be around twenty-five years, most growers have presumably made significant improvements and equipment changes to keep their houses operational.

2. Observations about growers and their grow-out agreements

From the standpoint of the contract analysis the survey asked about the growers' understanding of the contracts and their experiences with them, such as the use of dispute resolution processes. Several significant observations can be drawn from the answers.

First, eighty-eight percent of the growers said they have made a real effort to read and understand their contract, and eighty-two percent say they do understand their contract. These answers indicate a fairly high "comfort" level on the part of the growers with understanding the terms of their contracts.

Second, growers' answers to other survey questions may raise doubts about whether growers' understanding of the legal meaning of their contracts is as high as they believe. Most notably, when asked about the dispute resolution provision used in their contract, thirty-eight percent did not know the method, while thirty-six percent said that they knew what their process was and over twenty-five percent didn't believe dispute resolution was addressed in their contract. Among those who knew the procedure, over half said that arbitration was required and nine percent said mediation. Another thirty percent said that their contract requires "peer review." This review and analysis of the contracts found no contracts that use only mediation as a dispute resolution process. Instead, that method when used is always tied to subsequent arbitration if no agreement can be reached. In some situations where peer review is employed, such as under the Company B contract, it also is part of the arbitration process.

When asked about their experience using dispute resolution, fewer than half of the respondents chose to reply and only a handful of growers had had any personal experience with it. But the more interesting information may relate to the growers' answers why they have not used the dispute resolution processes provided for in their contracts. Fifty-three percent of growers responding said that they had not used the process because they had had no disputes, but twenty-nine percent didn't think the procedure would work to their benefit and thirteen percent thought it would be too expensive. Perhaps the most interesting result for this question, "why haven't you used the process?" is that thirty-three percent thought the company would retaliate. This response is one of the few places in the survey where growers' "fear of retaliation" was addressed.

Third, it would appear that many growers believe that the flock performance and, therefore, their compensation under broiler contracting is largely determined by factors outside their own control. For example, seventy-eight percent of growers said that their pay depends more on the quality of chicks and feed provided by the company than anything they do.

Fourth, many growers have concerns about their freedom not to implement company recommendations for the operation, even if they do not agree with the recommendations. This concern is seen in the responses that fifty percent of growers in the survey believe that their contract will not be renewed if they do not follow company recommendations on housing improvements, but only fifty-one percent believe the company's recommendations have made them better off.

Fifth, based on the survey questions concerning the growers' experiences with their companies, there are areas in which growers have strong and positive feelings about the relations. For example, eighty percent of growers in the survey feel that their company is helpful with flock management and seventy-seven percent feel that their company service person is a good judge of their work quality. For the most part these answers indicate a fair level of general satisfaction with the broiler growing arrangements. This is further reflected in the response of seventy-five percent of growers in the survey that getting into broiler growing has been good for them.

Finally, while many growers believe poultry contracting has been good for them the survey also indicates a strong sentiment that growers would not recommend the practice to others. Only thirty-five percent of growers replied that they would encourage others to become growers and fifty-one percent replied that they would not. It is interesting when three-fourths of the growers believe poultry contracting has been good for them but over half would not recommend it to any one else. Part of the explanation for this could relate to the specific concerns growers have about how broiler contracting actually works.

B. Analysis of Contracts As It Relates to Ten Grower Survey Concerns

To understand how the poultry growing contracts in use relate to the concerns identified in the survey, the study examined contracts used by eighteen of the companies raising broilers. Each contract was examined to see how the contract language addressed the concerns identified in the survey. The following discussion presents the findings of the examination and uses the actual language found in the contracts to illustrate the discussion.

1. Use of the ranking system to determine grower compensation

As noted above, the payment system used by the company is a major factor in both the growers' economic performance and in some ways their satisfaction with or confidence in the broiler contracting system. The vast majority of poultry contracts in use employ some form of comparative pooled ranking system to calculate the amount

growers are paid. In this “tournament” system, the individual performance of each grower’s flocks is determined and then compared to other growers’ performance to calculate an average level for the grow-out group as a whole. The payment for each individual grower is then determined in relation to this average cost of production. Growers who use more feed or have lower weight birds are paid less based on their higher cost of production per unit.

This method of payment is a source of concern for many growers. The survey responses show that forty-eight percent of growers surveyed do not feel that the ranking system provides an incentive for them to improve their performance. Growers’ distrust of and distaste for the ranking system are addressed through this contract analysis in two ways. The first concerns a possible modification of the ranking system to relieve some grower concerns. The second considers the use of alternatives to the ranking system as a basis for grower compensation.

One issue that can arise with the use of payment ranking pools is whether company employees or their family members who also raise broilers are included in the pool and ranked with other growers. The concern on the part of growers is that the company employees may somehow be favored in the process, for example through their control over chick placement and feed deliveries. Of the contracts reviewed, most are silent on this issue. The implication seems to be that, if company employees (or their family members) are also growers for the company they are treated the same for purposes of payment and are included in ranking pools along with non-employee growers.

However, a few companies, including Company A and Company F, do specifically address this issue in their contracts by providing for a separate process for handling employees’ birds. For example, the Company F contract addresses this issue by providing that the “weighted average production cost per pound” excludes “flocks of employees of [Company] and such employees’ immediate family (parents, brothers, sisters, spouse, and children).” The effect of such a provision is that the company employees’ flocks are not used when determining the averages and rankings for other growers.

The second, broader contract issue related to the use of the ranking system is whether there are viable alternatives to that payment system. Despite widespread concern among growers about the use of the ranking system to determine their compensation, a review of the contracts indicates that the ranking system is an industry standard. Only two contracts were identified which used another form of payment. The contracts offered by Company M and Company H provide for grower payment based at least in part on the square footage of the grower’s house(s). For example, the Company M agreement uses a square foot payment to establish a guaranteed minimum payment the grower would receive. It provides in part:

1. Subject to the terms of this Agreement, [Company] supplements to Grower, that, for each flock of Broilers placed with Grower by [Company] pursuant to a [Company] Broiler Agreement, Grower will realize from said Agreement not less than \$.2250 per square foot per flock (on 32,832 square feet) of floor space in said poultry house during the term of

___ flocks. In the event that payments to Grower for any such flock amounts [sic] to less than such supplemental amount, [Company] will pay the difference to Grower so that the said . . . Addendum per square foot will be paid.

The Company M contract also includes payment under a more traditional pooled system based on the birds' actual performance. If the payment based on that schedule would be higher than the payment available under the square-footage schedule, the ranking-based payment is what the grower receives.

The square footage system is one alternative to the ranking system for determining payment as demonstrated by its current use by at least two companies, but other alternatives may exist.

2. *Grower concerns about the quality of chicks and other inputs supplied by the company*

A grower's payment under a broiler contract is determined by the number of birds alive at the end of the grow-out period and the amount of weight they have gained relative to the feed consumed. These factors, in turn are affected by the health and quality of the birds raised and the feed and medical attention received. The survey indicates that a substantial majority (seventy-eight percent) of growers believe that their pay depends more upon the quality of inputs received than the growers' own work. Of the many inputs to the operation chick quality is a major concern for many growers, with only forty-four percent believing that good quality chicks are usually delivered and fifty-four percent saying that this happens only sometimes or rarely.

A review of the contracts indicates that the issue of chick quality is not universally addressed. Instead, the issue of the type of chicks provided, if referred to at all, is at the sole discretion of the company in connection with its ability to determine the type, number, and frequency of flocks provided. The only exception on the issue of chick quality is the Company A contract which, while making no reference to chick quality, notes that the chicks will be "randomly placed from the hatchery's production." This reference would appear that it was designed to address grower concerns that poorer quality chicks might be given to less favored growers.

3. *Settlement sheets unclear*

Thirty-one percent of growers in the survey indicated that they do not understand the calculations on their settlement sheets. The contract review did not include review of any settlement sheets, so no conclusions about this grower concern can be drawn from this analysis.

4. *Condemnation rates high and explanations unsatisfactory*

Growers' final payments are affected, sometimes significantly, by the number of birds condemned at the processing plant for health or quality reasons. Twenty percent of growers in the survey indicated that the condemnation rate for their flocks is usually higher than expected, and thirty-eight percent indicated that they are, at best, only sometimes satisfied by the company's explanation for the condemnation rate. Contract language generally does not address condemnation rate levels or the identification of condemnation causes. Only one contract, Company K's, seemed to set a maximum condemnation rate, in this case three percent of live weight pounds delivered by the grower. Nonetheless, the contract review did reveal a broad spectrum of provisions for assigning liability between the company and grower for condemned whole birds and parts. These provisions ranged from making no mention of condemnations to specifically assigning grower liability for condemnations resulting from particular diseases.

For example, the Company O contract provides that the company will be responsible for one-half of the condemned parts and all poultry condemnations resulting from leukosis, inflammatory process, or plant error. The grower is responsible for whole birds condemned for any other reason as well as one-half the condemned parts. Company N and Company I similarly charge growers for half of condemned parts, but only excuse growers from whole bird condemnations resulting from plant error. The contracts for Company C, Company L, and Company P exclude plant error condemnations from growers' responsibility, but do not specify how condemned parts are treated. Company R apparently provides for the most limited grower liability for condemnations, making growers liable only for whole birds condemned for airsacculitis and sep-tox.

5. *Contract dispute resolution procedures*

Experience shows that relations as involved and complicated as broiler production create the potential for disagreements between the parties involved. The nature of broiler contracts, which depend on growers providing the daily labor but which leave the vast majority of decisions as to management and measuring performance with the company, are especially prone to possible disagreements. The method of dispute resolution provided for in a contract creates not only the mechanism for resolving disputes that can arise in the grow-out relationship, but also determines the ability of growers to seek redress either from the courts or other authorities. The survey responses indicated some uncertainty among growers about the types of dispute resolution provided for in their contracts and little experience with them. The review of contracts indicates that several approaches are used, including arbitration, mediation, and peer review. Eleven of the contracts use some form of binding arbitration. Four of the contracts make use of a process of mediation but in all of these the mediation is a precursor to the use of arbitration. Four contracts make no

reference to the issue of dispute resolution, apparently leaving the issue to the courts. Several of the contracts, for example Company C and Company B, make use of a peer review process using other growers and perhaps company employees. In Company B's case, peer review is followed by arbitration if unsuccessful. Under the Company C contract, however, peer review is the sole means of dispute resolution provided for.

One trend that is apparent both in broiler contracting as well as in other commercial activities in the United States is the adoption of mandatory arbitration as a dispute resolution method. While arbitration may offer a viable process with certain advantages, it does have its limitations and is subject to criticism as being inherently biased toward institutions *vis-à-vis* individuals. Most broiler contracts that employ arbitration contain detailed procedures for how the arbitration process is to proceed. The following "Complaint Resolution" provisions from Company D's broiler production agreement, is representative:

Complaint Resolution: Any controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association, under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

A. Either party shall demand arbitration in writing within ninety (90) days after the alleged claim was known or reasonably should have been known. Such demand shall include the name and address of the arbitrator appointed by the party demanding arbitration.

B. Within thirty (30) days after such demand the other party shall name an arbitrator and notify the first party of the name and address of said arbitrator.

C. The two (2) arbitrators shall within thirty (30) days request a panel of seven (7) to be designated by the American Arbitration Association, one of who shall be selected as the third arbitrator. The party requesting arbitration shall make the first challenge/strike from the panel of seven. The third arbitrator shall serve as the chair of the proceedings. The parties may name anyone of their choice as their arbitrators, except that all arbitrators shall be persons having knowledge of and experience in the broiler production industry. By mutual agreement the parties may waive a three-member panel and proceed with one arbitrator only.

D. The expenses of witnesses shall be paid by the party producing such witnesses and each party shall pay for its own legal representation, if any. If Grower elects to appear at any hearing without an attorney and gives Company at least seven days notice of such election, Company will do the same unless the law requires otherwise. All other expenses of the arbitration will be borne equally by the parties; provided, however, that in order to encourage the resolution of claims, Company will pay all costs and expenses of the third arbitrator in excess of \$1,000, so that in no event will Grower be required to pay more than \$500 of the costs and expenses of the third arbitrator.

E. The arbitration hearing shall be held in _____ county, _____, within thirty (30) days of confirmation of the third arbitrator's appointment unless the parties agree otherwise.

Failure by either party to participate in the arbitration process shall preclude that party from objecting to the arbitration proceedings.

F. Both parties shall be allowed a period of time to submit post-hearing briefs within a period of time designated by the arbitrator acting as chairperson. The arbitrators may grant any relief they deem just and equitable and within the scope of the agreement of the parties, including, without limitation, monetary, equitable or declaratory relief. An award rendered by a majority of the arbitrators appointed pursuant to this agreement shall be final and binding on all parties except as provided by law.

G. The parties stipulate that the provisions hereof shall be a complete defense to any suit, action, or proceeding instituted in any Federal, State or local court or before any administrative tribunal with respect to any controversy or dispute arising during the period of the agreement and which is arbitrable as herein set forth. The arbitration provisions hereof shall, with respect to such controversy or dispute, survive the termination or expiration of this agreement.

H. Nothing herein contained shall be deemed to give the arbitrators any authority, power, or right to alter, change, amend, modify, add to or subtract from any provisions of this agreement.

As is apparent to anyone who takes the time to read the above provision, it sets forth a rather complex and involved legal procedure. While the use of arbitration may be an expected part of commercial activity there are legitimate issues concerning the ability of most poultry growers, or most lay people for that matter, to understand or appreciate the implications of this procedure. For example, it is questionable how willing a grower would be to initiate such procedure. Even once the procedure is implemented, the terms of section H raise questions about the exact scope of the remedy that the arbitrators may impose. While section F says the arbitrators have the power to impose "equitable" relief, section H notes that they may not alter or change the agreement. So, for example, it is doubtful that the arbitrators would have the authority to extend the agreement beyond its explicit term. The inherent problems with arbitration and the increasing use of it for "defensive" purposes by companies interested in shielding their conduct from review by the courts is one reason why legislation introduced in Congress and many state legislatures relating to production contracts prohibit such use of mandatory binding arbitration.

6. *Value of company recommended improvements and pressure to adopt them*

To enter a broiler growing contract a grower must make a significant investment in facilities and equipment. The current cost of a new broiler house averages around \$140,000, and most growers build at least three houses. One important issue of concern to growers is the ability of the company to require growers to make improvements in existing houses or to install new equipment. Experience shows and the survey responses indicate that broiler production is not a static enterprise but instead growers are frequently requested or encouraged to make

changes in their facilities. Two-thirds of the growers in the survey made at least one substantial improvement in the last five years, and more than forty-four percent made at least two. Company recommendations may relate to the adoption of new equipment or other improvements in the facilities, such as new waterers or curtains.

One issue is whether or not a grower is required to adopt the company's recommendations or to make changes in order to keep a contract. If the contracts are on a flock-to-flock basis, growers may be faced with little option but to make the changes if they desire to continue raising poultry because the company can make adoption of improvements a condition of receiving a new contract. But if contracts are for set periods or are silent on the issue of a grower's power to decide whether to follow company "recommendations" then the issue becomes more significant. The survey indicates that growers have some concern about this issue, with forty-two percent responding that they do not feel free to not follow the recommendations of the company service person.

The issue of increases in contract payments in conjunction with improvements also may come into play because the survey indicates that sixty percent of growers have had their contracts amended in recent years to increase their payments. This response may indicate at least two things. First, the companies use their ability to make unilateral changes in the contracts fairly frequently; and second, the companies may be using contractual payment increases tied to improvements to encourage growers to make desired improvements.

On the issue of growers being required or expected to make improvements to the facilities as recommended by the company, the contract review reveals that it is uncommon for contracts to make specific reference to such an expectation. Instead, the contracts make references to such commitments as the grower's obligation to provide "proper housing" as determined by the company. In addition, because the contracts may typically be for only one flock, adopting new requirements concerning equipment or improvements can be made a condition of obtaining a *new* contract rather than be incorporated into the contract itself.

However, there are some examples of contracts making more specific references to the necessity of making improvements. The Company A contract provides, "[t]he Producer agrees to cooperate with the Company in adopting and/or installing recommended management practices and equipment." The exact nature of the grower's legal commitment to "cooperate" is uncertain. The following provision from the Company E contract provides a detailed statement of the expectation of growers concerning operation of the facility and the adoption of new improvements.

Grower acknowledges full and complete responsibility for the care, maintenance, upkeep and financial responsibility for all aspects of the farm's premises and the buildings and equipment made a part thereof (the "premises"); agrees to keep the premises and equipment in reasonable care in accordance with acceptable industry standards during the duration of this contract; and further acknowledges that from time to time in the event suggestions are made by Owner with respect to the improvement, maintenance or upkeep of said premises to make every reasonable effort to comply fully with all Rules and

Regulations regarding the upkeep of the premises and any environmental concerns applicable thereto or other reasonable regulations from time to time in effect by the Owner.

7. *Prompt and accurate weighing of chicks and feed*

From the grower's perspective, the weight of the birds raised and removed from the house for processing is the main indicator of their performance and the most important determinant of their final payment. As a result, one concern that can arise is how much time passes before the birds are weighed once they have been loaded and removed from the grower's houses. This concern arises because the longer it takes for the birds to be weighed the more weight loss, or "shrinkage," will occur. Feed weights are also critical to growers because their payment is based in part on the amount of feed consumed by the flocks.

The survey responses indicate that there is real uncertainty among growers about when their birds will be weighed after they leave the grower's farm. Only fifty percent of growers believe that the birds are usually weighed promptly. With a large number, forty-two percent, answering "other": meaning they do not know or prefer for some other reason not to answer. Nineteen percent of growers responded that they are at least sometimes charged for more feed than is delivered, with thirty-two percent answering "other" to this question. The question of whether growers are able to observe the weighing of either the live birds or the feed relates to the confidence growers have in the company's measures.

A review of the eighteen contracts reveals that it is uncommon for broiler contracts to make any reference to prompt and/or accurate weighing of birds or feed. As to the issue of prompt weighing, only the contracts used by Company A, Company E, and Company F make this commitment. All of these contracts as well as that offered by Company L refer to the grower being entitled to and encouraged to view the weighing.

8. *Assistance from company with litter removal*

Under all of the contracts examined, the growers are responsible for the disposal of dead birds. For many of the contracts, similar provisions are included for the disposal of litter. Even for those contracts in which the issue is not addressed, the assumption is that the litter is the responsibility of the grower since it is in the facility and will have to be removed before new birds can be placed.

When the survey asked growers about the issue of disposal of dead birds and litter and whether the companies provide any assistance, twenty percent said they received some assistance from the company and seventy-eight percent indicated they received no assistance. These answers are notable because, as the following discussion

indicates, no contracts were found which make any provision for assistance to growers as relates to the disposal of litter or dead birds.

The issue of who is responsible for disposing of dead birds and litter is significant and, to the extent this responsibility is specifically addressed in the contracts reviewed, it uniformly rests with the growers. A review of all the contracts found no examples in which there was any specific or implied reference that the company would provide the grower any form of assistance in connection with the proper disposal of either manure and litter or dead and cull birds. The only exception to this might be provisions for circumstances where a large number of birds die due to a catastrophe. The following discussion details how the issues of litter and bird disposal are addressed in broiler contracts.

Bird Disposal. The contracts uniformly talk about the requirement for proper bird disposal and the need for growers to satisfy federal, state, and local requirements in this regard. For example, in the Company N contract, grower commitments include, “[t]o provide approved dead chicken disposal facilities which meet State Department of Health requirements.” The Company O contract reads, “Grower shall . . . [m]aintain the premises relating to this Agreement in a clean, sanitary and orderly condition, providing a proper disposal of all dead birds in accordance with the requirements of Federal, State and Local environmental, health and other applicable codes and regulations”

For the most part, the choice of how to dispose of the birds is left to the grower, however a few contracts provide specific disposal requirements such as incineration or composting pits. For example, the Company I contract requires the grower, “[t]o provide for prompt disposal of all dead and cull birds by means of (i) an incinerator equipped with an afterburner meeting all requirements of state and local environmental, health and other codes and regulations: or (ii) a pit disposal system with at least 400 cubic feet for each 16,000 square feet of housing, meeting requirements of [Company] and all state and local environmental, health and other codes and regulations as to its installation and operation.”

Litter Disposal. A surprising number of contracts are silent on the issue of the disposal of litter and manure left in the houses after a grow-out cycle, with the contract containing no reference either to the litter or the grower’s responsibility for removing it. Contracts used by the following companies are among those taking this approach: Company B, Company K, Company E, Company O, Company N, Company J, and Company P. In light of the increasing public and regulatory scrutiny of poultry litter disposal, the failure to include contract language addressing it can hardly be accidental. The most likely explanation may be that the companies are taking the position that the litter is clearly the growers’ property and by not making a specific reference to the litter, and by not explicitly allocating this responsibility to the grower in the contract, the company can avoid any direct connection with the litter. The company is likely relying on the fact that, to the extent the broiler production facilities are licensed, the license is in the name of the grower and the grower would have a statutory and regulatory obligation to dispose of the litter properly. Whether

this position is reasonable, or whether it would be effective in a regulatory enforcement context is uncertain.

The silent approach does stand in stark contrast to the other companies' approach to litter removal; namely the express allocation of the responsibility for litter to growers in the contracts. For example, the Company A contract provides that "[t]he Producer shall be responsible for the removal of all dead birds and litter and shall dispose of dead birds and litter in accordance with the law applicable to this location." Contracts used by Company L and Company G follow this approach, although in some situations the contracts include a reference to disposal in accordance with the company's recommendations.

In some situations the contract language is even more explicit concerning the grower's responsibility for proper litter disposal and the company's immunity from any responsibility. For example, consider the following provision from the contract used by Company M:

Grower shall be solely responsible for providing for manure or other poultry waste product removal, handling and disposal for the Facilities in compliance with all applicable laws, rules, and regulations. Grower agrees to indemnify and hold harmless [Company] from any claim, loss or damage which results from Grower's failure to comply with this provision, including any loss suffered by [Company] as a result of [Company] being forced to relocate its broilers from Grower's Facilities for failure to comply. In the event the Grower does not comply with Grower's manure and waste disposal responsibilities under this Agreement, Grower hereby grants [Company] full and complete access to the Facilities to carry out Grower's duties at the expense of the Grower. In such event, Grower agrees to indemnify and hold harmless [Company] from any claim, loss or damage which results from Grower's failure to comply with this provision, including without limitation any claim, loss or damage which results from [Company's] actions in performing Grower's responsibilities.

This provision is accompanied by a provision that similarly makes the grower responsible for implementing pollution prevention and odor control at the facility, and another provision that addresses the grower's responsibility to dispose of dead animals by composting or incineration.

The Company L contract also includes an extensive "hold harmless and indemnify" provision, under which the grower agrees to indemnify the company for any claims, liabilities, or damages which result from the grow-out arrangement, specifically including those which might arise in connection with pollution or waste disposal complaints. This provision includes the following language, "[i]t being expressly understood and agreed that all manure waste material produced or resulting from the broilers shall be the sole property and responsibility of the Grower from and after its production or creation."

9. *Risk disclosures and projections of expected returns*

One issue which surfaces indirectly in several of the survey questions concerns whether or not the experience of the growers has been as economically rewarding as they thought. One issue in this regard is what the growers may have been told they could expect in terms of the financial returns, or conversely whether they understood the risks involved.

When asked if the income they receive is above or below what they expected when starting out: only ten percent say more and forty-three percent said less with forty-seven percent saying their returns were about what they expected. Those who said that they had earned less were asked to indicate possible reasons why this was the case. A large number, seventy-six percent, said that they were given poor quality chicks and sixty-five percent said that more chicks died than expected. Eighty-six percent said that operating costs had risen faster than expected and sixty-five percent said the company required expensive improvements. More than forty percent said they received fewer chicks or poorer quality feed than expected.

One interesting response was that thirty-seven percent said they received less income than expected because the contract terms had changed, but in an earlier question sixty percent said the contract had changed in the last three years to increase their net income. One possible explanation for these results is that while the contracts changed over the past three years to increase growers' net income they had not changed enough to put that income at the level that the growers had expected.

The issue of whether raising broilers on contract is as rewarding as growers expected is a function of many things. One issue can be what the growers may have been led to expect. At the same time, it is understandable that broiler companies would be unwilling to make promises or other obligations to growers about the return that the growers can expect in the business. For this reason, most contracts include provisions reflecting the fact the arrangements involve significant risks. For example the Company A contract notes that, "[t]he Producer will bear the risk of loss of his own property. The Producer bears the risk of loss of his compensation in the event of any catastrophe while birds are in his possession." Some contracts include more detailed disclaimers of any promises of specific economic performance. For example, the Company E contract provides:

Owner makes no representations or commitments other than those contained herein, and Grower acknowledges there are no representations or commitments other than as set forth in this Agreement.

In no event will Owner be liable for special, indirect, incidental, consequential damages, or punitive damages, or including but not limited to, the loss of profit, revenue or other losses, even if the Owner shall have been advised of the possibility of such potential loss or damages. The Owner and Grower agree that the limitations set forth in this paragraph will survive even if the remedies set forth in this section or other provisions of this

Agreement are found to have failed in their essential purpose or are otherwise unenforceable.

All limitations upon Grower's remedy are made a part of the bargain between Owner and Grower and the Grower accepts the allocation of risk set forth herein and acknowledge [sic] that the allocation of risk are [sic] an exchange for other economic benefits to Grower.

As to statements concerning the expected returns a grower might expect, only five of the contracts include some sample calculation. In most cases, however, these examples are not provided as expectations as to what a grower will earn but instead are used to illustrate how the payment and settlement system will operate. Contracts used by Company L, Company F, Company J, Company M, and Company N include some form of payment calculation example.

10. *Timing and frequency of flocks*

A major influence on the income and profitability of a poultry contract is the number of flocks raised in a year. Down time or periods between flocks represent possible lost production time. However, there is a certain amount of time between flocks, typically seven to ten days, which is required to clean and prepare a house for new birds.

The typical contract language addressing the issue of the timing and frequency of flocks is found in the Company A contract, which provides that "[t]he Company reserves the right to determine the number, frequency and type of broiler chicks to be placed in the Producer's houses." It is clear from reviewing the contracts that the companies do not want or accept any obligation as to the timing or frequency of flocks given to the grower. For example, the Company I contract provides that the company agrees "[t]o consign flocks to the Producer . . . as such flocks are available for placement from time to time under prevailing markets, production, and other factors." The Company J contract provides that: "[Company] has the right of sole discretion as to the placement density and time each flock will be marketed."

The issue of how many flocks will be delivered and when is also linked to the issue of the term or length of the contract. Because many contracts are for only one flock, there is no reason why those contracts would address the number of flocks or the interval between flocks. This is true even though the contracts may include language that makes them continuous, meaning they roll over from one period to the next if a flock is delivered and neither party has taken any required steps to terminate the agreement. For example, the Company L contract includes this provision concerning mutual obligations:

That the term of this Agreement is for that period required to grow and deliver one (1) flock of broilers, unless canceled by either party in accordance with provisions contained in this Agreement. It shall automatically renew for a like successive term unless cancelled

by either party upon ten (10) days written notice thereof or superseded by a new contract. Notice shall be effective upon receipt.

The Company B contract contains a similar provision: “[f]or the convenience of not having to initiate a new Agreement after each flock, this Agreement shall be continuous until the Agreement is terminated by either [Company] or Producer.”

A different approach is for the contract to include much stronger language setting out the company’s obligation to provide no more than the one flock. For example, the Company E contract provides:

Grower acknowledges that the execution of this Agreement does not create a continuing relationship between Owner and Grower and that Owner is not obligated to provide Grower with any flocks after the flock delivered hereunder has been grown to maturity. This agreement covers only poultry delivered by Owner to Grower at or simultaneous with the execution of this Agreement. Upon completion of the grow-out process for the flock applicable to this contract, this Agreement shall terminate. It is expressly understood and agreed that Owner shall be under no obligation to extend further growing contracts to Grower under any circumstances. While it is envisioned that in the event Grower continues to provide services to Owner in full compliance with all terms hereof that future contracts will be entered into between the parties, this is not an obligation of the Owner. Owner specifically reserves the right not to extend future contracts to Grower for poor performance, violations of state law or all other reasons. It is expressly understood and agreed that Grower shall be under no obligation to accept further growing contracts upon the completion of the grow-out process for the flock applicable to this contract. Grower also specifically reserves the right not to accept future contracts from Owner.

Even contracts that are for a longer period of time, for example a Company K contract that is for a period of two years, include language that puts the actual timing and thus, number of flocks at the discretion of the company. The Company K contract provides that “[d]uring a period of [two] years from this date, [Company] agrees to sell and deliver to the Producer day-old flocks of chicks (each flock being referred to as a “Flock”), as such Flocks are available for placement from time to time under prevailing market and production conditions and other relevant factors. . . . [Company] shall not be obligated to deliver any certain number of Flocks to Producer or to deliver Flocks to Producer at any certain time.”

C. *Analysis of Contracts As It Relates to Grower Retaliation Concerns*

An issue that emerged in the survey, as well as in other surveys conducted over the years, is the worry some growers have about the possibility that the company will retaliate if the grower complains or causes problems. The potential for retaliation was identified in this survey in connection with answers relating to the use of dispute resolution and the implementation of recommendations, with thirty-three percent of growers who responded indicating that at least one reason why they had not used the contractual dispute resolution procedure available to them was a fear of retaliation. While sixty-seven percent of growers reported that they felt free to complain to the

company, forty-two percent of growers indicated that they did not feel free to use their own judgment to not follow the company service persons' recommendations, presumably because they feared non-renewal or some other adverse consequence if they did not defer to the company representative.

An issue that may be related to the question of retaliation, at least in the minds of some growers, is the effect of their decision to join an organization representing the interests of poultry growers. While the survey asked a question on this topic, the wording asked growers about joining an organization "to help them manage their operations better," which is not the typical reason a grower might join a grower organization. In response to this question twenty percent indicated that they belonged to a contract poultry grower association for that reason. While the issue of retaliation or other unfair practices may be covered by applicable federal and state law, as addressed in another part of the study, the issue as it relates to the contracts concerns whether there is any protection in contract language for growers joining organizations such as the National Contract Poultry Growers Association. Of the eighteen contracts reviewed, only three—those offered by Company A, Company E, and Company G—make any mention of this issue. For example, the Company G contract provides:

Participation in Organizations—Growers may join or assist any organization or association of their choice. A grower's membership in any organization or association will not affect his settlement in any way.

D. *Additional "Grower Friendlier" Contract Terms: Is a New Generation of Agreements Emerging?*

As the section discussing the contrast between the contracts used by Company A and Company B shows, there are examples of poultry growing contracts that include what can be termed "grower friendlier" provisions. A review of broiler contracts indicates that several contracts being offered by companies in the last year may fit this category, including the contracts from Company A, Company G, and Company F. A contract offered by Company F in 1999 contains a series of such provisions. These include:

Long-term agreement and recognition of investments. The preamble section of the Company F contract includes this language:

[Company] and the Grower desire to enter into an agreement by which the Grower will grow and care for broiler chickens owned by [Company]. The parties acknowledge that [Company] has a significant investment in and is subject to significant risks with respect to the Flocks placed on the Grower's farm, and that the Grower has a significant investment in, and is subject to significant risks with respect to his or her farm. The objective of this Agreement, and the attachments and schedules hereof, as amended and modified from time to time as provided herein, is to set forth a long term arrangement between the parties to protect the parties' respective investments and to minimize the parties' respective risks.

In keeping with this sentiment the contract provides that it “will be effective for fifteen years unless terminated as provided herein.”

Grower guide incorporated into the contract. The Company F arrangement is to be guided by the terms of the contract and an additional set of standards that are incorporated by reference into the agreement. Under the terms of the contract, “[t]he Grower agrees to operate the farm pursuant to and in accordance with the standards set forth in the [Company] Broiler Growing Program (a copy of which is attached hereto)”

Grower improvements, The Company F contract is one of the few contracts to address the controversial issue of growers being required to make improvements to houses or equipment either before the grower feels such improvements are required or without any financial assistance from the company. The contract includes the following provision:

As to equipment upgrades (i) [Company] will not require Grower to purchase and install individual items or additional equipment unless [Company] pays for such purchase and installation; (ii) [Company] will not, through density changes, reduce the Grower’s net income per square foot per annum (based on average expenses for Growers similarly situated as calculated and determined solely by [Company]) solely on the basis of equipment requirements; and (iii) any transfer or assignment of the Grower’s farm consented to by [Company] will not require equipment upgrades. This provision does not apply to worn out equipment or equipment that is not in good working order.

Additional provisions note that if the contract is terminated by either party the grower may have to reimburse the company for the un-depreciated cost of any equipment purchased by the company for the grower, and that the company is not obligated to purchase the same type of equipment for all growers.

Grower encouraged to view feed weighing. The Company F contract addresses the issue of feed weight accuracy by providing that feed will be weighed by a “bonded weigh master on scales (primary or alternatives) certified as required by state and federal law.” The section also provides in part:

The Grower has the right and is encouraged to be present at the time feed is loaded on trucks and weighed without prior notice to [Company]. If requested by Grower, [Company] will seal all bottom doors on the bins on the trucks at the time such are weighed. The Grower, if present at the time of delivery, may break the seals for unloading.

The provision also gives the grower twenty-four hours to report any concerns about a discrepancy between the amount of feed or the type delivered and what is indicated on the feed ticket.

Prompt weighing of flocks. The Company F contract includes a lengthy provision concerning the weighing of the birds. The provision notes that the flocks will be weighed according to the procedures required under the Packers and Stockyards Act, by a bonded weigh master, and that the Grower is encouraged to be

present at the time of weighing. As to the timing of the weighing the contract provides, “[Company] agrees to weigh the Flock as promptly as possible.” The contract reserves for the company the right to have the birds processed at a plant other than the usual destination for the grower but the contract includes a shrinkage table that will be used to adjust the weight of the birds for the additional travel time.

Employees not Included in calculations for payment pool. The Company F contract addresses the issue of employees in the payment pool by providing that the weighted average production cost per pound is defined to exclude “flocks of employees of [Company] and such employees’ immediate family (parents, brothers, sisters, spouse, and children).”

Mediation of disputes, as pre-condition to arbitration. The Company F contract does require that any controversy or claim arising between the parties be submitted to binding arbitration. However, the contract also sets out a detailed “complaint resolution” procedure that provides for the use of mediation as a method of resolving complaints. The contract ends with a paragraph in bold capital letters that reads as follows:

THE UNDERSIGNED DOES HEREBY DECLARE THAT THE TERMS OF THIS AGREEMENT HAVE BEEN COMPLETELY READ AND FULLY UNDERSTOOD. THIS AGREEMENT CONTAINS ARBITRATION LANGUAGE WHICH IS BINDING.

The Company F contract is one of the longer and more detailed agreements reviewed, which may provide a disincentive for growers to read the agreement carefully. The extensive detail may, therefore, counter the benefit of providing notice to growers of their statutory, regulatory, and contractual protections.

Another contract which includes some of these “grower friendlier” provisions is the Company G agreement. The terms are included in an attached schedule titled, perhaps inappropriately, “Best Management Practices.” Rather than dealing with best management practices in the sense of how the birds are raised or the litter disposed, the schedule really sets out a series of good contracting practices. For example, the schedule includes provisions relating to feed weighing, flock weighing, the grower’s right to join grower associations, provision of documents, exclusion of employees from the payment pool, and the term of the agreement, which might be as long as ten years for growers with newer facilities.

IV. OBSERVATIONS AND CONCLUSIONS FROM BROILER CONTRACT ANALYSIS

The preceding discussion has focused on a variety of practical and operational issues concerning contract production arrangements for the production of broilers. As the discussion indicates, while there is some variation in the type of contracts being used there is also great similarity in the structure and nature of most contracting relations. One's perspective on these issues probably influences what conclusions will be drawn and the recommendations made.

This contract review was undertaken as part of a project designed to assess the impact of contract poultry growing arrangements on the growers. One component of this was to identify the issues that are perceived by growers to be of continuing concern in the industry. These issues, as identified in the grower survey, were addressed from a contract review perspective in Part III.B of this paper. A second component of the project was the review and analysis of laws governing contract poultry growing arrangements, including common contract terms, with an eye toward identifying areas in the legal backdrop for the contract poultry growing arrangements that could be modified to improve relations in the industry. To provide assistance to anyone who might be engaged in this process, the following discussion identifies ten conclusions or observations that can be drawn from the contract review portion of the analysis.

A. *Similarity in Agreements—Lack of Grower Autonomy*

The review of the contracts now in use and the examination of the relations that they create make it clear that the broiler industry has developed a fairly standard approach toward dealing with growers. Poultry growers do make significant day-to-day management decisions in caring for their flocks: important decisions that can and do influence their incomes. But as to the most important decisions relating to the nature of the poultry operation itself this is not true. For the most part, the approach developing under standard poultry production contracts is very one-sided, with most contracts reserving almost all the critical decision-making and autonomy to the companies. One result is that many of the significant risks in the relation are left to the growers. The risks of not receiving new flocks, even though a grower may have invested hundreds of thousands of dollars in facilities, is perhaps the most significant concern, but it is certainly not the only risk growers must accept. The responsibility for complying with environmental laws relating to litter and dead bird disposal, increasingly costly and contentious issues in some areas, is another. When the agreements are boiled down to their essence, the only real decision a grower is left to make is whether to continue raising birds for one more flock. But given the nature of the investments and debts most growers have there is often little choice in this matter. More importantly, as the contracts demonstrate, the issue of whether a grower will even be offered the opportunity to raise another flock is largely beyond the grower's control.

B. *Short Term Nature of Contracts Is the Critical Element*

While broiler contracts may include dozens of legal clauses, the real essence of the relations is captured in just a few key provisions. The terms describing the relations as independent contractors, the pooled ranking system for payment, and the company's reservation of determining when a grower's performance is acceptable are all fundamental features of broiler contracting. In thinking about the contracts, however, the provision that is the keystone appears to be the term of the agreement and the related ability of the company to decide whether to continue to use a grower's facilities. As discussed above, almost all broiler contracts are relatively short-term—many for only one flock. Even though some contracts have set periods or are made "continuous," other terms in the contracts, for example the discretion to control the frequency, timing, and number of flocks placed with a grower, indicate that most contracts provide no guarantee to a grower that any given number of flocks will actually be raised.

When reduced to their essence the contracts operate much like at will employment agreements, with the companies essentially reserving the right to let a grower raise birds for them if the company feels like it or needs the facilities. The short-term nature of the relations is also the starting point for most of the difficulties that are present. It introduces vulnerability on the part of growers whose substantial investments are always at risk that the contract will not be extended. This threat helps make growers fearful of retaliation or less willing to take their own positions. It creates the "expectation" that a grower will need to adopt new improvements or equipment, even if the grower does not believe they are necessary to continue to raise birds efficiently.

C. *Grower Friendlier Contracts Are Possible*

The contract review revealed that while there is much similarity among broiler growing contracts there are also some companies offering contracts that are demonstrably more favorable to growers. For example, the contract that promises at least forty-eight flocks over a set period shows that contracts can provide more in the way of security to growers who are expected to invest all of their savings and life in the relations. Contracts providing that employees are not included with other growers for purposes of the ranking pools raise a similar feasibility issue. If the company does not need to use a ranking system for those growers, then why cannot the alternative be offered to other growers to provide more predictability in the returns?

The existence of these contract provisions is significant for several reasons. First, it shows that such contract terms are workable and have been found advantageous by some participants in the industry. Second, it may show that companies are willing or able to "compete" for growers by offering more favorable terms. Third, it shows that any regulatory or legislative effort to establish such

“grower protections” will not disrupt the broiler industry. In fact, companies adopting grower protections might be supporters of such regulations.

D. Need For Grower Education About Contracting and Alternatives

While the survey indicates that most growers have read and believe that they understand their contracts, there is always the opportunity for more education and understanding. The legal detail and complexity of many contracts raise serious questions about the real ability of non-lawyers to appreciate the legal significance and economic implications of the terms used. One topic that might be particularly valuable for growers is more education about the alternative approaches companies might use, such as the use of grower-friendlier contracts.

E. Need For Public Education About the Nature of Contracting

The terms used in broiler contracts and the nature of the relations they create are of primary concern to the parties involved: the growers and the companies. However, if the fairness or transparency of broiler contracts are going to be issues considered by government officials or legislators, there needs to be more appreciation and understanding of the relations they govern. In many ways broiler contracting is the first form of widespread industrialization of agriculture and the form with which we have the most experience. Because industrialization of agriculture is the goal of some people and because the use of production contracts is spreading rapidly to other commodities it is important for people to understand how the contracts that may be used will function. By considering the aspects of broiler contracting which raise concern it may be possible to avoid repeating these mistakes.

F. Considering How Changes in Contracting Practices Might Occur

While the goal of increasing grower understanding about the legal nature of contracting is a valuable objective, by itself this will not result in different or better contracts. The nature of the contract terms offered by poultry companies is influenced by several factors, most notably what is legal, what they can get growers to sign, and what they want to achieve. Conversely it is not difficult to identify the forces that might come into play if the goal is changing contract terms to make them fairer or more equitable for growers. Changes in contract terms will only come about for the following reasons: a) market forces such as competition from companies offering better terms or the refusal of growers to raise birds under existing contracts; b) increased bargaining power on the part of growers which forces companies to offer better terms; c) legal action by courts which prohibit the use of certain practices or require certain actions; d) legislation or regulation by state or federal officials which establishes the standards for using contracts; or e) enlightened self-interest and

altruism, which lead companies to offer “better” contracts because it is fair or the right thing to do. Because poultry contracting is at its base an economic relation, the most likely sources of influence to change contracting practices will be a combination of market forces, through competition or increased grower power and legislation⁸ or regulation.

8 On April 25, 2002, Kansas became the first state to enact a version of the comprehensive contract poultry growers protection act, which had been developed and promoted by a consortia of state attorneys general. The Kansas law, Senate Substitute for House Bill No. 2123, can be found on the website for the Kansas legislature at www.kslegislature.org.