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**The Southern Pulpcutter and the “Short  
Stick”: The Mississippi Uniform Pulpwood  
Scaling and Practices Act**

by

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# The Southern Pulpcutter and the "Short Stick": The Mississippi Uniform Pulpwood Scaling and Practices Act

Christopher R. Kelley\*

## I. INTRODUCTION

Pulpcutters are the farm laborers of the paper industry. They are as "important to the paper industry as farmers are to the production of food."<sup>1</sup> In the South, there are over one hundred thousand pulpcutters. Yet, despite their importance and their numbers, the pulpcutters' welfare and unique legal problems have generally been ignored.

The law affords the pulpcutter few of the protections accorded to other agricultural workers and industrial laborers. In this regard, the law only mirrors society's lack of concern for the pulpcutter's plight. Living and working in relative isolation from each other along the backroads of the South, pulpcutters are "invisible workers" going "unseen, unheard . . . in the poorest counties of America."<sup>2</sup> Their work is one of the "dirtiest, most dangerous and poorest paying of occupations."<sup>3</sup> All told, pulpcutters are at "the bottom of the barrel when you are talking about agriculture in the South."<sup>4</sup>

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1. Cromwell and Israel, *1980s Sharecropping*, X SOUTHERN EXPOSURE 58 (1982) [hereinafter cited as *1980s Sharecropping*].

2. Greenhaw, *Backwoods*, SOUTHERN CHANGES, Feb.-March, 1981, at 15-16, quoting from an interview with Jim Drake, coordinator in Mississippi of the Southern Woodcutters Assistance Project. Greenhaw published a three-part series on the southern woodcutter in SOUTHERN CHANGES. The first part, entitled *Echoes of Change in the South's Backwoods—Woodcutters Organize* appeared at page 16 in the December, 1980, issue. References to that article will be to *Echoes of Change*. The second part was entitled *Backwoods* and will be referred to accordingly. The third part, entitled *The Fight to Survive in the South's Backwoods*, appeared in the July, 1981, issue at page 11, [hereinafter cited as *Fight to Survive*].

3. Israel and Williams, *Ending the Short Stick in Mississippi's Woods*, SOUTHERN CHANGES, June-July, 1982, at 16 [hereinafter cited as *Ending the Short Stick*].

4. *Backwoods*, *supra* note 2, at 15, quoting from an interview with Dr. Herman Aiken, professor of forestry at Auburn University, Auburn, Alabama.

Figuratively, the pulpcutter has traditionally received the "short end of the stick." Literally, the "short stick" bears some of the blame.

The "short stick" is the colloquial designation for an incorrectly measured load of wood. The designation is derived from the traditional use of a ten foot rod, or "stick," to measure the volume of stacked pulpwood. Because pulpcutters are paid a piece rate for each cord of wood they cut and deliver, being "short stuck" results in the pulpcutter being underpaid. "Short sticking" is neither an infrequent nor trivial occurrence. It has been estimated that an average pulpcutter in Mississippi loses about fifteen hundred dollars a year as a result of short sticking.<sup>5</sup> For most pulpcutters in Mississippi, that amount is nearly one-quarter of their annual earnings.

In March, 1982, the Mississippi legislature enacted the Mississippi Uniform Pulpwood Scaling and Practices Act.<sup>6</sup> The act is the only comprehensive pulpwood scaling legislation in the South. It was enacted only after three years of lobbying by the United Woodcutters Association, an association of Mississippi pulpcutters. The primary evil the act seeks to remedy is the short stick.

This article will examine the Mississippi Uniform Pulpwood Scaling and Practices Act and other pulpwood scaling laws in the South. Although little noticed<sup>7</sup> by persons other than pulpcutters and those concerned with their plight, the Mississippi legislation may be one of the most significant pieces of agricultural labor law legislation recently enacted in the South. The act's significance is threefold. First, it is the only comprehensive regulatory legislation exclusively addressing the needs of southern pulpcutters.<sup>8</sup> In the context

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5. *Ending the Short Stick*, *supra* note 3, at 17.

6. MISS. CODE ANN. §§ 75-79-1 to 33 (Supp. 1983). The statute is set forth in its entirety in Appendix A, *infra*.

7. The author has been able to locate only one article addressing the act's passage in a regionally or nationally circulated publication. That article was co-authored by an organizer for the United Woodcutter's Association. *Ending the Short Stick*, *supra* note 3.

8. Pulpcutters are generally considered independent contractors in relation to those for whom they cut and deliver wood. Accordingly, they lack the basic protec-

of the pulpcutter's economic, political, and social status, this aspect of the act's significance cannot be underestimated.

Second, the act is significant not only because of its purpose, but also because of the relative comprehensiveness and breadth of its provisions designed to effect that purpose. As will be noted by a review of Mississippi's pulpwood scaling law prior to the 1982 legislation and the current scaling laws in the states of Arkansas, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Tennessee, the Mississippi legislation offers a model for other states recognizing the need to enact comprehensive pulpwood scaling laws.

Finally, but not least, the Mississippi legislation is significant because the impetus for its enactment came from organized pulpcutters. Although the act ultimately garnered the support of the Mississippi Farm Bureau, the lobbying force behind the act was the United Woodcutters Association, an association of pulpcutters with members in forty-two counties in Mississippi.<sup>9</sup> Pulpcutters have historically been unorganized although, periodically, localized organizing or other collective activity has been successful. The three-year effort by the United Woodcutters Association to obtain passage of their proposal underscores the act's significance and the overdue promise for relief it offers to the pulpcutters in that state.

## II. BACKGROUND

### A. The Southern Pulpwood Industry

Pulpwood is round wood, cut in lengths, and used as a source of fiber in the manufacture of paper and paper products. In the South, pulpwood is traditionally "bucked" or cut in lengths of seventy-two inches. Once harvested, it is

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tions of workers' compensation, disability insurance, unemployment insurance, etc. To the extent that an individual pulpcutter may be covered by such remedial legislation, the legislation invariably was not enacted to address the specific needs of pulpcutters. Even statutes which have specific provisions applicable to pulpwood logging, such as the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1982), were not enacted solely to benefit pulpcutters.

9. *Ending the Short Stick*, *supra* note 3, at 17.

sold by the cord, a volume measurement consisting of 128 cubic feet of stacked roundwood.<sup>10</sup>

In 1981, the South produced 54.3 million cords of pulpwood.<sup>11</sup> That amount represents nearly two thirds of all pulpwood consumed in the United States that year.<sup>12</sup> Southern pulpwood was processed by 114 paper mills in the South and by nine mills outside of the South.<sup>13</sup>

Because of pulpwood production, the South is rapidly becoming the "woodbasket of the nation."<sup>14</sup> Most pulpwood is obtained from softwoods such as pine, sweetgum, sycamore, and other fast-growing species.<sup>15</sup> Extending from eastern Texas to Virginia, there are over sixty million acres of softwood forests in the South. Investments in timberland in the South are increasing, a trend reflected in the decision of one major timber company to move its corporate headquarters from Oregon to Georgia. At present, the South supplies nearly half of the country's softwood timber, and that percentage is expected to increase.<sup>16</sup>

In all of the southern states, timber is one of the most important agricultural products. In North Carolina, the value of timber production is second only to tobacco.<sup>17</sup> In Mississippi, timber is the state's leading crop.<sup>18</sup> Equally as important, the South's pulpwood industry provides employment for approximately 1.3 million workers.<sup>19</sup> In Missis-

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10. J. PEARCE & G. STENZEL, *LOGGING AND PULPWOOD PRODUCTION* 346 (1972) [hereinafter cited as PEARCE & STENZEL].

11. Hutchins, *Southern Pulpwood Production 1981*, USDA, SOUTHERN FOREST EXPERIMENT STATION, RESOURCE BULL. SE66, 1 (1982) [hereinafter cited as Hutchins].

12. USDA, *AGRICULTURAL STATISTICS* 503 (1983).

13. Hutchins, *supra* note 11, at 1.

14. Hatley, *Forestry and Equity*, SOUTHERN CHANGES, July-Aug., 1983, at 19-20 [hereinafter cited as *Forestry and Equity*].

15. In 1981, softwood accounted for about fifty percent of southern pulpwood production, hardwood accounted for eighteen percent, and mill byproduct thirty-two percent. Hutchins, *supra* note 11, at 1. However, more typically and on a nationwide basis, nearly seventy-five percent of pulpwood is derived from softwoods. PEARCE & STENZEL, *supra* note 10, at 348.

16. *Forestry and Equity*, *supra* note 14, at 19-20.

17. *Id.* at 19.

18. *Ending the Short Stick*, *supra* note 3, at 16.

19. *Forestry and Equity*, *supra* note 14, at 18.

issippi, it is estimated that approximately fifty-eight thousand persons are employed in the manufacture and sale of forest products. Of that number, approximately ten thousand workers are pulpcutters.<sup>20</sup>

### B. Pulpcutters

Pulpcutters cut and haul pulpwood to the paper mills and woodyards. Pulpcutters are distinguishable from loggers by the end product of the timber they cut and the way they haul it to the mill. Loggers, whose work is generally more profitable, fell timber destined to become lumber. The logs they haul are long and are stacked lengthwise on their trucks. A pulpcutter's load of short logs is stacked across the width of the truck.<sup>21</sup>

Accurate figures on the number of pulpcutters in the South are difficult to obtain. An organizer for the United Woodcutters Association estimates that there are about ten thousand pulpcutters in Mississippi.<sup>22</sup> Based on the number of vehicles registered as pulpwood trucks and on the assumption that each truck requires a crew of three persons, an estimated 150,000 families are dependent on pulpwood for their livelihood in the region consisting of Mississippi, Alabama, Louisiana, Georgia, Texas, Arkansas, and Florida.<sup>23</sup>

Although the expanding demand for the South's pulpwood has been profitable for the large timber companies, it has not been so for the pulpcutter. Indeed, it has been suggested that the low wages and labor costs in the South have been major factors influencing the decisions of some of the large timber companies to relocate or expand their facilities in that region.<sup>24</sup>

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20. Mississippi's paper industry employs approximately 7,000 persons; 18,000 are employed in the manufacture of furniture, and the lumber and wood products industry employs approximately 23,000 persons. *1980s Sharecropping*, *supra* note 1, at 60.

21. *Ending the Short Stick*, *supra* note 3, at 16.

22. *1980s Sharecropping*, *supra* note 1, at 60; *Ending the Short Stick*, *supra* note 3, at 16.

23. *Backwoods*, *supra* note 2, at 15-16.

24. See generally H. NORTHRUP, *THE NEGRO IN THE PAPER INDUSTRY* 24 (1969). The availability of privately owned timberland for acquisition is also an at-

For a variety of reasons, pulpcutters generally have been considered to be the most economically disadvantaged of southern agricultural workers.<sup>25</sup> The economic system under which southern pulpcutters work is similar to sharecropping. However, unlike sharecropping, very little has been written about the pulpcutters' economic plight.

In 1973, a pulpcutters organization and one of its locals picketed paper mills owned by the International Paper Company in Mobile, Alabama, and Moss Point, Mississippi. In addition, a mill in Mobile owned by the Scott Paper Company was picketed. Both companies sought to enjoin the picketing in the United States District Court for the Southern District of Alabama. The court's opinion in *Scott Paper Co. v. Gulf Coast Pulpwood Ass'n*,<sup>26</sup> contains an extensive discussion of the economic system under which the pulpcutters represented by the defendant association worked. Their situation is typical of the circumstances experienced by pulpcutters throughout the South. Further insight into the economic conditions of pulpcutters can be gained by reference to workers' compensation cases describing pulpcutters' working conditions, of which *Battles v. Thomas R. Foster Pulpwood Co.*,<sup>27</sup> and *Brown v. L.A. Penn & Son*<sup>28</sup> are representative. The discussion which follows is primarily drawn from those cases and is essentially a composite of the working conditions and economic system experienced by the pulpcutters in each case.

### C. Paper Mills and Wood Dealers

Most southern paper mills operate twenty-four hours a day, seven days a week. Pulpwood is constantly delivered to the mills, usually from the woodyards of dealers who ac-

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tractive feature of the South for paper companies. The demand by paper companies and investors for forest land is becoming a significant factor in the continuing saga of the loss of black-owned land in the South. *Forestry and Equity*, *supra* note 14, at 20.

25. *Backwoods*, *supra* note 2, at 15.

26. 85 L.R.R.M. (BNA) 2978 (S.D. Ala. 1973), *aff'd*, 491 F.2d 119 (5th Cir. 1974).

27. 444 So. 2d 876 (Ala. Civ. App. 1984).

28. 227 So. 2d 470 (Miss. 1969).

quire the wood from pulpcutters.<sup>29</sup> Paper companies do not buy pulpwood from pulpcutters or have any direct relationship with them. Instead, the paper companies procure their pulpwood through individuals commonly known as dealers.<sup>30</sup>

Dealers usually deal with one paper company at a time for the sale of pulpwood. However, the relationship between the paper company and the dealer is not that of employer-employee. Rather, the dealer simply agrees to furnish the paper company with a specified number of cords of pulpwood for an agreed upon price and is paid on a per-cord basis, usually monthly or more frequently.<sup>31</sup>

The dealer is essentially a middleman between the paper company and the pulpcutter. It is generally assumed that the dealer's role is one deliberately fostered by the paper companies to avoid the assumption of responsibility for the payment of employee benefits and the provision of employee protections to pulpcutters. In turn, for the same reasons, dealers generally desire to avoid creating an employer-employee relationship with the pulpcutters with whom they contract. To maintain the buffer from liability afforded by the dealer, many of the woodyards operated by dealers are capitalized by a paper company. The dealer then enters into a long-term, first-refusal contract with the paper company.<sup>32</sup>

Dealers obtain pulpwood in a variety of ways. Dealers may purchase pulpwood from other dealers under written bulk sales contracts.<sup>33</sup> More commonly, dealers obtain stumpage rights from private landowners or act as intermediaries or labor contractors in arranging for pulpcutters to cut on paper company land.<sup>34</sup> Finally, dealers acquire wood from pulpcutters who have purchased stumpage rights or arranged for their own tracts of forest to be

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29. *Scott Paper Co.*, 85 L.R.R.M. (BNA) at 2980.

30. *Id.*

31. *Id.* In the *Battles* case, the defendant-dealer only purchased from pulpcutters wood which conformed to the specifications of its buyers, Georgia Pacific and Kimberly-Clark. *Battles*, 444 So. 2d at 877.

32. *1980 Sharecropping*, *supra* note 1, at 59.

33. *Brown*, 227 So. 2d at 471.

34. *Id.* *Scott Paper Co.*, 85 L.R.R.M. (BNA) at 2983.

cut.<sup>35</sup> Very few individuals are in this latter category of pulpcutters.<sup>36</sup>

After having acquired stumpage rights from private landowners or having made arrangements with a paper company for stumpage to be cut on company land, the dealer arranges with one or more pulpcutters to cut the wood and haul it to either the dealer's facility or the company's mill or woodyard. As with most paper companies, the paper companies in *Scott Paper Co.* would not purchase pulpwood from pulpcutters. Before accepting a load, the companies required the pulpcutter to obtain a dealer card indicating the identity of the dealer and the week for which the card was valid. A pulpcutter trying to sell wood directly to a company would be turned away.<sup>37</sup>

#### D. The Pulpcutters and the Dealers

The disparity in economic status and power between the typical pulpcutter and the typical dealer is profound. In many respects, the relationship between the dealer and the pulpcutter represents the transition of sharecropping from the South's fields to its forests.<sup>38</sup>

The economic and political inequality between the dealer and the pulpcutter extends to and affects all aspects of their relationship. With respect to business acumen, the court in *Scott Paper Co.* found that the pulpcutters represented by the Gulf Coast Pulpwood Association generally had less than a high school education and that some were barely literate.<sup>39</sup> In *Brown*, the pulpcutter was illiterate.<sup>40</sup> Dealers, on the other hand, are "knowledgeable businessmen" who may deal with up to 100 pulpcutters.<sup>41</sup> In *Brown*, the dealer was a partnership engaged in farming and sawmilling as well as in pulpwood. In addition, the partner-

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35. *Brown*, 227 So. 2d at 471.

36. *Scott Paper Co.*, 85 L.R.R.M. (BNA) at 2983.

37. *Id.*

38. *1980s Sharecropping*, *supra* note 1, at 58.

39. *Scott Paper Co.*, 85 L.R.R.M. (BNA) at 2981.

40. *Brown*, 227 So. 2d at 471.

41. *Scott Paper Co.*, 85 L.R.R.M. (BNA) at 2982.

ship operated a store and a service station.<sup>42</sup>

Because of fluctuations in the demand for and availability of pulpwood, bad weather, and other factors, pulpcutters generally work no more than forty weeks a year. In *Scott Paper Co.*, decided in 1973, the court found that the pulpcutters' take-home pay ranged from less than \$90.00 per week to \$125.00 per week although, occasionally, under "optimum conditions of production," an exceptional pulp cutter could realize \$150.00 in a week.<sup>43</sup> A 1982 estimate places the average Mississippi pulp cutter's wages at about six to seven thousand dollars a year.<sup>44</sup>

Because of the limited financial resources of pulpcutters, most become dependent on a dealer for loans and advances for operating expenses such as gasoline, tires, parts, and the repair and maintenance of equipment. In addition, dealers frequently co-sign notes for the pulp cutter's larger purchases such as trucks and logging equipment.<sup>45</sup> The circumstances in *Brown* are typical:

Fifteen to twenty haulers cut and hauled wood for Penn's [the dealer's] account. Penn paid for some small repairs to his haulers' trucks, and when parts were needed, Penn bought them at a discount from a dealer and sold them to his workers with a limited markup of ten percent, allowing them to benefit from the discount. Penn would occasionally arrange financing and guarantee payments for major repairs, and sometimes the bills were sent directly to Penn. Brown and other haulers purchased some of their power saws from Penn, and had use of its repair shop. Penn also operated a grocery store used by the haulers and others and deducted the amount of their purchases from their weekly pay for hauling. Brown, at various times, would buy gasoline, groceries, clothing, and other items from Penn; and on one occasion he purchased a power saw. Brown also had minor repairs made on his truck at Penn's repair shop. When major repairs were needed, Brown would take it to a

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42. *Brown*, 227 So. 2d at 471.

43. *Scott Paper Co.*, 85 L.R.R.M. (BNA) at 2982.

44. *Ending the Short Stick*, *supra* note 3, at 17.

45. *Scott Paper Co.*, 85 L.R.R.M. (BNA) at 2982.

Chevrolet dealership in Canton, which would bill him for the work; and Brown would make payments through Penn's office.<sup>46</sup>

The dealer deducts a portion of the amount owed by a pulpcutter out of each payment for wood. The usual result is that the pulpcutter never gets out of debt to the dealer.<sup>47</sup> As the court concluded in *Scott Paper Co.*, in this way, "the dealer exercises virtually total economic control over the producers."<sup>48</sup>

As a consequence of the economic dominion which the dealer usually has over a pulpcutter, many pulpcutters are unable to move from one dealer to another or to work for several dealers at one time. Dealers who have leased equipment to pulpcutters or have loaned them money for equipment purchases are often in a position to threaten repossession if a pulpcutter takes any action which displeases the dealer.<sup>49</sup>

The disparity in financial circumstances between the dealer and the pulpcutter extends to their working relationship as well. There is no real bargaining between the two for the pulpcutter's services. As to the availability and nature of the work, the dealer designates the tract to be cut and the pulpcutter has only the option to do the work or not to do it. To compound the disparity, even if the pulpcutter performs the work, the dealer reserves the right to decline to accept the wood. Pulpwood may be rejected if it is hollow, the wrong dimension, beetle-damaged, or the wrong species.<sup>50</sup> Of course, if it is rejected, the pulpcutter does not get paid.

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46. *Brown*, 227 So. 2d at 471.

47. *Ending the Short Stick*, *supra* note 3, at 17; *see also Brown*, 227 So. 2d at 473; *Scott Paper Co.*, 85 L.R.R.M. (BNA) at 2986; *Echoes of Change*, *supra* note 2, at 17. One pulpcutter's experiences suggest that high interest rates contribute to the prolonged indebtedness:

I borrowed \$1,400 about four years ago to replace the engine in my truck, fix my pickup and buy a new chainsaw. He's been taking five to ten dollars out of every load I haul. About a year ago I asked him how much I still owed.

After he checked his books he told me—\$1,400.

1980s *Sharecropping*, *supra* note 1, at 58.

48. *Scott Paper Co.*, 85 L.R.R.M. (BNA) at 2986.

49. *Id.* at 2983.

50. *Id.*

Before examining the method of payment for pulpcutters, it should be noted that most pulpcutters are considered to be independent contractors.<sup>51</sup> As a consequence, most pulpcutters are ineligible for unemployment compensation, workers' compensation, and other employer-employee based benefits.

Although most pulpcutters are not employees of a dealer or a paper company, many pulpcutters are employers of one to three other pulpcutters who work with them. Therefore, when a pulpcutter is paid, he not only must pay his operating expenses, installments on vehicle and equipment purchases, liability insurance, severance taxes, social security, and his debt to the dealer, but workers' compensation insurance premiums as well.<sup>52</sup>

#### E. The Short Stick

Pulpcutters are paid a piece rate for each cord of wood they sell.<sup>53</sup> A cord is 128 cubic feet of stacked roundwood, a measurement having its origin in the custom of stacking four-foot lengths of fuel wood in ricks four feet high and eight feet long. Although the actual cubic content of solid wood in a stack will vary in accordance with the diameter, straightness, smoothness, and bark thickness of the logs, the number of cords in any stack of wood is determined by measuring the length of the stack, its width, and its average height. The three dimensions of the stack expressed in feet are multiplied, and the product is then divided by 128 to determine the number of cords.<sup>54</sup>

After a pulpcutter fells a sufficient number of trees, the trees are limbed, cut in seventy-two inch lengths, and stacked on the pulpcutter's truck. The pulpcutter then transports the wood to his dealer, a company mill, or a woodyard. There, the load of wood is measured in one of two ways, by "stick scaling" or by weight.

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51. E.g., *Dennis v. Huff*, 406 So. 2d 412 (Ala. Civ. App. 1981); *Boyd v. Crosby Lumber & Mfg. Co.*, 166 So. 2d 106 (Miss. 1964).

52. *Scott Paper Co.*, 85 L.R.R.M. (BNA) at 2984.

53. *Ending the Short Stick*, *supra* note 3, at 16.

54. PEARCE & STENZEL, *supra* note 10, at 347.

Stick scaling is accomplished by using a ten-foot measuring rod with divisions of one-tenth of a foot. It is invariably done before the wood is unloaded from the pulpcutter's truck. Normally, the pulpcutter holds the measuring stick against the stack of wood on his truck while the dealer or yardman stands back and reads the scale off the top of the stick. Because the wood is usually measured from the bottom to the top, the pulpcutter is unable to see the scale, and he often is not even told the measurement until the truck is unloaded. By that time, any objection to the measurement would be futile.<sup>55</sup>

At some woodyards, measuring is more informal. As the son of one pulpcutter remembers his father's experiences,

I remember Daddy getting *short sticked* from the yard down in Florida. It was a bad time. A *short stick* is a bad count on your cord. A cord of wood is supposed to be 128 cubic feet. That's the measure. But one yard Daddy worked out of down there had him pile his wood in an old pig pen. They said that when the wood came up to the top of the fence, that was a cord. If it had had a true measure, it would have actually been about one and a half cords. In another place, over in Georgia, the yard manager walked out to the truck, looked it over, then wrote in his book. He said he judged cords with his naked eye. Daddy would then haul his wood into the yard, dump it into a pile that had already been unloaded by other trucks, waiting there for the railroad cars to come and get it and take it to various paper mills, and Daddy wouldn't know what the man determined until he pulled up in his empty truck and walked into the office for his slip. If the manager liked you, you got a good count. If he didn't, you got *short sticked*.<sup>56</sup>

As noted in the son's recollections, pulpwood measuring is subject to abuse. In the trade, an incorrect measurement is known as the short stick. Because pulpcutters are paid a piece rate for each cord of wood they sell, getting a short stick results in the pulpcutter being underpaid.

Although a certain amount of short sticking may be the

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55. *Ending the Short Stick*, *supra* note 3, at 17.

56. *Echoes of Change*, *supra* note 2, at 18.

consequence of the inherent difficulty in measuring such a nonuniform commodity as a load of pulpwood, dealers are also subject to economic pressures which make short sticking attractive. For example, when a paper company which a dealer is supplying reduces the prices it will pay for pulpwood, the dealer has the choice of bearing the loss himself, reducing the price he pays for the wood, or short sticking.<sup>57</sup> Assuming the dealer will find the first alternative unacceptable, short sticking may be the more attractive of the latter two alternatives because it offers greater financial gain for the dealer.

To the pulpcutter, the financial consequences of short sticking are serious. Estimates of the annual losses to individual pulpcutters range from one thousand to five thousand dollars<sup>58</sup> with about fifteen hundred dollars being average.<sup>59</sup> When one considers that a pulpcutter may realize only twenty dollars per cord for a correctly measured load,<sup>60</sup> the amount of the estimated annual losses underscores the frequency and significance of short sticking. As noted previously, the estimated average annual loss to short sticking is equivalent to nearly one-quarter of the annual earnings of most pulpcutters in Mississippi.

When pulpwood is weighed, as was the practice of the mills in *Scott Paper Co.*, the loaded truck is driven on to a platform scale. Because the scale's dial is in the scale house, the pulpcutter cannot see it unless he leaves his truck and enters the scale house. Usually, the pulpcutter remains in his truck and is given an automatically stamped weight receipt. After the wood is unloaded, the truck is weighed again empty, and another automatically stamped weight re-

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57. *1980s Sharecropping*, *supra* note 1, at 59.

58. *Id.* at 62.

59. *Ending the Short Stick*, *supra* note 3, at 17.

60. *Green v. Farmers Ins. Co.*, 412 So. 2d 1136, 1137 (La. Ct. App. 1982). In hearings before the Mississippi House of Representatives Committee on Agriculture in January, 1983, pulpcutters testified that their earnings, after deducting costs, for five cords of pulpwood averaged from \$85.00 to \$90.00. *Pulpwood: Hearings on H.B. 363 Before the Comm. on Agriculture of the House*, 1983 Sess. (unpublished report available from the House Committee on Agriculture) [hereinafter cited as *Pulpwood Hearings*].

cept is given to the pulpcutter.<sup>61</sup> Because a cord is a volume measurement, the weight of the load is expressed in cords by applying conversion factors based on the average weight for each species of wood.<sup>62</sup>

Weighing pulpwood is faster than the alternative of stick scaling. Weighing takes approximately one minute while stick scaling takes ten. However, stick scaling requires less of a capital investment for the dealer or company and may be more accurate.<sup>63</sup>

Although pulpwood has traditionally been stick scaled and stick scaling remains the predominant method of measurement among dealers, the trend is toward measuring by weight, a transition that is virtually complete among the paper companies.<sup>64</sup> This trend is paced primarily by the dealers' ability to afford the cost of platform scales, and the size of that investment is likely to prevent industry-wide measurement by weight for many years. Nevertheless, an emerging issue for pulpcutters in Mississippi is the economic consequences of selling pulpwood by weight rather than by volume. Pulpwood varies in weight depending on the extent to which it has been damaged by insects and the degree to which it has dried between the time of cutting and the time of sale. Beetle-damaged or dried wood, often referred to as "light" wood, has the same volume as freshly-cut, undamaged "heavy" wood when measured by stick scaling. The same price is often paid for stick-scaled light wood as is paid

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61. *Scott Paper Co.*, 85 L.R.R.M. (BNA) at 2983-84; see also PEARCE & STENZEL, *supra* note 10, at 347.

62. *Id.* In 1983, the Mississippi Legislature enacted a statutory formula for converting pulpwood from weight to volume or from volume to weight. MISS. CODE ANN. § 75-27-39 (1983). The conversion factors were based on data obtained by the Mississippi Department of Agriculture and Commerce from the scaling of 706 loads of woods at random locations in Mississippi during November and December, 1983. Expressed in terms of pounds per cord, the conversion factors are as follows: pine—5200 pounds; soft-hard—5400 pounds; mixed hardwood—5600 pounds; and hardwood—5800 pounds. See *Pulpwood Hearings*, *supra* note 60.

63. In *Scott Paper Co.*, one expert testified that stick scaling had a margin of error of one-half of one percent while weight measurement had a margin of error of five percent. However, another expert testified that weight measurement was more accurate. *Scott Paper Co.*, 85 L.R.R.M. (BNA) at 2984.

64. For example, Weyerhaeuser Company, a major wood products corporation, buys wood exclusively by weight. *Pulpwood Hearings*, *supra* note 60.

for similarly scaled heavy wood although some buyers, most notably the paper companies, make price adjustments to reflect the lesser yield of light wood. However, when wood is sold by weight, the presence of light wood results in a smaller return to the pulpcutter because the pulpcutter's costs are roughly equal regardless of the weight of the wood. For that reason, pulpcutters generally favor stick scaling despite its amenability to abuse.<sup>65</sup> Irrespective of trends and preferences, stick scaling currently remains at the heart of the pulpcutter's livelihood.

#### F. The Campaign to End the Short Stick

The Mississippi Uniform Pulpwood Scaling and Practices Act was the culmination of a three-year organizing and lobbying effort by the United Woodcutters Association. An appreciation and understanding of the significance of that effort can only be gained by a brief review of the history of collective activity by pulpcutters and woodworkers in the South.

Historically, pulpcutters and woodworkers have been unorganized, although, periodically, efforts at unionization or other collective activity have occurred. In the early 1900's, woodworkers were usually employees of a timber company rather than independent operators. From 1911 through 1913, during the "lumber wars" in western Louisiana and eastern Texas, the biracial Brotherhood of Timber Workers organized and, in 1912, affiliated with the Industrial Workers of the World.<sup>66</sup> Since the 1890's, the southern forests had been opened to timber interests as a result of the Homestead Act.<sup>67</sup> Thousands of poor whites and blacks migrated from hill country farms and Delta plantations to take advantage of the higher wages offered by the timber companies. However, although the typical wage of \$1.50 per eleven-hour day was higher than in other available occupa-

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65. *Id.*

66. Green, *The Brotherhood*, IV SOUTHERN EXPOSURE 21 (1976) [hereinafter cited as *The Brotherhood*].

67. Ch. 561, 26 Stat. 1097 (1891) (codified as amended at 43 U.S.C. 161-203 (1982)).

tions, the workers found that they would receive their pay irregularly or in the form of script, which could only be negotiated at company stores.<sup>68</sup>

In 1907, when the timber companies cut wages by twenty percent and extended the working day, the workers took their first collective action, a walk-out that idled hundreds of mills. That strike, though short-lived because the operators responded with promises of higher wages, led to the formation of the Brotherhood of Timber Workers and its operators' counterpart, the Southern Lumber Operator's Association.<sup>69</sup> The subsequent relationship between the two organizations was bitter and violent as the operators' association immediately began lockouts and other anti-union activities.<sup>70</sup>

In July, 1912, in Bon Ami, Louisiana, the hostility between the two groups turned violent when an exchange of gunfire between company guards and assembled workers resulted in the death of four men and the wounding of forty others. The violence did nothing to reduce the intransigence of the operators who continued their lockouts and anti-union efforts. By 1913, after organizing "law and order leagues" in the middle-class community, the primary function of which was to reinforce the operator's efforts to divide the workers along racial lines, the operators were able to isolate most of the workers' leaders and destroy the union.<sup>71</sup>

Subsequent to the demise of the Brotherhood of Timber Workers, pulpcutters generally remained unorganized until the late 1960's. Modern-day pulpcutters are difficult workers to organize because they are no longer employees of large timber companies and, as independent contractors, are relatively isolated from one another. Moreover, their fear of dealer retaliation arising from the dealers' economic dominion over them is a substantial impediment to collective activity.

Despite the organizational obstacles, collective activity

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68. *The Brotherhood*, *supra* note 64, at 22.

69. *Id.* at 23-24.

70. *Id.* at 24.

71. *Id.* at 27-29.

by pulpcutters experienced a rebirth in the late 1960's with the formation of the Gulf Coast Pulpwood Association in Mississippi. By 1973, the Gulf Coast Pulpwood Association had organized nearly three thousand pulpcutters in southwest Alabama, southern Mississippi, and northwest Florida.<sup>72</sup>

In 1979, another pulpcutter's organization, the United Woodcutters Association, was organized in Mississippi with the assistance of the Southern Woodcutters Assistance Project, an ecumenical project sponsored by the United Church of Christ and several other Protestant groups and Catholic orders.<sup>73</sup> Initially drawing its membership from north of Jackson to avoid jurisdictional disputes with the Gulf Coast Pulpwood Association, the United Woodcutters Association had members in forty-two counties in Mississippi by 1983.<sup>74</sup>

In August, 1980, the United Woodcutters Association held a convention in Forest, Mississippi, and formulated a proposal for a "Fair Pulpwood Scaling Practices Board." The proposed Board was to be given the authority to license wood dealers. Licenses would be subject to revocation for abusive practices such as short sticking. Through the Board, the United Woodcutters Association contemplated that the disparity in bargaining power between the pulpcutter and the dealer would be reduced.<sup>75</sup>

Subsequently, in the fall of 1980, the United Woodcutters Association held meetings in various communities in Mississippi in an effort to gather support and to inform state legislators of its desire for remedial legislation. Although a relatively traditional approach for garnering support for legislation, the community meetings were unique for pulpcutters since, for many, it represented their initial participation

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72. *Backwoods*, *supra* note 2, at 16.

73. *Id.* at 16-17.

74. *Echoes of Change*, *supra* note 2, at 17; *Ending the Short Stick*, *supra* note 3, at 17. Among other things, the United Woodcutters Association has formed a purchasing cooperative for logging equipment and parts, a federally chartered credit union, and an information and assistance program to aid pulpcutters with problems in workers' compensation, insurance, and other legal areas. *Echoes of Change*, *supra* note 2, at 17.

75. *Echoes of Change*, *supra* note 2, at 17-18. *See infra* note 77.

in public, collective action on a matter expected to incur the displeasure of dealers and the pulpwood industry. Despite the widespread fear of reprisals, the meetings were generally well attended.<sup>76</sup>

Unsuccessful in obtaining passage of its proposal in the 1981 session of the Mississippi legislature,<sup>77</sup> the Association reintroduced the proposal in the 1982 session. The 1982 lobbying efforts of the United Woodcutters Association were a mixture of the traditional and the nontraditional with the latter characterized by a noon-hour caravan of pulp trucks through downtown Jackson. The pulpcutters also had the organizational support of the interdenominational Mississippi Clergy and Laypeoples Committee for Woodcutter Justice as well as individual statements of support from the presiding officers of the Mississippi Conference of the United Methodist Church, the Jackson Diocese of the Catholic Church, and the Central Mississippi Presbytery of the Presbyterian Church U.S.<sup>78</sup> Significantly, the proposal ultimately gained the support of landowners, particularly small farmers, who realized that they were losing stumpage income because of the short stick.<sup>79</sup> Shortly before its passage in the 1982 session, the proposal was endorsed by the Missis-

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76. *1980s Sharecropping*, *supra* note 3, at 62.

77. *Id.* In the 1981 session, the legislation was proposed in House Bills Nos. 333 and 334, which were textually identical. Both bills died in the House Committee on Agriculture.

House Bills Nos. 333 and 334 differed from the enacted legislation in two significant respects. First, Section 4 of H.B. 333 and 334 would have provided for the creation of a five-member Fair Pulpwood Scaling and Practices Board with its members being appointed by the Governor. Three of the members were to have been chosen from a list of eight names submitted by the United Woodcutters Association. The Board was to have been given the authority to administer the legislation and to promulgate rules and regulations, basically the same authority vested in the Department of Agriculture and Commerce in the enacted legislation.

Second, Section 12 of H.B. 333 and 334 would have given the Board the authority to arbitrate grievances brought by pulpcutters against pulpwood dealers, a provision absent from the enacted legislation. Under the arbitration provision, the Board would have had the authority to require the pulpwood dealer to pay liquidated damages, interest, attorney's fees, and costs if the pulp cutter prevailed. A pulpwood dealer's failure to submit to arbitration would have been grounds for license suspension, cancellation, or revocation.

78. *Id.* at 62-64.

79. Landowners are paid "stumpage" based on the amount of wood harvested.

Mississippi Farm Bureau.<sup>80</sup>

### III. THE MISSISSIPPI UNIFORM PULPWOOD SCALING AND PRACTICES ACT

Before examining the new Mississippi legislation, a review of prior Mississippi law and the current laws regulating pulpwood scaling in the South will serve to provide a point of reference. The laws encompassed by this review will be those of the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee.

#### A. Pulpwood Scaling Laws in the South

None of the southern states, other than Mississippi, have enacted comprehensive pulpwood scaling legislation. Indeed, the only relevant legislation found in most states is a statutory definition of "cord" as a unit of measurement and the provision of penalties for improper measurement.

Virginia's statute is representative in its definition of a cord as "the amount of wood that is contained in a space of 128 cubic feet when the wood is ranked and well stowed."<sup>81</sup> As do other states, Virginia specifically prohibits the sale of

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80. *Ending the Short Stick*, *supra* note 3, at 17.

81. VA. CODE § 3.1-921 (Repl. 1983). *See also*, ARK. STAT. ANN. § 79-124 and 79-203 (Repl. 1981); FLA. STAT. ANN. § 531.27(7) (West 1982); Ga. Code Ann. § 2-14-80.1(a) (1984); TENN. CODE ANN. § 47-26-202(8) (Supp. 1983); TEX. AGRIC. CODE ANN. § 13.026 (Vernon 1982). Alabama, South Carolina, and Louisiana do not have a statutory definition of "cord." Instead, they incorporate and adopt the standard of the National Bureau of Standards. ALA. CODE § 8-16-2 and 3 (1977); LA. REV. STAT. ANN. § 55.4 (West 1952); and S.C. CODE ANN. § 39-9-50 (Law Co-op. 1977).

North Carolina elaborately defines a cord to include, in addition to the standard 128 cubic feet, the provision that the volume is to be construed as containing seventy percent solid wood and thirty percent air, or ninety solid cubic feet of wood. N.C. GEN. STAT. § 81A-9 (Rep. 1981). Interestingly, although not yet in extensive use, an electronic technique for measuring the solid volume of wood exists. Using the technique, a photo of a load of pulpwood is displayed before a black-and-white television camera. On the image transmitted by the camera, the wood appears white and the air spaces between the bolts of wood appear black. A video area evaluator then scans the image focusing on the white areas. As it scans, the evaluator sends radio-frequency pulses to an electronic counter which produces a digital readout in units of volume. The entire process can be completed in less than five seconds with a margin of error of approximately two percent. PEARCE & STENZEL, *supra* note 10, at 347-48.

pulpwood by the cord unless the statutory definition of a cord is satisfied.<sup>82</sup> Violation of that statute is a misdemeanor.<sup>83</sup>

Virginia's statutes, as well as the statutes of North Carolina,<sup>84</sup> Alabama,<sup>85</sup> and Arkansas,<sup>86</sup> also contain a provision which may operate to the detriment of the pulpcutter. Title 3, section 1-967 of the Virginia Code creates a presumption that a measuring device was used by a commercial establishment if that device is on the premises. As noted earlier, some dealers prefer to "eye-ball" a load of wood or to simply use a convenient point of reference rather than measure the wood with a measuring stick. However, if a measuring stick were kept on the dealer's premises, the dealer would enjoy a presumption that the stick had been used to measure the pulpwood. The pulpcutter would carry the burden of proving that it was not used as well as the burden of proving the incorrect measurement.

As is apparent from the Virginia statute and the statutes of the other southern states surveyed in this article, all of which basically parallel the Virginia statute, the only protection afforded to pulpcutters is the mandatory imposition of the cord as the standard of measurement and the general prohibition against false scaling. A few states have ventured further in the scope of their statutory provisions, but the extension of protection has been minimal. For example, South Carolina has enacted weight-to-cord conversion tables and

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82. VA. CODE § 3.1-956 (Repl. 1983). *See also* ALA. CODE § 8-16-13 (1977); ARK. STAT. ANN. § 79-229 (Repl. 1981); FLA. STAT. ANN. § 531.43 (West Supp. 1983); LA. REV. STAT. ANN. § 55.15 (West 1952); N.C. GEN. STAT. § 81A-22 (Repl. 1981); TENN. CODE ANN. 47-26-238(6) (Supp. 1983); and TEXAS AGRIC. CODE ANN. §§ 13.036 and 13.037 (Vernon 1982).

83. VA. CODE § 3.1-965 (Repl. 1983). *See also* GA. CODE ANN. § 2-14-80.1(b) (1984); N.C. GEN. STAT. § 81A-29 (Repl. 1981); S.C. CODE ANN. § 39-9-130(2) (Law Co-op. 1977). In Georgia, failure to pay for pulpwood may constitute a felony. GA. CODE ANN. § 16-9-58 (1984); *see also* ALA. CODE § 8-16-18 (1977); ARK. STAT. ANN. § 79-229 (Repl. 1981); FLA. STAT. ANN. § 531.50 (West Supp. 1983); LA. REV. STAT. ANN. § 55.19 (West 1952); TENN. CODE ANN. § 47-26-238 (Supp. 1983); and TEXAS AGRIC. CODE ANN. § 13.041 (Vernon 1982).

84. N.C. GEN. STAT. § 81A-31 (Repl. 1981).

85. ALA. CODE § 8-16-13 (1977).

86. ARK. STAT. ANN. § 79-231 (Repl. 1981).

has provided criminal penalties for their violation.<sup>87</sup> In 1983, subsequent to the enactment of the Uniform Pulpwood Scaling and Practices Act, Mississippi also enacted weight-to-cord conversion standards.<sup>88</sup>

Unlike South Carolina and Mississippi, Georgia prohibits the use of conversion tables by requiring that sales of pulpwood by weight be priced per 1000-pound unit rather than by the cord.<sup>89</sup> Sales by the cord, however, are permitted, and the statute expressly provides that the use of scales is not required.<sup>90</sup> Violations of the statute are a misdemeanor.<sup>91</sup>

Alabama requires timber dealers to obtain an occupational license.<sup>92</sup> However, that license is essentially a revenue measure as its issuance is conditioned on nothing more than payment of an annual fee.

Although Arkansas' weights and measures provisions are comparable to the other southern states, Arkansas is unique in its provision for double damages and attorney's fees in the event of short sticking. Such awards are authorized either where the erroneous measurement was made by the pulpcutter's employer or by a dealer purchasing pulpwood from an independent pulpcutter. By statute,<sup>93</sup> Arkansas provides that piece-rate wages on a cordage basis must be measured by the statutory cord. If erroneous measurement results in underpayment of piece-rate wages, the employer is liable to the employee for the amount of the unpaid wages plus an equal amount in the form of a penalty.<sup>94</sup> For the pulpcutter who is an independent contractor, Arkansas provides that payment for wood purchased at a price based on volume must be computed on the basis of the statutorily defined cord or the purchaser is liable for the difference between the correct computation and the amount actually paid

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87. S.C. CODE ANN. § 39-9-130 (Law Co-op. 1977).

88. MISS. CODE ANN. § 75-27-39 (Supp. 1983).

89. GA. CODE ANN. § 2-14-80.1 (1982).

90. *Id.*

91. *Id.*

92. ALA. CODE § 40-12-121 (1977).

93. ARK. STAT. ANN. § 54-312 (Repl. 1971).

94. ARK. STAT. ANN. § 54-313 (Repl. 1971).

plus an equal sum as a penalty.<sup>95</sup> In either case, the employer or the purchaser is liable for the prevailing claimant's attorney's fees.<sup>96</sup>

Arkansas' provision for double damages and attorney's fees for a pulpcutter prevailing on a claim of having been short sticked offers more relief than is available in most southern states. However, as will be discussed subsequently with reference to the Mississippi legislation, relegating enforcement of weights and measures standards in pulpwood purchases to private actions presents certain difficulties. Despite the incentives offered by the Arkansas statute, the Mississippi legislation is preferable.

### B. The Mississippi Act

Prior to the adoption of the 1982 legislation, Mississippi law followed a statutory scheme similar to Virginia's and the other southern states surveyed by defining a cord,<sup>97</sup> prohibiting false weighing,<sup>98</sup> and providing for criminal penalties.<sup>99</sup> Although the Mississippi Uniform Pulpwood Scaling and Practices Act did not create the separate Fair Pulpwood Scaling Practices Board envisioned by the United Woodcutters Association, it is, in virtually all other respects, the legislation which the Association desired. Of greater importance, it represents a substantial improvement over previous Mississippi law and the existing statutory schemes in the other southern states.

The stated purpose of the act is "to insure that acceptable standards are applied uniformly in the scaling of pulpwood throughout the State of Mississippi."<sup>100</sup> The regulatory mechanism by which it seeks to accomplish that purpose is licensing.

Under the act, operating licenses are required of "pulpwood receiving facilities," which are defined as a "place of

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95. ARK. STAT. ANN. § 54-315 (Repl. 1971).

96. ARK. STAT. ANN. § 54-316 (Repl. 1971).

97. MISS. CODE ANN. § 75-27-7 (1972).

98. MISS. CODE ANN. § 75-27-59(6) (1972).

99. MISS. CODE ANN. § 75-27-59 (1972).

100. MISS. CODE ANN. § 75-79-3 (Supp. 1983).

business where pulpwood is received from pulpwood cutter-haulers . . . in the regular course of business.”<sup>101</sup> A “facility operator” includes any person who owns, operates, or manages a pulpwood receiving facility but specifically excludes landowners employing hourly workers to harvest wood on their own property.<sup>102</sup> “Pulpwood cutter-haulers” are persons engaged in the business of “severing and carrying pulpwood.”<sup>103</sup>

Responsibility for the implementation and enforcement of the act is delegated to the Commissioner of Agriculture and Commerce.<sup>104</sup> The Commissioner is given four basic responsibilities:

1. To issue, suspend or revoke the licenses of operators of pulpwood receiving facilities;
2. To establish standard procedures and to promulgate regulations for the measurement of pulpwood offered for sale;
3. To conduct periodic inspections of the facilities of licenses; and
4. To receive, investigate and act on complaints alleging violations of the act.<sup>105</sup>

A license is required before any person can engage in the business of operating a pulpwood receiving facility.<sup>106</sup> The cost of a license is modest: \$30.00 annually.<sup>107</sup> Licenses must be renewed at the first of each calendar year.<sup>108</sup> Operating without a license is a criminal offense.<sup>109</sup>

The grounds for denial, suspension, cancellation, or revocation of a license are comprehensive. Specifically, the act provides for denial, revocation, or suspension of a license for any of the following reasons:

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101. MISS. CODE ANN. § 75-79-5(e) (Supp. 1983).

102. MISS. CODE ANN. § 75-79-5(f) (Supp. 1983).

103. MISS. CODE ANN. § 75-79-5(d) (Supp. 1983).

104. MISS. CODE ANN. § 75-79-7 (Supp. 1983).

105. MISS. CODE ANN. § 75-79-7 (Supp. 1983).

106. MISS. CODE ANN. § 75-79-9 (Supp. 1983).

107. MISS. CODE ANN. § 75-79-13 (Supp. 1983).

108. MISS. CODE ANN. § 75-79-15 (Supp. 1983).

109. Although a misdemeanor, the fine for a first violation ranges from not less than \$300.00 to not more than \$1,000.00. The minimum fine for a second offense is \$1,000.00, the maximum is \$5,000.00. MISS. CODE ANN. § 75-79-19 (Supp. 1983).

(a) Any material misstatement in the application for license.

(b) Defrauding any pulpwood cutter-hauler in the measurement of pulpwood to the cutter-hauler's damage.

(c) Failure to maintain accurate weighing and measuring devices used in the measurement of pulpwood.

(d) Requiring a pulpwood cutter-hauler to deliver or transfer any quantity of pulpwood to the facility operator's control as a condition of the purchase or receipt thereof before the facility operator has notified the hauler of the total number of cords or the volume for which payment will be made.

(e) Willful failure to apply standards established by law or by the commissioner in the measurement of pulpwood.

(f) Discriminating against a pulpwood cutter-hauler because the cutter-hauler has filed a complaint, given testimony or otherwise sought relief under this chapter. . . .<sup>110</sup>

In reviewing the foregoing bases for license denial, revocation, or suspension, it should be noted that subsection (a) is limited in its scope by the fact that an applicant for a license need only provide his or her name, the address of the facility for which a license is sought, and the names of the facility's owners. No financial information is required.<sup>111</sup> More significantly, no information is required relating to the volume of business conducted, the measuring devices available and normally used at a facility, or other data describing the nature and extent of the facility's operations. In 1984,

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110. A sixth reason, set forth in subsection (g) and omitted above, is "[w]illful failure to collect the fee as provided in section 75-79-33." The fee imposed by section 75-79-33 is a fee of eight cents per cord of pulpwood measured by volume, not weight, which is to be collected by pulpwood processors and submitted to the state tax commissioner for deposit in the state general fund. The sums collected will be used to fund the initial costs of implementing the act. On July 1, 1985, section 75-79-33 will be automatically repealed and subsequent funding for administration and enforcement of the act will be by appropriation. MISS. CODE ANN. § 75-79-21(1) (Supp. 1983).

111. MISS. CODE ANN. § 75-79-11 (Supp. 1983).

over three hundred licenses were issued,<sup>112</sup> and such information might be useful to the Commission in determining priorities for scheduled and unscheduled inspections. Although granted the authority by the act,<sup>113</sup> the Commissioner has not required by regulation the submission of any information not specified in the act.<sup>114</sup>

Subsection (b), prohibiting the “defrauding” of a pulpwood cutter-hauler, presumably would require proof that the facility operator knew he was defrauding the pulpcutter to establish a violation, a standard usually satisfied by a showing of an intentional act or careless disregard for the statutory requirements.<sup>115</sup> From the pulpcutter’s perspective, the inherent difficulty in proving fraudulent intent limits the protection offered by subsection (b). A preferable alternative or addition would have been the specification that a certain deviation from the standard measurement was presumptively fraudulent. A deviation from the standards imposed under the act is a basis for action against a facility operator under subsection (e), but that provision limits violations to “willful” conduct. Subsection (e), therefore, also would require proof of both knowledge and intent or a degree of indifference so gross as to constitute “willfulness.”<sup>116</sup> Accordingly, under the act’s present standards, it is reasonable to assume that the Commission will not initiate license revocation proceedings against a facility operator unless a

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112. Letter from William P. Eldridge (Director, Weights and Measures Division, Mississippi Department of Agriculture and Commerce) to Christopher R. Kelley (April 13, 1984).

113. MISS. CODE ANN. § 75-79-11 (Supp. 1983).

114. Uniform Pulpwood Scaling and Practices Regulations, Mississippi Department of Agriculture and Commerce (July 1, 1982). The regulations are set forth in their entirety in Appendix B, *infra*.

115. *Commodity Futures Trading Commission v. Savage*, 611 F.2d 270, 283 (9th Cir. 1979) (interpreting section 4(b) of the Commodity Exchange Act, 7 U.S.C. §§ 1-24 (1982), which makes it unlawful to “cheat” or “defraud” in the sale of commodity futures). Common law fraud actions in Mississippi require proof that the speaker knew of the falsity of his statements or was ignorant of their truth and that he intended that the statement should be acted on by the hearer. *Franklin v. Lovitt Equipment Co.*, 420 So. 2d 1370, 1373 (Miss. 1982); *see also Long’s Transfer and Storage v. Busby*, 358 So. 2d 393 (Miss. 1978). Mississippi also recognizes a cause of action for negligent misrepresentation. *First Money, Inc. v. Frisby*, 369 So. 2d 746 (Miss. 1979).

116. *Long’s Transfer and Storage v. Busby*, 358 So. 2d 393, 396 (Miss. 1978).

series of short sticking incidents is alleged. In that case, proof of such a pattern or practice would undoubtedly satisfy the fraudulent intent or willfulness requirements.

Apart from the difficulties of proof in establishing fraud or a willful violation of the standards imposed by the act, an equally substantial enforcement difficulty arises in ascertaining the precise standard to be applied. In the regulations promulgated by the Commissioner under the act, specific permission is granted for "measurement variation . . . based upon scientific statistical data from recognized authorities."<sup>117</sup> That variation is based on the "inherent inexactness of the science of pulpwood measurement."<sup>118</sup> As initially proposed, the regulations provided that a permitted measurement variation of plus or minus four percent could be recognized.<sup>119</sup> That language was deleted, however, in response to objections by both pulpcutters and pulpwood industry representatives.<sup>120</sup> As a consequence, proceedings under subsection (e) will almost invariably necessitate the introduction of expert testimony.

Despite the difficulties of enforcement presented by subsections (b) and (e), it is particularly noteworthy that subsection (f) makes discrimination against a pulpcutter who has filed a complaint, given testimony, or otherwise availed himself of the relief afforded by the act a ground for license denial, revocation, or suspension. Although attempts at enforcement of such provisions also present difficulties of proof, the provisions of subsection (f) may counteract some of the reluctance by pulpcutters to file complaints for fear of economic reprisal. On the other hand, retaliation may take subtle or hard to trace forms, particularly in the more rural areas where a pulpcutter may be dependent for credit, em-

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117. Uniform Pulpwood Scaling and Practices Regulations, Mississippi Department of Agriculture and Commerce § 3 (July 1, 1982).

118. *Id.*

119. *Pulpwood Hearings before the Commissioner of Agriculture and Commerce 4* (May 1982).

120. *Id.* Some of the pulpcutters expressed the opinion that any permitted variation was "legalized cheating" and an industry representative testified that the four percent figure was too low. In measuring a load, a one-tenth inch error in a single measurement could result in a two percent difference in the total.

ployment, and other aspects of his business and everyday affairs on a relatively few individuals who are likely to be sympathetic to the dealer.

In addition to the licensing requirements, the act imposes certain record keeping requirements, including the requirement that facility operators are to give every pulpcutter a delivery ticket stating:

1. The pulpcutter's name;
2. The pulpcutter's social security number and/or employer identification number;
3. The name of the landowner from which the wood was cut; and,
4. The number of cords, or if weighed, the gross weight on the truck or trailer.<sup>121</sup>

The ticket must be prepared before the truck or trailer is unloaded. The operator must retain each ticket for three years.<sup>122</sup>

The Commission may inspect pulpwood receiving facilities, the measuring devices and equipment used at those facilities, and the scales tickets.<sup>123</sup> The Commissioner is also granted the authority to issue subpoenas for the attendance of witnesses and the production of documents.<sup>124</sup> Finally, the Commissioner has the authority to refer the result of any of his investigations to the appropriate district attorney with a recommendation for possible submission to a grand jury or the pursuit of civil relief.<sup>125</sup>

Despite its limitations, the act's regulatory approach gives it a strength and an advantage over Arkansas' statutory provision for double damages and attorney's fees to the prevailing plaintiff in short sticking cases. For example, a pulpcutter who is short stucked on a single load may lose under twenty dollars. Although the cumulative effect of repeated instances of short sticking would be significantly more substantial, the incentive to litigate the underestima-

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121. MISS. CODE ANN. § 75-79-7(b) (Supp. 1983).

122. *Id.*

123. MISS. CODE ANN. § 75-79-27 (Supp. 1983).

124. MISS. CODE ANN. § 75-79-29 (Supp. 1983).

125. MISS. CODE ANN. § 75-79-31 (Supp. 1983).

tion of a single load is not great even when double damages and attorney's fees are recoverable. Consequently, in Arkansas, a pulpcutter is unlikely to pursue the available remedy for a single short sticking. Moreover, having failed to challenge the initial short sticking, it is unlikely that subsequent incidents would be pursued even if, when considered cumulatively, the incidents result in substantial losses and constitute a pattern or practice of short sticking by the dealer because, with each failure to challenge a short sticking, the proof necessary to establish cumulative damages would be lost.

On the other hand, under the Mississippi act and regulations, the incentive to challenge short sticking is substantially greater. As a threshold matter, under the Mississippi act, a pulpcutter does not need to obtain the assistance of an attorney to assert his grievance. Complaints under the act may be made to the Commission either orally or in writing.<sup>126</sup> Accordingly, a pulpcutter can simply telephone the Commission to lodge his complaint. Moreover, although the Commission lacks the authority to formally arbitrate a resolution of the pulpcutter's complaint,<sup>127</sup> the Commission's license revocation authority offers an incentive to the facility operator to cooperate with the Commission and to consider rectifying the grievances of individual pulpcutters.<sup>128</sup> If an individual complaint is serious enough or the investigation of the complaint ultimately reveals a pattern or practice of misconduct by a dealer, the Mississippi act provides the potential for relief beyond that which would be available in

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126. Uniform Pulpwood Scaling and Practices Regulations, Mississippi Department of Agriculture and Commerce § 4 (July 1, 1982).

127. See *supra* note 77. The arbitration provision contained in the bills proposed by the United Woodcutters Association would have vested the proposed Fair Pulpwood Scaling and Practices Board with that authority. The arbitration provision was deleted from the final bill along with the provision creating the Board, the latter deletion being primarily motivated by a desire to avoid proliferation of state boards and the operating costs associated with them. Interview with Jane Jackson, Counsel to the House Committee on Agriculture, in Jackson, Mississippi (Aug. 8, 1984).

128. During the 1982-83 fiscal year, twenty-two complaints were received by the Commission and twenty-two were "resolved." ANNUAL REPORT OF THE STATE DEPARTMENT OF AGRICULTURE AND COMMERCE 44 (1983).

litigation between private parties; that is, the revocation or suspension of the facility operator's license.

The broad investigatory powers granted to the Commissioner in conjunction with his licensing authority affords a mechanism through which abusive practices can be efficiently discovered and remedied. However, because the exercise of that authority by the Commissioner is discretionary, an evaluation of the act's effectiveness may have to wait until the act has been in effect long enough for the Commissioner to demonstrate his willingness to exercise that authority. Similarly, because enforcement of the act also depends, in part, on the willingness of pulpcutters to initiate proceedings under it, it may take some time before the deep-rooted fear of confronting the dealer has been displaced by both a confidence in the act and less financial dependence on the dealer. Finally, because self-compliance is necessarily the underpinning of virtually any regulatory scheme, the actions of Mississippi's pulpwood dealers in response to the act will ultimately determine whether the short stick will cease to be a hallmark of the pulpcutter's lot.

#### IV. CONCLUSION

The Mississippi act has been called the possible "first step on the road out of poverty" for the Mississippi pulpcutter. If that is the case, then it is clear that Mississippi pulpcutters will be alone on that road unless other states follow Mississippi's lead. Nevertheless, if nothing else, the Mississippi act has accorded legislative recognition to the problem of short sticking. Of course, it is intended to do more than that and, if administered properly, may well do so. If pulpcutters are the "invisible workers" of the South, and virtually every aspect of their economic situation suggests that they are, to have given recognition to one of their most significant problems is an accomplishment in itself.

## APPENDIX A

MISSISSIPPI UNIFORM PULPWOOD SCALING  
AND PRACTICES ACT

§ 75-79-1. Short title.

This chapter shall be known and may be cited as the "Mississippi Uniform Pulpwood Scaling and Practices Act."

§ 75-79-3. Purpose.

The purpose of this chapter is to insure that acceptable standards are applied uniformly in the scaling of pulpwood throughout the State of Mississippi.

§ 75-79-5. Definitions.

The following words and phrases, as used in this chapter, shall have the meanings respectively ascribed to them in this section, except where the context or subject matter otherwise requires:

(a) "Person" means any individual, firm, copartnership, association, corporation, receiver, trustee, legal representative, organization or any other group or combination acting as a unit.

(b) "Commissioner" means the Mississippi Commissioner of Agriculture and Commerce.

(c) "Pulpwood" means any timber product delivered to a receiving facility in short-length form, eight (8) feet or less, and intended for use as a raw material in the manufacture of pulp and pulp products.

(d) "Pulpwood cutter-hauler" or "cutter-hauler" means any person engaging in or continuing to engage in this state in the business of severing and carrying pulpwood.

(e) "Pulpwood receiving facility" or "facility" means any woodyard, pulpmill or other place of business at which pulpwood is received from pulpwood cutter-haulers as herein defined in the regular course of business.

(f) "Facility operator" means any person who owns, operates or manages a pulpwood receiving facility as herein defined. Provided, however, that any landowner who shall pay employees an hourly wage to both cut and collect pulp-

wood on his private property shall not be deemed a facility operator under the provisions of this chapter.

§ 75-79-7. General powers and duties of commissioner of agriculture and commerce.

It shall be the function and duty of the commissioner to:

(a) Issue licenses to operators of pulpwood receiving facilities determined to qualify under the provisions of this chapter, and revoke or suspend licenses previously issued by the commissioner in any case where the licensee is determined to have violated any of the provisions of this chapter.

(b) Establish standard procedures and promulgate regulations for the measurement of pulpwood offered for sale, both by weight and by volume, in a manner consistent with the Mississippi Weights and Measures Law of 1964, as amended (section 75-27-1 et seq.). Such standard provisions and regulations shall require that all pulpwood receiving facilities shall give every cutter-hauler a ticket which shall state at the minimum (i) the name of the hauler and (ii) the hauler's social security number and/or employer identification number, (iii) the name of the landowner from which the wood was severed, and (iv) the number of cords or, in the event of weighing, gross weight on the truck of the hauler. In the event that the hauler is not the person to be paid for such pulpwood, the ticket shall contain the name and social security number and/or employer identification number of the payee. This ticket shall be prepared prior to the unloading of any pulpwood. Provided, however, that where such wood is measured on scales, the ticket shall be issued at the time of the weighing, and shall state the gross weight of the wood and truck and the tare weight of the truck after unloading to determine the net weight of the wood; the number of cords is not required on tickets so weighed. The pulpwood facility shall keep a copy of such ticket on file for subsequent inspection by the state tax commission and the department of agriculture and commerce for a period not less than three (3) years.

(c) Conduct periodic inspection no less than every six (6) months, and establish and carry out other procedures

designed to insure that licensees will comply with the provisions of this chapter.

(d) Receive, investigate and take appropriate action with respect to any charge or complaint filed with the commissioner to the effect that any pulpwood receiving facility operator has violated any provision of this chapter.

§ 75-79-9. License required for pulpwood receiving facility.

No person shall engage in the business of operating a pulpwood receiving facility as defined in this chapter without having first obtained a license pursuant to this chapter.

§ 75-79-11. Application for license.

Applications for licenses under this chapter shall be made in writing, under oath, on forms prescribed by the commissioner for each separate pulpwood receiving facility. The application shall contain the name of the applicant, the address of the pulpwood receiving facility for which the license is to be issued, the name or names of the owners thereof and such further information as the commissioner, by regulation, requires. Provided, however, no financial statement shall be required.

§ 75-79-13. License fee.

The license fee for each calendar year or part thereof shall be thirty dollars (\$30.00) for each pulpwood receiving facility operated within the state.

§ 75-79-15. Issuance of license; contents; display.

Upon the filing of an application and the payment of the required fee, the commissioner shall issue a license to the applicant to operate a pulpwood receiving facility under and in accordance with the provisions of this chapter for a period which shall expire the last day of December next following the date of its issuance.

Each license shall specify the location of the facility for which it is issued and must be conspicuously displayed there.

§ 75-79-17. Loss or destruction of license; replacement; fee.

Upon the loss or destruction of a license issued to a pulpwood receiving facility operator, a duplicate thereof or a

new license may be issued under the same number for a fee of two dollars (\$2.00).

§ 75-79-19. Denial, suspension, cancellation or revocation of license; grounds; procedure.

(1) The commissioner may deny an application for a license, or revoke or suspend a license after it has been granted, for any of the following reasons:

(a) Any material misstatement in the application for a license.

(b) Defrauding any pulpwood cutter-hauler in the measurement of pulpwood to the cutter-hauler's damage.

(c) Failure to maintain accurate weighing and measuring devices used in the measurement of pulpwood.

(d) Requiring a pulpwood cutter-hauler to deliver or transfer any quantity of pulpwood to the facility operator's control as a condition of the purchase or receipt thereof before the facility operator has notified the hauler of the total number of cords or the volume for which payment will be made.

(e) Willful failure to apply standards established by law or by the commissioner in the measurement of pulpwood.

(f) Discriminating against a pulpwood cutter-hauler because the cutter-hauler has filed a complaint, given testimony or otherwise sought relief under this chapter.

(g) Willful failure to collect the fee as prescribed in section 75-79-33.

(2) If a pulpwood receiving facility operator is convicted of any crime involving fraud under the provisions of this act, the commissioner, may, in his discretion, suspend, cancel or revoke the license of such operator.

(3) All proceedings for the suspension, cancellation or revocation of licenses shall be before the commissioner, and the proceedings shall be in accordance with the rules and regulations which shall be adopted by the commissioner. No license shall be cancelled or revoked, except after a hearing before the commissioner, upon reasonable notice to the licensee and an opportunity to appear and defend. Whenever

the commissioner suspends, cancels or revokes a license, he shall prepare an order so providing which shall state the reason or reasons for such suspension, cancellation or revocation. The order shall be sent by certified mail by the commissioner to the licensee at the address of the pulpwood receiving facility licensed. Within thirty (30) days after the mailing of the order, the licensee, if dissatisfied with the order of the commissioner, may appeal to the chancery court of the county in which the pulpwood receiving facility is located by filing a written notice of appeal alleging the pertinent facts upon which such appeal is grounded. At the time of the filing of the appeal, the appellant shall give a bond for costs conditioned upon his prosecution of the appeal without delay and payment of all costs assessed against him. Appeal may be with supersedeas and shall be subject to the provisions of section 11-51-31.

(4) In case a license issued to a pulpwood receiving facility operator expires or is suspended, cancelled or revoked by the commissioner or his designated representative, such license shall be immediately returned to the commissioner.

§ 75-79-23. Licensee is responsible for acts of his employees.

Each licensee shall be responsible for the acts of any or all of his employees while acting as his agent, if such licensee after actual knowledge of such acts retained the benefits, proceeds, profits or advantages accruing from such acts or otherwise ratified such acts.

§ 75-79-25. Chapter not to restrict free dealing.

Nothing in this chapter shall require any person to buy from or sell to any other person in any situation or transaction in which the persons would otherwise be free, in their discretion, to deal or not to deal one with the other.

§ 75-79-29. Subpoena powers; oaths and affirmations; enforcement; penalty.

The commissioner shall have power to issue subpoenas to compel the attendance of witnesses and the production of documents, papers, books, records and other evidence before

him in any matter over which it has jurisdiction, control or supervision pertaining to this chapter.

The commissioner or any agent designated by him, may administer oaths and affirmations, examine witnesses and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the state at any designated place of hearing.

If any person refuses to obey any such subpoena, or to give testimony, or to produce evidence as required thereby, any judge or the chancellor of the chancery court of the first judicial district of Hinds County may, upon application and proof of such refusal, make an order awarding process of subpoena, or subpoena duces tecum, out of the court, for the witness to appear before the commissioner and to give testimony, and to produce evidence as required thereby. Upon filing such order in the office of the clerk of the court or the office of the clerk of such chancery court, the clerk shall issue process of subpoena, as directed, under the seal of the court, requiring the person to whom it is directed, to appear at the time and place therein designated.

If any person served with any such subpoena shall refuse to obey the same, and to give testimony, and to produce evidence as required thereby, the commissioner may apply to any judge or the chancellor of the chancery court of the first judicial district of Hinds County for an attachment against such person, as for a contempt. The judge or chancellor, upon satisfactory proof of such refusal, shall issue an attachment, directed to any sheriff, constable or police officer, for the arrest of such person, and upon his being brought before such judge, proceed to a hearing of the case. The judge or chancellor shall have power to enforce obedience to such subpoena and the answering of any question, and the production of any evidence, that may be proper by imposition of a fine, not exceeding five hundred dollars (\$500.00), or by imprisonment in the county jail, or by both imposition of a fine and imprisonment, and to compel such witness to pay the costs of such proceeding.

§ 75-79-31. Investigation of alleged violation.

If an investigation by the commissioner indicates prob-

able cause for belief that a violation of law has occurred, the commissioner shall refer the complaint with any evidence gathered during the investigation to the agency or official charged with the administration of such law and to the district attorney having jurisdiction, with a recommendation that it be considered for presentation to the next grand jury, as well as any further recommendations for seeking civil remedies.

§ 75-79-33. Fee on pulpwood measured by volume; amount; collection and remittance; state tax commission to administer; application of administrative provisions of Sales Tax Law.

There is hereby imposed a fee of eight cents (8) per cord or part thereof of pulpwood measured by volume, as provided in section 75-79-7(b). Such fee shall not be collected on pulpwood measured by weight. Such fee shall be collected by processors of pulpwood severed in this state and submitted to the state tax commission as hereinafter provided.

The fees shall be due and payable in monthly installments, on or before the fifteenth day of the month next succeeding the month in which the pulpwood is received by the processor. The processor shall, on or before the fifteenth day of the month, make out a return on the form prescribed, showing the amount of fees for which he is liable for the preceding month, and shall mail or send the same, together with a remittance for the amount of the fees, to the state tax commission.

All administrative provisions of the Mississippi Sales Tax Law, including those imposing penalties, interest and damages for failure to pay taxes imposed, and all other requirements and duties imposed upon taxpayers under said chapter, shall apply with like force and effect to all persons liable for less under the provisions of this chapter, and the state tax commission shall exercise all power and authority and perform all the duties with respect to taxpayers under this act as are provided in the Mississippi Sales Tax Law. In case of conflict between the provisions of this chapter and

any provisions of its sales tax law, then the provisions of this chapter shall control.

All fees collected shall be remitted to the state tax commission for deposit into the state treasury to the credit of the general fund.