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An Agricultural Law Research Article

Contracting in Agriculture: Potential Problems

by

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CONTRACTING IN AGRICULTURE: POTENTIAL PROBLEMS

*Joseph A. Miller**

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I. INTRODUCTION

Contracting of agricultural production and marketing has become much more common the past few years. For example, it is estimated that eighty percent of all hogs produced in the United States are sold on some type of contract.[1] That would equate to almost eighty million hogs each year![2] Virtually all of the poultry and eggs produced and sold in the United States is done so under contract.[3] Approximately twenty-five percent of the U.S. cattle supply is marketed via contract.[4]

But contracting is not limited to livestock. A growing portion of the U.S. grain production is grown or marketed under contract. With specialty grains such as high oil corn, food grade soybeans, popcorn, white corn, and various non-biotech crops, we are seeing a rapid move towards contracting as a means to ensure access to a particular market as well as the producer attempting to garner larger returns on his or her production. Over one-third of the total commodity

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1. GLENN GRIMES, UNIV. OF MISSOURI & NAT'L PORK BD., HOG MARKETING CONTRACT STUDY (2002), *at* http://agebb.missouri.edu/mkt/vertstud.htm.

2. *See* NAT'L AGRIC. STATISTICS SERV., USDA, STATISTICS OF CATTLE, HOGS AND SHEEP tbl.7-1 (2002), *available at* http://www.usda.gov/nass/pubs/agr02/acro02.htm (available under the "Cattle, hogs, and sheep" link).

3. *See* Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation, Seeking Remedies for Contract Poultry Growers*, 25 U. MEM. L. REV. 1207, 1208 (1995) (stating that "99% of the poultry produced in America is produced by vertically integrated companies").

4. *See* GRAIN INSPECTION, PACKERS & STOCKYARDS ADMIN., USDA, CAPTIVE SUPPLY OF CATTLE AND GIPSA'S REPORTING OF CAPTIVE SUPPLY, at viii (2002), *available at* http://www.usda.gov/gipsa/pubs/captive_supply/captivesupplyreport.pdf.

production in the United States is under a marketing or production contract.[5] This includes fruit and vegetable production, dairy products, and all of the other diverse commodities produced in the United States. It is expected that the level of contracting will continue to increase in the years ahead.

Given the perceived need by processors and others for a stable supply of agricultural commodities, with certain quality characteristics, and a predictable purchase price, contracting is likely to increase. As processors and retailers move towards branded products and the need for identity preservation of specific crop and livestock traits increases, the need for contracts to ensure a viable supply will increase. Producers see contracts as a way to manage price risk, diversify income sources, access new markets, and get paid for adding more value.

Another major impact that contracts can have on a producer is to provide direct feedback as to his or her production output in relation to consumer preferences. Under the traditional marketing system the producer takes his crop or livestock to a market. The market may pay the producer a slight premium or discount, but in general the producer is paid an average price. It is then up to the processor and retailer to try to make sure that the consumer will buy the "average" product. The producer has little feedback as to whether the product being produced is actually what the consumer desires. The producer also has little feedback as to when the processor would prefer delivery of a product. About the only mechanism available for the processor to relay to the producer that it is desired that delivery be postponed or sped up, or to change the genetics of the product being produced, is by severe price movements.

In many respects, that is what happened to hog prices in 1998, when the national average price fell below ten cents per pound,[6] a price not seen since the Great Depression (and in real dollars, was actually lower than the price paid during the Depression).[7] Processors were overloaded with hogs and simply could not process all of the hogs being delivered to them each day.[8] But processors

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5. *See* NAT'L COMM'N ON SMALL FARMS, USDA, A TIME TO ACT: A REPORT OF THE USDA NATIONAL COMMISSION ON SMALL FARMS (1998), *available at* http://www.reeusda.gov/smallfarm/report.htm.

6. Foreign Agric. Serv., USDA, *Why Hog Prices Haven't Plummeted,* INTERNATIONAL AGRICULTURAL TRADE REPORT, Jan. 28, 2000, *available at* http://ffas.usda.gov/dlp/highlights/2000/wmr_0128.pdf.

7. *See, e.g., USDA's Russian Food Aid Program: Hearing Before the House Comm. on Agric.,* 106th Cong. 10 (1999) (statement of Dan Glickman, Sec'y of Agric.), *available at* http://www.usda.gov/news/special/ctc12.htm.

8. BRAD C. GEHRKE & JAMES MATSON, USDA RURAL DEV., LAST TRAIN LEAVING, *available at* http://www.rurdev.usda.gov/rbs/pub/sep00/train.htm (last visited Apr. 22, 2003).

cannot, without violating various laws (such as the Packers & Stockyards Act [9] and possibly RICO[10]), buy hogs from some and refuse to buy from others.[11] Therefore, the processors' only alternative was to keep lowering the price paid to all producers selling without contracts to a level that the producers simply stopped bringing hogs to the processors. However, producers with contracts could be told to reduce marketing for a short period of time until the glut was over. Processors are better able to schedule their processing plants to utilize them at more economical levels. As a result they are not forced to lower the price to such extreme levels.

The same problem is developing in relation to branded products. One key to having a good branded product is consistency. But with all of the different breeds of cattle and hogs in the United States, all with slightly different traits, it is virtually impossible to buy on the open market and end up with a consistent product. With a contract, however, genetics can be specified and consistency becomes much easier to achieve.

While basic contract law applies to agricultural contracts, there have developed several issues unique to these contracts. Agriculture is rapidly consolidating at all levels of the industry. While there are slightly over two million farms in the United States,[12] USDA reports that 567,000 farms produce ninety percent of all agricultural products produced in the United States.[13] The four largest beef packers process eighty percent of all of the beef in the United States.[14] The four largest pork packers process almost sixty percent of all of the pork in the United States.[15] In the retail arena, the twenty largest food retailers account for over fifty percent of all food sold.[16] Consumers demand a more uni-

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9. Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181-231 (2000).

10. Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-1968 (2000).

11. *See, e.g.*, 7 U.S.C. § 192 (2000) (listing the activities prohibited by the Packers and Stockyards Act).

12. ECON. RESEARCH SERV., USDA, UNITED STATES STATE FACT SHEET: FARM FINANCIAL INDICATORS, *at* http://ers.usda.gov/StateFacts/us.htm (last updated Jan. 9, 2003).

13. *See* ROBERT A. HOPPE ET AL., USDA, AGRIC. INFO. BULLETIN NO. 728, STRUCTURAL AND FINANCIAL CHARACTERISTICS OF U.S. FARMS, 1993: 18TH ANNUAL FAMILY FARM REPORT TO CONGRESS (1996), *available at* http://www.ers.usda.gov/publications/aib728 (stating that of the 2.1 million farms in the contiguous United States, commercial farms account for 27% of the total farms but produced 90% of total farm sales).

14. GRAIN INSPECTION, PACKERS & STOCKYARDS ADMIN., USDA, ASSESSMENT OF THE CATTLE AND HOG INDUSTRIES: CALENDAR YEAR 2001, at 18, tbl.3 (2002), *available at* http://www.usda.gov/gipsa/pubs/01assessment/01assessment.pdf.

15. *Id.* at 37, 38 tbl.10.

16. *See* ECON. RESEARCH SERV., USDA, FOOD MARKET STRUCTURES: FOOD RETAILING

form product. Brand labeling has become much more important in marketing products.

All of this leads to a situation where producers' choices on where to market their products have become severely limited. In many cases they may have only one or two places in which to sell. Due to this, many of the contracts offered to producers are very one-sided and contain clauses that are often glanced over, if discussed at all. These types of contracts can result in disastrous situations for the producer. As the attorneys advising these clients, we have the responsibility to make sure that they are aware of some of the pitfalls in these contracts. It will then be up to the producer to get these provisions changed or to not enter into the contract at all.

Below are some of the most common problems and concerns that I have observed in agricultural contracts the past few years.

II. COMMON CONTRACTING PROBLEMS, CONCERNS, AND POSSIBLE SOLUTIONS

A. *Lack of Clarity*

Many of the contracts presented to producers are often long and complex, often with contradictory clauses.[17] It appears that many of the contracts were not written by attorneys, but by others within the organization with little or no legal training. The clauses seem to be pulled from various other contracts that have been used. This results in clauses that in one instance claim that the producer owns the crop while another clause of the same contract states that the company always owns the crop. Often times technical terms are used without a definition of the term being supplied. Many times different terms are used to mean, or intended to mean, the same thing within a contract. Lack of clarity can be especially troublesome when it relates to determining the price that the producer will be paid or who actually owns the crop being grown.

AND FOOD SERVICE, *available at* http://www.ers.usda.gov/briefing/foodmarketstructures/foodservice.htm (last updated Dec. 8, 2000).

17. To avoid pinpointing any one particular company, the author will not name what company contract each particular clause came from. All clauses cited are reprinted word for word, including punctuation marks, except that the word "Company" has been inserted in place of the actual company name, unless otherwise noted. All contract clauses were taken from contracts offered by major U.S. companies.

Crop ownership can be especially troublesome. In order for a producer to be eligible for government farm payments, he or she must actually be producing a crop.[18] But if the company retains ownership of the crop then the producer may well be denied government benefits. This could add up to rather large sums of money.

In relation to the Indiana Grain Indemnity Program,[19] the producer must show evidence of ownership of the grain to be covered by the statute.[20] Indiana Code 26-4-1-5 provides "'Claimant' means a producer that is a participant in the grain indemnity program and satisfies any of the following conditions: (1) Possesses written evidence of ownership of grain . . . ."[21] It is not uncommon for seed production contracts to contain a clause indicating that the seed company maintains ownership of the growing crop. If the seed company goes bankrupt, the producer may not receive any compensation from the Indemnity Fund. The final decision as to whether compensation will be paid is up to the Grain Indemnity Board.[22] However, contract wording could cause major problems in such instances.

1. *Possible Solutions*

Suggestive legislative solutions include the use of an understandability grading scale ordinarily applied to insurance policies; a requirement that non-legal terms be used; a standard which uses a certain educational level as its basis; a mandate for a summary sheet containing the material terms and conditions of the arrangement; and a statement of risks of the transaction as a preface to the actual contract.

18. *See* FARM SERV. AGENCY, USDA, PAYMENT ELIGIBILITY AND LIMITATIONS 2 (2001) (stating "[t]o be eligible for payments and benefits under some programs, a producer must be considered 'actively engaged in farming.'"), *at* http://www.fsa.usda.gov/pas/publications/facts/payelig01.pdf.

19. IND. CODE ANN. §§ 26-4-1-1 to 26-4-8-3 (Michie 1999).

20. *Id.* § 26-4-1-1 (stating that the Indiana Grain Indemnity Law applies to grain buyers).

21. *Id.* § 26-4-1-5.

22. *Id.* § 26-4-6-7. The Indiana Grain Indemnity Board may deny payment to a producer if the producer did not own the grain in question, or if the producer undertook marketing arrangements that differ from generally accepted marketing practices within the grain industry. *Id.*

2. *Cautions*

There appears to be little disagreement about the need to enhance the clarity and readability of production agreements currently being offered to producers. However, a prohibition against the use of legal terms, for example, may make it difficult for the offeror of the contract to clearly and precisely outline his or her intentions and expectations, inasmuch as legal terms typically have well established meanings. In addition, a grading scale ordinarily used in reviewing insurance policies may not, in all cases, adapt well to the rather unique process of producing agricultural commodities. Finally, any legislation requiring that a contract have a risk disclosure statement must be carefully drafted to ensure that only realistic, practical risks are disclosed, and time is not wasted on listing risks which are not likely to occur. A mandate for a summary sheet should require that the summary actually be part of the contract itself and not a separate document.

The solution to the dilemma of lack of clarity probably lies in a combination of some of the above ideas and suggestions. It is vital that any legislative provision be carefully drafted, however, to avoid unintended consequences or provide the producer a false sense of security. A requirement that a contract contain, as its first section, a summary of the material terms and conditions of the arrangement might be desirable, so long as the summary is brief; there is some direction in the statute as to what might be considered "material terms and conditions"; and in the event of a conflict between the summary sheet and the actual contract, the summary sheet governs. Otherwise the unintended consequence may be a summary sheet which is unduly long and lacks clarity itself. Another solution would be to have any conflicting or vague terms resolved in favor of the producer.

Regardless, producers need to understand that they are signing a legal document and they should be encouraged to seek legal assistance by someone with experience in agricultural contracts. Legislation cannot, and should not try to, take the place of qualified legal advice.

B. *Overly Broad Confidentiality Clauses*

A major problem in poultry contracts over the years, which is increasingly becoming a problem in livestock and grain contracts, is confidentiality clauses which prohibit the producer from discussing the contract with anyone. That would include a producer's legal advisor, accountant, or even spouse. Some clauses are so prescriptive that they prohibit the producer from even acknowledging a contract with a company. Following are some examples:

> Company and Producer agree to keep the existence of this Agreement and all of its terms, including without limitation the price of hogs, in strict confidence.
>
> Or
>
> Each party's Confidential Information will be kept confidential by the other party and shall not, without prior written consent, be disclosed by the other party to any other person or entity or be used by the other party for any purpose other than in connection with this Agreement.
>
> (NOTE: Confidentiality is defined as information that is non-public, confidential or proprietary in nature)
>
> Or
>
> The parties do each hereby represent and warrant to the other that they hold all terms and conditions of this agreement and all attachments in the strictest of confidence and will not divulge any of the terms thereof to any third party without the written consent of the other party first being obtained, unless required by law. However, disclosure is specifically allowed to a corporate parent, affiliate, subsidiary or investor feeding cattle under this program. IN NO EVENT shall Seller divulge the terms or provisions of this Agreement to any person or organization.

1. *Possible Solutions*

Some states have passed legislation that makes a confidentiality clause in a production contract illegal.[23] As contracts become more common, they will be a key part of the price discovery process. The basic terms of the contracts will provide information about the availability of supply and demand just as cash crop and livestock prices have provided information in the past. Without this information in the marketplace, contractors and producers will lack the information to make critical decisions.

2. *Cautions*

Most people would agree that there may be some information, perhaps even in production agreements, which rises to the level of a trade secret, and thus is deserving of protection. To simply outlaw all confidentiality clauses across the

23. *See, e.g.*, MINN. STAT. ANN. § 17.710 (West Supp. 2003).

board ignores legitimate interests in protecting certain proprietary property. It also makes it possible for all information on a contract to be available to other individuals, such as names, addresses, and personal financial information.

A possible approach would be to have legislative proposals recognize true trade secrets and other proprietary information, but then also provide that other aspects of any confidentiality clause are not enforceable against a producer. Phrased in that fashion, it would have the added benefit of not requiring the producer to discuss his or her contract if he or she chooses not to do so. Exceptions also need to be made for information and terms of a contract that must be reported as a requirement of state and national laws and regulations.

C. *Independent Contractor vs. Agent*

Most contracts today have clauses that state the producer is an independent contractor. This relieves the company of paying employment taxes, social security, insurance and other benefits the company would be required to provide. However, many of the contracts offered to producers are offered as a "take it or leave it" proposition. There are now several cases where the contract states the producer is an independent agent, but in reality the producer is in fact an agent or employee of the company.

Examples of such clauses include:

> GROWER is, for purposes of this Agreement, an independent contractor and nothing contained in this Agreement shall make GROWER an agent or employee of Company or authorize him/her to act on behalf of Company.

Or

> Company and Producer agree that the relationship between them is that of independent contractors. Nothing in this Agreement shall constitute either Producer or Company as agent, representative, partner, joint venturer or employee of the other party. Neither Producer nor Company shall have, nor shall either represent itself as having, any right, power or authority to create any agreement or obligations, either express or implied, on behalf of, or in the name of, or binding upon the other party, or to pledge the other's credit or to extend credit in the other's name unless the other party shall provide advance written consent thereto.

Or

> Grower desires to enter into this Agreement and, pursuant to it, to undertake, as an independent contractor, to raise and care for broiler chicks furnished by Company.

Or

> Company and Producer agree that the relationship between them is that of independent contractors.

To give some idea just how far some of these contracts go in directing the "independent contractor", consider the following:

> The broiler houses used by Grower will be constructed and equipped by Grower, and maintained, without cost to Company, in accordance with the plans and specifications established by Company, which plans and specifications are incorporated herein by reference, and which plans will be furnished by Company to Grower without charge and without any warranty of any kind. Company reserves the right to upgrade and change the plans and specifications from time to time to improve the growing facilities or better equip them for the growing of broilers.
>
> Equipment requirements may be changed from time to time by Company, which changes shall be provided to the Grower in writing. In the event Grower elects to make or perform the requested modifications, additions, deletions at grower's expense, such shall be made before delivery of a subsequent flock, in which event this Agreement shall continue without interruption. If Grower fails to perform the requested modification within the time limit for making modifications thereof, it shall be conclusively presumed that Grower has thereby elected to terminate the Agreement.
>
> Company will provide to the Grower broiler growing facility and equipment requirements, in writing, as a service, and not as a representation that the plans and specifications for the housing or equipment contained therein are free from any error, nor does Company give Grower any warranty whatsoever with respect to such plans and specifications.

The Oklahoma Attorney General outlined employee-agent law in his Opinion dated April 11, 2001.[24] In that letter the following points were made:

> 1) In determining whether an employment relationship exists the courts look at the actual roles played by the parties to the contract, not necessarily to what relationship is stated in the contract itself.[25]

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24. Op. Att'y Gen. Okla. 01-017 (Apr. 11, 2001), *available at* http://www.oklegal.onenet.net/ (available using "01-017" as search term).

25. *Id.*

2) "The distinguishing characteristic of an employment relationship is control over the manner in which the work is performed."[26]
3) An independent contractor is free from control and direction of his employer in all matters of the service rendered, except the result thereof.[27]
4) "[A]n employer may specify and control the manner in which an employee actually performs the actual work itself."[28]
5) Most of these type of contracts allow the contractee to use his own barns and equipment and hire his own employees. In addition, the contractee is paid upon performance, not a salary or wage. All of this is indicative of an independent contractor situation.[29]
6) Factors in these type of contracts that are indicative of an employment relationship include: tools of the trade such as feed, medicine, and other supplies furnished by contractor; performance of the contract not assignable; the contractee may only raise animals for the contractor; the contractor may terminate the contract at any time; the contractor exercises an immense degree of control over how the animal or crop is raised.[30]

The Oklahoma Attorney General concluded by stating, among other things:

1) "Contracts establishing contract-growing arrangements that are presented to the grower with no opportunity to negotiate their essential terms are contracts of adhesion."[31]
2) "Where an integrator directs in detail the manner in which raising of the crop is to be performed the contract grower is the employee of the integrator."[32]

Other courts have also held that in spite of the contract designation as independent contractor, there was actually employment or an agency relationship.

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

Tyson Foods, Inc. v. Stevens[33] was an Alabama case where a producer raised hogs for Tyson Foods.[34] Tyson Foods supplied and retained ownership of the hogs and told the producer how to construct the barns and waste system and even arranged financing.[35] The producer fed, watered and cared for the animals, but did not have any other decision making control over the operation.[36] The waste system developed problems and the neighbors sued over the smell the hog unit created.[37]

The court held that the existence of an agency relationship is a question of fact for a jury to decide and that the determination of an agency relationship is determined from the facts, not by how the parties choose to characterize their relationship.[38] In addition the court added that in determining whether an independent contractor relationship or a master-servant relationship existed depended upon "whether the entity for whom the work is performed has reserved the right to control the means by which the work is done."[39]

1. *Possible Solution*

Legislation outlining what factors determine an independent contractor or employment status.

2. *Cautions*

There are several problems with legislatively defining the relationship between parties to a contract. The courts have pretty well defined the differences between the relationships, but contract writers tend to ignore those differences and state the relationship they desire. In either case it is left up to the producer to pursue in court a determination contrary to what the actual contract states. However, if the differences were legislatively determined the producer would have an easier and more certain outcome.

Another problem with making this determination legislatively is that it may well result in companies dealing only with large producers, thereby eliminating the smaller producers from access to a viable marketplace. This could

33. 783 So. 2d 804 (Ala. 2000).
34. *Id*, at 805-806.
35. *Id.* at 806.
36. *See id.* at 806, 809.
37. *See id.* at 806.
38. *Id.* at 808-809.
39. *Id.* at 808.

have profound implications upon the structure of agriculture and serve to speed up consolidation within the producer sector.

Related to this last point, large companies may well decide that they desire an independent contractor situation and leave the process of growing the crop or livestock to the producer, but demand that the final product meet certain specifications that can only practically be developed by using the growing process suggested by the company. This could leave the producer with the expense of growing a particular livestock or crop and then not having that product accepted by the company, but the product would not be marketable to anyone else either. The end result would be to put upon the producer a great deal of uncertainty and risk in growing a product. This added leverage could actually increase the demands put upon the producer by the company with no added benefit to the producer.

D. *Unequal Bargaining Power*

Many contracts within agriculture are between large companies and much smaller, independent producers. This situation usually results in unequal bargaining power between the parties. In many cases the producer is offered a set contract with no opportunity to change any of the provisions of the contract. Most of these contracts are a "take it or leave it" type of contract. The contract requires the producer to install special buildings or systems. Sometimes the contracts are not long enough to even begin to cover the expenses involved in buying this specialized equipment or buildings. In some cases the producer is not given much time, if any, to make a decision as to whether to accept the contract or not. Some producers report that they are taken into rooms in which the producer and a few company representatives are present, with no one else allowed, and are told that if the contract is not signed when they leave the room that they will not be offered another opportunity to contract.

This type of situation leads to contracts of adhesion. In an Opinion letter dated April 11, 2001, the Oklahoma Attorney General quoted the Oklahoma Supreme Court in defining an "adhesion contract" as:

> [A] standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power be-

> tween the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis, without opportunity for bargaining . . . .[40]

Just because a contract is an adhesion contract does not mean that the contract is necessarily void.[41] It does generally mean, however, that the contract will be interpreted most strongly against the drafter of the instrument.[42] It is also possible that a court will even go so far as to hold the contract unconscionable if there is a great disparity of bargaining power combined with terms that are unreasonably favorable to the party with the disparate bargaining power.[43]

1. *Possible Solution*

Requiring corporations to allow producers time to have others review the contract would help level the playing field. Also, legislation requiring contractors to offer contracts lasting long enough for producers to have an opportunity to recover their investment may be advisable. Legislation should have a notice of termination, cancellation, or nonrenewal that allows for the awarding of actual damages especially for specialized equipment.

2. *Cautions*

However, this legislation must be narrowly written so that a contractor is not simply responsible for the entire cost of the investment. Rather, any value that the equipment may have in case the contract does not last long enough should be taken into account. Contractors will likely become very reluctant to do business in any location that makes their liability extremely high and out of proportion to the contract.

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40. Op. Att'y Gen. Okla. 01-017 (Apr. 11, 2001), *available at* http://www.oklegal.onenet.net/ (available using "01-017" as search term) (quoting Rodgers v. Tecumseh Bank, 756 P.2d 1223, 1226 (Okla. 1988)).

41. *See, e.g.*, Towe, Hester & Erwin, Inc. v. Kansas City Fire & Marine Ins. Co., 947 P.2d 594, 597 (Okla. Ct. App. 1997).

42. *See, e.g.*, *id.*

43. *See, e.g.*, Municipality of Anchorage v. Locker, 723 P.2d 1261, 1265-66 (Alaska 1986).

E. *Producer as Merchant*

> "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. [44]

"'Between merchants' means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants." [45]

Determining whether a farmer is a merchant or not is of major importance in not only determining the enforcement of the contract between the parties, but also in determining whether certain oral contracts may also be enforceable against them. The Indiana Statute of Frauds states:

> (1) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
> (2) Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficiently against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten (10) days after it is received. [46]

As noted in paragraph (2), if a written confirmation is received by a merchant then the defenses offered by paragraph (1) would not apply.[47]

Whether a producer is considered a merchant varies from state to state. It is very important to consider this when looking at the provisions within a contract. In Indiana, a producer is a merchant only upon the determination of the particular factors surrounding the circumstances.[48] In *Sebasty v. Perschke*,[49] the court held that the lower court did not err in concluding that the producer was a

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44. IND. CODE ANN. § 26-1-2-104(1) (Michie 1992).
45. *Id.* § 26-1-2-104(3).
46. *Id.* § 26-1-2-201(1) to (2).
47. *Id.* § 26-1-2-201(2).
48. *See* Sebasty v. Perschke, 404 N.E.2d 1200, 1202-03 (Ind. App. 1980).
49. 404 N.E.2d 1200 (Ind. App. 1980).

merchant.[50] In this case, the producer reneged on the selling of wheat to a grain broker in 1973[51] (as a side note, that was the year grain prices skyrocketed higher due to the unexpectedly large Russian grain buying[52]). The court held that "[a] farmer who grows crops for the sole purpose of selling them has by his occupation held himself out as having the knowledge or skill peculiar to the transaction."[53] In this case, the producer in question had in fact dealt with this very same grain broker in other grain trading transactions.[54] The court went on to hold that "[a] farmer who regularly sells his crops is a person who deals in goods of that kind."[55] As a side note, Indiana Code 26-1-2-105(1) provides that "Goods" includes the unborn young of animals and growing crops. [56] A typical contract provision is as follows:

> The undersigned Seller represents and warrants to Buyer that Seller is a MERCHANT with respect to the commodity that is the subject matter hereof.

1. *Possible Solution*

I do not suggest that a major change be made to the Uniform Commercial Code and therefore do not have a solution for this area.

2. *Concern*

Other than being aware that in some states producers may be considered merchants and the corresponding implications that has, there are no concerns.

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50. *Id.* at 1202-1203.
51. *Id.* at 1201.
52. *See* Clifton B. Luttrell, *The Russian Wheat Deal—Hindsight vs. Foresight*, FED. RESERVE BANK OF ST. LOUIS REV., Oct. 1973, at 2.
53. *Sebasty*, 404 N.E.2d at 1202.
54. *Id.* at 1203.
55. *Id.*
56. *See* IND. CODE ANN. § 26-1-2-105(1) (Mitchie Supp. 2002)

> "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale, other than the money in which the price is to be paid, investment securities (IC 26-1-8.1), and things in action. 'Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (IC 26-1-2-107)."

Id.

F. *Equitable Allocation of Risks and Liability*

One of the troubling aspects of many agricultural production agreements is the apparent attempt by the offeror of the arrangement to shift risks and liability to the producer in amounts and types beyond which any party to the transaction should ordinarily anticipate or accept. This can manifest itself in such areas as requiring unattainable non-genetically modified organism ("non-GMO") levels in grain, making the producer liable for any and all damages associated with commingling of non-GMO and Genetically Modified Organism ("GMO") grain, requiring different testing procedures at different stages of the handling process, being able to terminate contracts virtually at will, requiring the producer to be in compliance with state statutes in states far from the production area, and giving undue access to the producers fields and buildings. One midwest grain contract had the following clause:

> Seller hereby represents and warrants that all grain delivered will be in compliance with the provisions of the California Safe Drinking and Toxic Enforcement Act of 1986 (proposition 65);[57] and that it will not be adulterated or misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act,[58] nor be a grain which may not, under the provisions of section 404 and 505 of the Act, be introduced into interstate commerce.

Another contract had the following clause:

> Grain delivered under this Agreement shall be of merchantable quality, unadulterated and unrestricted from movement in interstate commerce within the meaning of the Federal Food, Drug, and Cosmetic Act, Environmental Protection Agency tolerances, the United [States] Grain Standards Act[59] and applicable state law.

Producers in the Midwest are not likely to know the substantive portions of California's Proposition sixty-five. Nor are they likely to know the substantive issues surrounding the Federal Food, Drug, and Cosmetic Act, interstate commerce, and EPA tolerances. As such, they should at least ask for, or be advised of, what they are contracting. Some of these issues are likely to be within the control of the producer while others may not.

In the area of liability, it is common to see the following clauses in agricultural contracts:

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57. CAL. HEALTH & SAFETY CODE § 25,249.5 (West 1999).
58. 21 U.S.C. §§ 301-399 (2000).
59. 7 U.S.C. §§ 71-87k (2000).

> Producer shall indemnify and hold Company harmless against any losses, claims or lawsuits caused by said default or breach.
>
> Or
>
> No claim of any kind, whether or not based on negligence, shall be greater in amount than the value of commercial seed in a quantity comparable to that quantity of seed subject to this agreement. Neither party shall be liable for special, consequential, punitive, exemplary, or indirect damages and the measure of damages shall be without regard to the cause relative thereto and whether or not caused by or resulting from the negligence of such party.

In effect, this means the producer could lose his entire crop but not be able to recover any more than the cost of the seed involved—an amount that would be very small compared to the losses actually incurred.

Related to this issue is where and when the producers will deliver their product. Clauses such as the following should be reviewed very carefully and the producer needs to understand their impact.

> Seller agrees to store the soybeans at Seller's expense until Buyer has called for full or partial delivery hereunder. The Contract need not be priced for Buyer to take delivery; provided however, that where required by law or Buyer's procedures, this Contract will be replaced by a credit sale contract if Buyer has received shipments not priced or not paid.

It is important to understand that in a credit sale situation the producer is giving up title to the grain and becomes an unsecured creditor of the buyer, extending interest-free credit to the buyer. Therefore, the producer's ability to be paid depends upon the future solvency of the buyer.

Also, in this type of arrangement the producer will incur storage costs on his or her production. The average storage costs run around three cents per bushel per month on corn and five cents per bushel per month on soybeans. On a fifty thousand bushel contract that would mean storage costs of $1,500 to $2,500 per month. These types of costs could last ten to twelve months or longer, meaning that overall storage costs could easily run the producer $18,000 to $30,000 per year. In addition, this type of contract requires the producer to deliver the grain at the time the buyer desires. The producer could easily be busy with other work, such as spring planting, when the buyer calls for the grain to be delivered. The producer may find that they are in the position of having to decide whether to breach the contract or to get the next year's crop planted. These types of costs

need to be built into the consideration of whether the premiums offered by the contract are worthwhile.

Producers need to understand under what circumstances a particular contract may be terminated. Most producers expect the contract to last for a given length of time. However, it is not uncommon to find the following clause in an agricultural contract:

> Either party to this Contract may terminate this Contract at any time, for any reason at all by giving the other party ten (10) days written notice of that party's intention to terminate.

The unsuspecting producer may invest hundreds of thousands of dollars implementing such a contract only to have it terminated with ten days notice. Producers should understand under what circumstances their contracts can be terminated, whether certain factors need to be present or not, and how quickly such contracts can be terminated.

Some recent cases highlight some of the problems producers may face. In *Seegers v. Pioneer Hi-Bred International, Inc.*,[60] the farmer had a growing contract with the company.[61] In a counterclaim, the Defendant asserted the farmer assumed any liability related to any damage to the crop from application of herbicides.[62] The contract required the farmer to notify the company prior to applying any herbicides, and the company had the right to prohibit the use of any particular herbicide.[63] The farmer had high grass growing in his field.[64] The company recommended to the farmer a particular herbicide to use, which the farmer did in fact use.[65] The crop sustained severe damage from the herbicide.[66]

The court held that the contract was clear in stating that the company only had the right to deny the use of any particular herbicide and that the farmer was liable for any damage caused to the crop due to herbicide use.[67] It did not matter that the farmer used the herbicide recommended by the company.[68] The

60. 997 F. Supp. 1124 (N.D. Ind. 1998).
61. *Id.* at 1125.
62. *Id.*
63. *Id.* at 1126.
64. *Id.*
65. *Id.*
66. *Id.* at 1125.
67. *Id.* at 1127-28.
68. *Id.* at 1127.

court held that the farmer did not have to use any herbicide and that it was his choice to do so.[69]

In *Crowell v. Campbell Soup Co.*,[70] a group of twenty-two farmers entered into poultry production contracts.[71] The defendant, through an employee, made various oral and written representations including statements that the defendant was committed to long-term placement of birds under its grow-out program, and that the defendant would only terminate the grower contracts of those growers that produced unsatisfactory results.[72] The defendant also made representations that they would provide growers flocks for the useful lives of the barns they had to build and that the contracts would generate sufficient annual revenue to repay the reasonable cost of building and equipping the barns,[73] plus operating expenses and additional revenue to cover a portion of the farmers annual labor and management expenses.[74] The contract was for an indefinite term and also included an addendum which provided that in the case of a "premature termination", the defendant would make payments to reimburse the "reasonable cost of financing" a contract grower's barn.[75] However, the contract also contained a provision permitting the defendant to terminate, at any time and for any reason, a farmer so long as no flocks were in the farmer's barn or scheduled to be placed in the barn.[76] Within a relatively short period of time the defendant no longer had any use for the farmers' barns.[77]

The trial court held that, as a matter of law, the farmers could not rely upon false promises made by the defendant to induce them into entering into contracts.[78] However, Minnesota law controlled this case, and Minnesota had enacted a statute requiring any contractor to reimburse each contractee for the cost of equipment and land required to make the buildings operational, and the corresponding interest rates, time periods, and loan terms.[79] The trial court did

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69. *Id.*
70. 264 F.3d 756 (8th Cir. 2001).
71. *See id.* at 756, 759.
72. *Id.* at 759-60.
73. *Id.*
74. *See id.* at 759 (stating that the defendant promised certain profit projections).
75. *Id.* at 760.
76. *Id.*
77. *Id.* at 767.
78. *Id.* at 760.
79. *Id.* at 766 (noting that district court interpreted Minn. Stat. § 17.92, subd. 1 (1990) to include the cost of the raw materials and labor for constructing the buildings, the cost of equipment and land required to make the building operational, and the corresponding interest rates, time periods, and loan terms).

not allow evidence of any operating expenses, operating revenue, or lost profits.[80] The Eighth Circuit affirmed the district court on all points.[81]

Lickley v. Max Herbold, Inc.[82] resulted in the farmer receiving a higher price for that product which was rejected than for that product which was not rejected.[83] The plaintiff was a potato farmer wherein he agreed to supply the defendant with 12,000 hundred weight of Russet Burbank potatoes.[84] The contract set a base price of $6.15 per hundred weight.[85] The contract also provided minimum standards of quality and those potatoes not meeting that standard would be rejected.[86] If rejected, the price would be subsequently determined and negotiated between the plaintiff and the defendant.[87]

The farmer delivered twenty-three truckloads of potatoes to defendant over a six-day period.[88] On average, eighty-five percent of the potatoes delivered by the farmer were not of the minimum quality and therefore were rejected as per the contract terms.[89] The defendant offered to pay the farmer $3.22 per hundred weight for the rejected potatoes.[90] The farmer refused the price and wanted the defendant to pay $8 per hundred weight.[91]

The trial court held that the farmer should receive fair market price, which was $7.55 per hundred weight for the rejected potatoes and $4.11 per hundred weight for the non-rejectable potatoes.[92] The Supreme Court of Idaho affirmed.[93] The court cited Idaho Code section 28-2-305(1), based on the Uniform Commercial Code, in stating that where the parties fail to agree upon a price, a reasonable price should be used.[94] Evidence was presented that the farmer had sold potatoes from the same field on the open market and received between $7.50 and $8.00 per hundred weight.[95]

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80. *Id.*
81. *Id.*
82. 984 P.2d 697 (Idaho 1999).
83. *See id.* at 699.
84. *Id.* at 698.
85. *Id.*
86. *Id.* at 699.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 702.
94. *Id.* at 700.
95. *Id.* at 701.

1. *Possible Solutions*

This may be the most difficult area of production contracts to adequately address, in that it appears to stem from unequal bargaining power. It is unclear how legislation, standing alone, can redress that situation. The most likely solutions in the near term seem to be education of producers, and a requirement of a statement of risk disclosure.

2. *Cautions*

In our zeal to redress the balance of risks and liabilities, caution must be used to ensure that such risks and liabilities are fairly apportioned among the parties to the transaction, and not just moved completely from the producer. It must be remembered that the producer will have to bear his or her fair share of the risks of the transaction.

G. *Dispute Resolution*

It has become popular with producers to seek justice through other means than the court system. Many producers are not comfortable with attorneys and they usually balk at the fees associated with a lawsuit. In their quest to find an alternative to lawsuits many producers have turned to various types of dispute resolution. The popular perception is that this method is much quicker and much cheaper with similar results. I am not clear where some of these perceptions developed, but in many cases they simply are not true.

A whole host of problems develop when the contract, or even legislation, demands dispute resolution before a case can be brought to court, if court is a possibility at all. A basic problem in many agricultural contracts is the disparity in bargaining power between the two parties to the contract. If a contract or legislation requires arbitration or mediation, the party with the stronger bargaining power usually starts with the stronger position.[96] The reason for this is simple. Usually the one with the stronger bargaining power generally has the most resources. As a result, it is much easier for them to go into mediation or arbitration and to prolong such cases. If a company is looking to get out of a contract with a producer and mediation or arbitration is required, it would mean little to a com-

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96. *See, e.g.*, Neil D. Hamilton, *Broiler Contracting in the United States—A Current Contract Analysis Addressing Legal Issues and Grower Concerns*, 7 DRAKE J. AGRIC L. 43, 70-72 (2002) (discussing contract dispute resolution concerns).

pany to throw the contract into the process. Even if they know they have little chance of winning. There are no disadvantages for them to go to dispute resolution. They not only gain time, which will more than likely be in their favor, but they may get something out of the process.

If the contract or legislation allows a case to go to court after dispute resolution then the producer not only has the costs associated with the dispute resolution process, but also normal court expenses. This only increases the out of pocket costs to the producer and makes court even less attractive as an alternative.

Many agricultural contracts allow dispute resolution as the only alternative. Court actions are expressly forbidden. Common are clauses such as:

> The parties agree that the sole remedy for resolution of all disagreements or disputes between the parties arising under this Contract shall be arbitration proceedings under the trade association identified in this Contract.

Many arbitration clauses require the parties to pay for three or more arbitrators to form an arbitration panel. If the case takes any time at all this could become a very expensive proposition. Other arbitration clauses only call for one person to arbitrate the case. While cutting down expenses it also creates a situation where only one person is deciding the case.

In addition, the discovery process can be quite different in an arbitration case compared to a court case. As a result, producers may find themselves turning over documents that they may not necessarily want to turn over. On the other hand, producers may not be allowed to turn over documents that they may want to have considered. Either way, producers may find that the arbitration process is not what they thought it would be.

Producers need to understand what rights they do and do not have in arbitration or mediation. Educational information needs to be made readily available to producers as to the benefits and disadvantages of each system, as well as how those compare with the court system. This could be done through bar associations, land-grant institutions, farm organizations, or state departments of agriculture.

Extremely careful consideration needs to be given to any legislative fixes to this, such as a dispute resolution requirement. Such legislation may well have the unintended consequences of giving producers an unwarranted feeling of security about the legal process and its role in settling disputes. It also gives the implication that the court system is in fact broken and that mediation or arbitration is in fact much more just and fair, as well as cheaper and quicker.

H. *Contract Pricing*

The method the contract uses to set the price is very important. Some contracts are very straightforward while others, either intentionally or unintentionally, are very complex. The contract may also require the producer to put up rather large sums of money to keep the contract in force. One contract priced grain as follows:

> The compensation for a load of delivered, dried Company grain shall be the Pricing Elevator cash price for U.S. No. 2 yellow corn, based upon the export market for commodity corn on day of delivery (if not priced earlier with Pricing Elevator), less any discounts, plus a premium based upon the oil content times the total number of net bushels of the grain delivered. Pricing Elevator will post a direct ship bid price for Delivery Location. Grower acknowledges that depending upon market conditions, the pricing of Company grain may be higher or lower than the local price of U.S. No. 2 yellow corn. The Grower agrees to accept this export price as the final determination in the settlement of the said grain.

I am very familiar with grain markets but I cannot tell you, especially on a day-to-day basis, the export price of grain. Many producers would likely assume that it is similar to the normal cash price of corn. However, the export market is a very specialized market with only a few players. Market conditions in other countries will have more impact upon this price than domestic events. It will also be very hard for almost any producer to be able to document what the export price is, let alone follow the factors involved in the determination of that price.

I have seen contracts that are based upon futures price but were so complicated that people with over twenty years of experience in the futures markets could not begin to explain what price the farmer would receive.

Also, producers need to be aware of the location where delivery of the product is to take place. Some contracts allow the buyer to name the delivery point. If a company has a national operation, or if it has contracts with national operations, delivery could be virtually anywhere in the United States. In addition, most contracts require delivery to be at the producer's expense, so any premiums that the producer expects may be eaten up delivering the product.

Clauses such as the following should cause concern:

> Delivery is to be made to either of Companies two nearest operational plants.

Or

Delivery is to be made at a point determined by Company.

While a company may have operational plants nearby when the contract is signed, plant closings may result in delivery being thousands of miles away. This could be especially true in longer term contracts.

1. *Trade Options*

Hopefully, after the myriad of problems surrounding hedge-to-arrive contracts in the mid- 1990s, most of the problems associated with price later contracts are resolved. The major qualification is that there must be a delivery date certain for the contract. Open-ended delivery contracts may run into problems as being an off-exchange option. These types of options are illegal.[97] Trade options are not permitted on the agricultural commodities that are enumerated in the Commodity Exchange Act.[98]

Producers with these types of contracts found themselves having to come up with margin calls of hundreds of thousands of dollars in the space of a few days. Bankruptcies occurred both at the producer level and at the elevator level.

2. *Base Price Contracts*

Another popular contract provision, especially in livestock contracts, is where the contractor offers the producer a set floor price, regardless of the actual market price. These floor price contracts became especially popular after the hog market crashed in late 1998.

Typical to these contracts are provisions that will pay the producer a price of thirty-two dollars per hundred weight, even if the actual market price is much lower. On the other side, the contract will provide that anything over a set price, say forty-five dollars per hundred weight, the producer only receives one-half of the price increases. So if the hog market goes to $50 per hundred, the producer would only be paid $47.50 per hundred weight. These types of contracts became popular because most producers cannot stay in business with prices below production costs for extended periods of time. They are willing to forgo some of the up-side potential to ensure they will make enough to stay in business during price downturns.

97. *See* 7 U.S.C. § 6c(b) (2000).
98. *See id.* §§ 1 - 27f.

The major problem that has developed with these types of contracts is that in some cases, while the company is paying the producer a set floor price, the difference between the floor price and the market price is added to a credit account on behalf of the producer. So while the producer may be getting a set price, he or she actually is getting little more than a loan from the company. The producer usually has to pay interest on the balance in the account. The idea is that when the price increases the producer will be able to still receive a price that will cover production costs but will also be able to pay the company the amount owed in the account balance.

The real problems developed when some producers found that after an extended period of low prices, they owed the company hundreds of thousands of dollars – amounts that they would not be likely to pay off in many years. To make the situation worse, other producers without these types of contracts were able to receive much higher market prices since they were not paying off the company. In addition, production costs usually climb in tandem with higher hog prices resulting in higher production costs for all producers. The result was that these producers actually found themselves in a much worse financial situation with these types of contracts and the higher market prices than other producers that did not have these types of contracts.

A variation of this type of contract is to pay the producer based upon the price of corn and soybean meal, the two main feed ingredients for swine. The caution here is that there may be extended periods of time when the price of corn and soybeans are not indicative of the hog market.

Producers simply need to be aware of the financial ramifications of these types of contracts and what happens when the market goes through extended periods of low prices. Producers also need to be aware that by the time the contract ends, they may still owe the company a fair amount of money. Many contracts contain provisions that the producer has the option of paying the company the full amount owed or to continue delivering hogs to the company, at market price, until the amount owed is paid off.

3. *Non-GMO Contracts*

Contracts calling for non-GMO products are becoming more common. These types of contracts should bring many unique concerns with them. Many such contracts tend to use the words "identity preserved" and "segregated" interchangeably. In addition, neither word is defined within the contract. The producer needs to get some type of writing from the contractor as to the meaning of these words.

Just as important is the level and the testing that will be done. Some contracts call for the producer to plant a particular seed that may actually contain more GMO product than the contract allows the final product to contain. There is little reason for a producer to enter into a contract in which the producer knows up front that he or she cannot meet the standards required. Other contracts state the level of GMO product allowed to be considered acceptable for non-GMO delivery. Some contracts may call for less than one percent of GMO product to be detectable in the grain. The fact is that most farmers cannot maintain that level of non-GMO product in their grain production.[99] Pollen can travel many miles, pollinating the corn of a producer trying to keep his or her grain GMO free.[100] Unless the contract allows for a tolerance of three to five percent of GMO grain, the producer is unlikely to be able to meet the specifications of the contract.

Many non-GMO contracts call for testing. The test procedures that will be used need to be specified in the contract. The time of testing also needs to be stated. Some contracts state that a particular test must be done at a particular time, but then in an addendum or separate certificate state another test at a different time. Different tests will likely have different results. In addition, unless the buyer of the grain is going to keep the producer's grain separated (and most do not), it would be wise to insist that such testing take place at delivery time, before unloading the grain.

Liability becomes another important matter in these contracts. Unless the producer liability ends at delivery, the grain the producer delivers will most likely be co-mingled with other grain. If a test is done later and it can be proven that the producer's grain caused the entire amount to be unfit for the buyer, the producer may find himself liable for a large bin, barge, or even a shipload of grain.

I. *Liability for Environmental Regulations*

It has become common in agricultural production contracts to assign liability for environmental concerns onto the producer. The producer may or may not own the animals involved, but in almost every production contract I have reviewed, the producer owns and is responsible for the waste produced by the animals. As environmental regulations grow at both the state and national levels,

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99. *See* John P. Mandler & Kristin R. Eads, *Potential Liability Exposure to Seed Companies from GMO Pollen Drift*, AGRA/INDUS. BIOTECH. LEGAL LETTER, May 2000, at 1.
100. *See* id.

the burden this places on the producer also increases. Typical of these types of clauses is as follows:

> Producer hereby assumes full and complete responsibility for environmental hazards or conditions, and associated costs and expenses to remedy or resolve such hazards or conditions, which may be pertinent, to the Facilities and the conduct of these operations. Producer shall be solely responsible for compliance with environmental and other laws and resulting liabilities that may be incurred as a result of operation of the Facilities or arising from any judicial or administrative action or ruling concerning the operation of the Facilities, including, but not limited to, operation of a waste control system or waste disposal methods deployed at the Facilities, emission, disposal or pollution complaints. Producer agrees to indemnify and hold harmless Company and its employees, agents or representatives from and against all claims, actions, damages, losses and expenses direct and indirect, or consequential damages, including, but not limited to, attorney fees and costs, arising out of any environmental law compliance matter or from any and all environmental hazards or conditions pre-existing or subsequently discovered on the Producer's Facilities or arising out of the performance hereof, whether or not presently known to Company and Producer, or either of them. It is expressly understood and agreed that all manure and waste material generated at, or resulting from operation of, the Facilities shall be the sole property and responsibility of Producer after its creation.

Or

> Grower shall take all reasonable steps necessary to prevent any pollution associated with the operation of the Facilities and to reduce odor from the Facilities. Company agrees to share information with Grower as to odor control know-how and technology. Grower agrees to either inject manure into the ground or to land apply manure and incorporate the manure within 24 hours thereafter and not to use spray irrigation for manure; provided, however, that Grower can utilize spray irrigation for effluent from anaerobic treatment systems. Grower shall respect all applicable setback requirements for the Units and the waste storage facility at the Facilities. Grower agrees to consult with Grower's neighbors regarding the timing of manure applications from the Facilities. Grower agrees to take reasonable steps to reduce odor by the planting of windbreaks such as Austrees or sudan grass or bluestem around the waste storage system.

It is important to note that both of these clauses note odor. Air quality around animal production facilities is becoming much more regulated. While there are some possible exceptions to animal agriculture in the Clean Water Act, there are no exceptions for agriculture within the Clean Air Act.[101] Emissions

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101. Clean Water Act of 1972, 33 U.S.C. § 1362(14) (2000) (stating that agricultural storm water discharges and return flows from irrigated agriculture are not point sources). *See also* Clean Air Act of 1977, 42 U.S.C. §§ 7401-7617q (2000).

limits of gases such as ammonia and sulfides may become a requirement on livestock farms. The costs to monitor these gases may well swallow up any profits the producer was expecting in relation to the production of the animals.

Also note in the second clause above that the producer must consult with neighbors about timing of manure applications. While it would be advisable for any livestock producer to work with his or her neighbors as to the timing of applying manure, having such a clause in a contract may make it virtually impossible for a producer to apply manure to a field, especially if the neighbor is trying to shut down the operation.

In *Tyson Foods, Inc. v. Stevens*,[102] the producer was required by the contract to use the waste system designed by the Company.[103] For a variety of reasons, though, the system was not adequate to control the waste or to keep the waste from entering a nearby stream.[104] As a result, the producer was sued for not complying with state and national environmental requirements.[105] If the producer had contracted to indemnify the Company for any and all costs associated with defending such suits, it could have become especially troublesome to the producer if the jury decided to "punish" the Company by awarding large punitive damages against the Company.

J. *Agricultural Fair Practices Act of 1967*[106]

In the past few years there have been many attempts to legislatively fix perceived or actual shortcomings related to agricultural contracting. As noted above, some of these "fixes" are legitimate while caution needs to be exercised with others. One section that seems to have been overlooked is an act already on the books that, if strengthened, might offer viable, market-oriented, solutions to many of the problems faced by producers when contracting agricultural production or marketing.

The Agricultural Fair Practices Act ("AFPA") deals with specific kinds of unfair trade practices involving coercion of producers in bargaining with companies and with joining or not joining particular associations.[107] The idea is that if producers can have protections when forming bargaining units they could better direct the form and function of the contract language. However, to date, and

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102. 783 So. 2d 804 (Ala. 2000).
103. *Id.* at 806.
104. *Id.*
105. *Id.*
106. 7 U.S.C. § 2301 (2000).
107. *Id.* § 2303.

for a variety of reasons, the AFPA has been of little help to producers.[108] There have been numerous reports of producers being threatened by a company with cancellation of their contract if they joined a particular group or tried to pursue collective bargaining. The Act is weak on enforcement and does not go far enough to allow producers to join together to bargain with a company without that company being able to effectively prevent the producer from obtaining or keeping their contracts.

While there are extremely few court cases involving this statute, it was invoked in *Baldree v. Cargill, Inc.*[109] In that case the plaintiff claimed the defendant cancelled poultry contracts in response to producers trying to organize.[110] The court granted a preliminary injunction stating there was a substantial likelihood the defendant had sued, in an unfair and discriminatory manner, to prevent efforts to organize.[111]

Possible solutions could be to strengthen the Agricultural Fair Practices Act to require active policing by USDA or the Department of Justice, strengthen the penalties associated with violation of the Act, and broaden the scope of activities under which producers are protected.

K. *Enforcement of Legislation*

One problem associated with legislative efforts to solve perceived and actual agricultural contracting problems is enforcement. Exactly who enforces such provisions and who pays for this enforcement becomes a major problem. State Attorneys General rarely have the staff or resources to conduct effective policing of all of the agricultural contracts available to producers. Making the state department of agriculture the police may have the unintended consequence of opening the door to other police actions by that agency, making it a very ineffective advocate for the producer. Other federal and state agencies also lack the resources or expertise to conduct effective enforcement programs. Producers are often not in a good position to bring such enforcement actions.

In addition, complex legislation tends to work against the producer, even though the intent may offer added protection to these same producers. Legislation requiring a laundry list of items that must be met to make the contract valid may be used by the contractor to nullify the contract while the producer lacks the

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108. *See* Roth, *supra* note 3, at 1223.
109. 758 F. Supp. 704, 706 (M.D. Fla. 1990).
110. *Id.*
111. *Id.* at 707-708.

expertise to determine whether all required provisions are met. The producer may feel compelled to fulfill the contract while the processor could take advantage of the situation.

L. *Unintended Consequences*

While legislation is often intended to help producers, the actual effects may be that producers will not have access to particular markets as processors move to other locations, will not be able to secure credit, or will be forced out of business due to increased capital requirements. Any proposed legislation must be scrutinized for possible unintended consequences it may place on producers. Obviously, what makes this so difficult is that many unintended consequences may not become apparent until after the legislation has been implemented, underlying the extreme importance of taking the time to carefully examine any such legislation and try to consider all possibilities.

1. *False Sense of Security?*

Many producers may feel that if a law is passed, they are protected and may not consider what the contract they are signing actually does. They may assume that if something is wrong with the contract, legislation has been passed to protect them and they need not worry.

Some legislation proposes to have a state agency review contracts, not for content, but to see that all requirements of the law have been met. This may give producers the sense that the state has approved the content of the contract as well. Any such state certification needs to clearly state, perhaps several times, that the state certification only indicates the contract meets the form required by the state law, not that the state approves the terms of the contract.

2. *Forcing Geographic Shifts in Production*

Unless very similar legislation is passed in several states, production may be shifted artificially due to the legal requirements of a particular state or region.

3. *Lack of Alternatives*

If legislation makes illegal certain types of contracts or places undue burdens on one particular sector of agriculture, the alternatives available to producers may become few.

4. *Education*

Agricultural contracting is a very complex issue with few, if any, simple answers. Probably one of the best things that can be done is to educate producers in some basic contract rules. University extension, bar associations, state and federal governmental agencies, public libraries, and trade associations can all do a better job in educating producers in contracting. Something as simple as the following would likely aid producers when they are considering contracting options:

Basic Rules of Contracting:

1. Get everything in writing. This includes any spoken assurances or changes in the contract.
2. Read and understand the contract before signing. If you have questions, seek legal advice.
3. Recognize that you most likely will be bound by the terms of the contract—that you are not likely to be able to get out of the contract if you later find out you do not like it.
4. Research and understand the background of the person or company with which you are signing the contract.
5. Carefully consider possible benefits of the contract with any possible increases in price.
6. Make sure that production or delivery of the product is realistic.
7. Understand that the person writing the contract will construct the contract in terms most favorable to them. And they most likely will have an easier time breaking the contract than you will.
8. Try to fill the contract, even if market price is higher than the contract price on the date of delivery. The buyer may be able to not only sue for the amount of the contract, but also for the difference the buyer has to pay to cover the contract, which may be much higher than the current market price. The buyer may also be able to recover attorney's fees.
9. If you have a disagreement with the other contract party do NOT cash the check. Cashing the check may be deemed by the court as settlement of the dispute.
10. Try to renegotiate any terms you think are unfavorable to you.
11. NEVER rely upon spoken communications from the company's representatives, either before or after the contract is signed. If the terms are not in writing and signed by the company, they probably are not

not in writing and signed by the company, they probably are not considered part of the contract.

The Iowa Attorney General's office has developed an excellent web site on agricultural contracts. Not only does it post contracts that are in use in Iowa, it also provides checklists that producers can use in relation to livestock and grain contracts.[112]

III. CONCLUSION

Contracting within agriculture has increased dramatically in the past decade. However, an increasing number of contracts appear to have been poorly drafted and extremely one-sided. In many cases producers do not seem to be aware of the terms to which they are actually agreeing. It is only after the fact that an attorney is brought into the picture and asked by the producer to "fix" the problem.

The past few years have also seen numerous attempts to provide legislative "fixes" to these contracting problems. While in most cases the intention behind such legislation is good, the solutions can often end up causing many more problems than it actually fixes. This does not include the many unintentional problems that, such fixes may cause. Before legislative solutions are pursued, they should be well thought out as to all possible consequences.

At the same time there are remedies that it appears only legislation will solve. While unequal bargaining power cannot, and should not, be "fixed" through legislation, legislative policies that ensure the rights of producers to seek professional services seem to be needed. Legislation increasing the producers' right to bargain is also necessary.

Producers need to understand a contract is a legally binding document that comes with certain obligations. The time to question and possibly change these obligations is before the contract is signed, not after. Educational efforts should be increased not only by law associations, but also by adult educational programs, university extension programs, and by attorneys themselves to impress upon producers the importance of having a good contract before signing, rather than trying to fix problems after signing.

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112. Iowa Attorney General, Environmental and Agricultural Law Division, *at* http://www.state.ia.us/government/ag/farm.htm. While this website is Iowa specific, it has many different types of contracts in use today by major companies. Contract provisions can be compared and one can also determine the types of clauses commonly used by companies today. In addition, the website offers many consumer tips and points that are applicable in most states.

Producers also need to be aware of the possible extensive liabilities they may be agreeing to in the contract. Often times the liabilities may end up being significantly greater than the entire value of the contract itself. Most producers have no idea to what extent they become liable under many of these contracts until a problem occurs. Care needs to be taken to not "save" the producer from these types of risks. Rather, the goal should be to empower producers to understand these risks so that proper management decisions can be made.

As agriculture moves away from a commodity production system to a product specific industry, contracting will increase. It will only be a few years before the majority of all agricultural production in the United States is done under some type of contract. Everyone involved in agriculture needs to take responsibility to ensure that producers have real freedom in determining whether they want to enter into specific contracts with the knowledge of not only the benefits but also the risks associated with these agreements.