

Which Flock Can Beat the Fox?

— Evaluating Poultry Growers' Legal Claims

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Poultry growers nationwide claim that they are being driven to financial ruin by integrators' unfair practices.¹ They feel that the "fox is guarding the chicken coop," and they want to sue the fox.

Some poultry growers are winning significant victories in their lawsuits against poultry integrators.² The problem is that hundreds of other growers in similar situations cannot find lawyers who know how to handle such cases.³

Lawyers who are new to the poultry litigation field are asking what makes a good case. They want to know what to look for as they decide which poultry growers to represent. A group of lawyers who currently represent growers recently came up with the following simple checklist of factors⁴ that help to define a good case.

¹ See *Poultry Grower News* (all issues) (available from *Poultry Grower News*, RAFI-USA, P.O. Box 655, Pittsboro, North Carolina, 27312); S. Marbery, "Poultry Growers Suing Contractors, Organizing for Clout," *Feedstuffs* (Jan. 18, 1993), p. 22; S. Marbery, "Lawsuit Shows Tension Between Integrators, Poultry Growers," *Feedstuffs* (May 17, 1993), p. 9; "Dead Chickens, Tough Times Spark Tactical Changes," *McCurtain Daily Gazette* (Feb. 10, 1993), Idabel, Oklahoma.

² *Braswell v. ConAgra, Inc.*, 936 F.2d 1169 (11th Cir. 1991); *Baldree v. Cargill, Inc.*, 758 F. Supp. 704 (M.D. Fla. 1990), *aff'd without op.*, 925 F.2d 1474 (11th Cir. 1991); *Shoemake v. Freeman*, Case No. 90-4-68 (2d. D. Miss. April 1993).

³ Taking on a poultry grower's case is a huge commitment for a lawyer. The cases are generally done on a contingent-fee basis, which means that the lawyer does not get paid for his or her work unless the grower wins in the end. This is significant, because to pursue one of these cases properly, a lawyer usually needs to spend thousands of hours of time and tens of thousands of dollars of expenses. Expenses include expert witness fees, deposition expenses, travel expenses, document and exhibit preparation, etc. See footnote 15.

⁴ This list was generated at a recent seminar entitled "Strategic Considerations in Representing Contract Poultry Growers."

Factor #1—Credible Witnesses

All of the lawyers who helped create this checklist agreed that the most important factor in deciding whether to take a case is the credibility of the main witnesses. You will have many important witnesses in your case, but usually your most important witnesses are the growers themselves. The growers should be honest, competent, believable and likeable. If the jury thinks that the growers are lying, hiding secrets, or scheming to reach into a deep pocket, that will hurt you. The jury must *want* your clients to win.

Factor #2—Documentation

Documentation is critical. The unfair practices about which growers complain are often very difficult to prove. Some growers allege, for example, that they received sick chicks, bad feed, and inappropriate medication, but all that they have to prove it is a list of sketchy memories. Proof *may* become available through discovery, but it is very risky to count on that. The best case is one in which the grower has documented every relevant thing that happened during the period at issue. Following are some types of documentation to look for.

Photographs and Videos

A picture can be compelling. Photographs or videos of sick chicks, feed spills, and other problems can draw the jury into the story and give your experts valuable information to use as the bases for their opinions. One grower, for example, said that she received a load of baby chicks that were so sick that they couldn't stand up. A photo of those chicks lying on their sides would have been a big help to the case.

Be sure that the photo contains enough information to be meaningful. For example, a picture of a feed spill is not meaningful unless there is some other reference point in the picture that allows the viewer to understand how big the spill was.⁵

All Papers Received From the Integrator

The growers should have saved all of the settlement sheets, contracts, feed delivery tickets, chick delivery sheets, company newsletters, and other papers that they received from the integrator. The lawyer may want to arrange for a computer analysis of the information in those documents. Also, the lawyer may find that the "duplicates" of the documents that the integrator furnishes in discovery are materially different from the growers' copies of the "same" documents.⁶

It is very important to keep all of the envelopes in which the grower's mail from the integrator arrived. Growers should get in the habit of stapling the envelope to each piece

⁵ For example, a person, a car, or a newspaper.

⁶ For example, one grower has a feed ticket that does not indicate any problem with the farm. On the duplicate copy of the ticket with the same serial number, the truck driver indicated that the grower's watering system was broken.

of mail as soon as it is opened. This is important because some legal claims require the grower to prove that certain documents arrived in the mail.⁷

It is also very important to save all *medication labels*, packets, and containers.

All Papers Given to the Integrator

The growers should have saved copies of all papers that they signed and/or gave to the integrator during the course of the relationship, including all correspondence.

Running Record

The growers should have kept a record of each conversation or other interaction that they had with the integrator over the course of the relationship. The best way to do this is for each grower to keep a notebook in which he or she records every significant conversation and event. For each item that is recorded, the grower should indicate:

- *Where* the conversation or event took place;
- *Who* was present;
- The *time* and *date*;
- Exactly *what each person said*; and
- *What documents or photos correspond* to the recorded event.

Scientific Evidence

It is also very helpful if the growers have had independent laboratories conduct analyses of samples of their feed and/or dead birds.⁸

Very few growers actually have this much documentation. The more they have, the better. Lawyers representing growers who are still raising poultry should instruct their clients to begin a documentation program immediately.

Factor #3—Dramatic Facts

Many growers claim that a never-ending series of subtle, hard-to-prove, unfair practices is ruining their cash flow. For example, a grower may claim that the company is sending him sick chicks, slightly short loads of feed, and medication that is not quite right. The grower will typically find that these practices make his feed-conversion efficiency look bad and increase mortality by several percentage points. Many, many growers claim these problems. This kind of case is very difficult to prove.

In addition to the claims described above, though, some growers will present an additional, dramatic fact. For example, one grower claimed that he was “top” grower for many years but that when he became active in the National Contract Poultry Growers

⁷ For example, Racketeer Influenced and Corrupt Organizations Act (RICO) claims often depend upon establishing mail fraud.

⁸ Depending on a grower's specific contract, there may be legal issues regarding the grower's use of feed or dead birds for laboratory analysis. Lawyers should analyze individual contracts to formulate advice to growers on this topic.

Association (NCPGA), he went to the bottom of the rankings.⁹ Another dramatic fact would be a blatant breach of contract¹⁰ or a pattern in which a certain serious problem occurs on many growers' farms.¹¹ These dramatic facts give the case a big advantage: the dramatic facts themselves are generally easy (or easier) to prove, and they can be used to move the jury into a state of mind that is more receptive to hearing about the other, more subtle unfair practices.

Factor #4—Claims that Provide for Punitive Damages

Poultry cases are expensive to litigate. It is difficult for lawyers to recover their fees and costs with a contingent fee based only on *actual* damages resulting from the loss of one grower's chicken farm.¹² The big damage awards are generally to be found not in actual damages, but in punitive damages.¹³ Therefore, a case that contains a valid basis for punitive damages has a better chance of being affordable for the lawyer.¹⁴

Factor #5 —Applicability to a Class

Class actions are a lot of work for attorneys, but in some cases they have the best chance of success. In the right case, a class action is good for two reasons. First, a class action adjudicates the rights of everyone in the class. A class could include hundreds or even thousands of growers. Second, a winning class action can bring in a much higher damage award than a winning individual case because the total award is all of the

⁹ Retaliation for organizing is prohibited by the Packers and Stockyards Act, 7 U.S.C. § 181, *et seq.* (see *Baldree v. Cargill, Inc.*, 758 F. Supp. 704 (M.D. Fla. 1990), *aff'd without op.*, 925 F.2d 1474 (11th Cir. 1991)) and by the Agricultural Fair Practices Act, 7 U.S.C. §§ 2301-2306.

¹⁰ For example, in one case the contract promised that the grower could retain a square-footage payment arrangement for a certain number of flocks, but the payment arrangement was changed to a feed conversion computation after just one flock. In another case, a grower bought his chicken farm from the integrator, who promised in the contract to bring the buildings and equipment "up to integrator specifications" and failed to do so.

¹¹ For example, a group of six growers with one integrator had their chickens suddenly turn purple and die: it seems clear in this case that the problem was not attributable to any individual grower's management practices. In another case, the company falsified the tare weights as an ongoing practice. See *Braswell* (cited above in footnote 2).

¹² It is especially difficult to prove large, actual damages from the loss of a poultry farm if the grower was *losing* money (or making a negligible amount of money) on the farm.

¹³ See *Braswell* and *Shoemake* (cited in footnote 2 above).

¹⁴ In many states, punitive damages may be sought for claims such as fraud, gross negligence, and willful and wanton negligence. Also, the federal Racketeer Influenced and Corrupt Organizations Act (RICO) statute, 18 U.S.C. § 1964, gives a basis for treble damages. The Packers and Stockyards Act provides only for actual damages. 7 U.S.C. § 209.

individual growers' awards combined. That means that the lawyer's contingent fee is larger, which allows the lawyer to spend a great deal more money on developing the evidence, analysis, and experts for the case.¹⁵

Conclusion

Growers' recent and continued victories should make more lawyers want to take on growers' cases and will persuade integrators to treat growers more fairly. In the meantime, lawyers are finding that they must conduct a kind of "triage"¹⁶ analysis to determine which, if any, growers' cases they can afford to take on. The factors described above are intended to serve as a starting point for lawyers who are new to this field and facing these difficult choices.

¹⁵ For example, the growers' lawyer in the *Braswell* case spent approximately \$231,800 in out-of-pocket expenses and spent over 4000 hours of time.

¹⁶ An example of triage would be a situation in which you have a lifeboat that holds only 10 people but 1000 need to get on. How do you decide who gets on?