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State Regulation of Agricultural Production Contracts

NEIL D. HAMILTON*

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* Ellis and Nelle Levitt Distinguished Professor of Law and Director of the Agricultural Law Center at Drake University, Des Moines, Iowa. This Article was prepared for the 15th Annual Educational Conference American Agricultural Law Association, October 1994, Memphis, Tennessee. Portions of this material also appear in Chapter 12 of NEIL D. HAMILTON, A FARMER'S LEGAL GUIDE TO PRODUCTION CONTRACTS (Farm Journal Publishing 1995). The Author would like to thank his research assistant Jill Swanson Martone for her help in researching state contracting laws and his colleagues, J.W. Looney, Christopher Kelley, Randi Roth, and Marcus Van Pelt, for their comments and ideas on contract regulation. The observations, conclusions, and any errors are, of course, the Author's.

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I. INTRODUCTION: WHY REGULATE AGRICULTURAL PRODUCTION CONTRACTS?

American farmers have many different opportunities available to them in determining which crops to raise, how to market what they raise, and how best to achieve profitability for their operations. One tool that more and more farmers are being asked to consider using is to raise crops or livestock under contract for someone else.[1] The party offering the contract could be a seed company, a food processor, or a vertically-integrated livestock processor. The reasons the contractors want to use contracts will vary, but it is usually because they are seeking a stable supply of a particular commodity or because

1. The legal issues which can arise in use of such agreements are the subject of Neil D. Hamilton, *Why Own the Farm If You Can Own the Farmer (and the Crop)?: Contract Production and Intellectual Property Protection of Grain Crops*, 73 NEB. L. REV. 48 (1994).

they need someone to provide labor and services to raise livestock they own. Such agreements, which will be referred to throughout the Article as production contracts, will play an increasingly important role in American agriculture as more companies use contracts to make linkages with farmers. Production contracts are an exciting new legal development for farmers and can have many important impacts on farming operations. Increased use of production contracts will mean more farmers are going to be faced with deciding whether to enter such agreements. Some farmers will call their attorneys for advice in considering the risks and benefits of contracting, which means the agricultural law community must understand the legal issues relating to such contracts.

Production contracts can provide exciting opportunities to increase farm markets and profits, but they can also greatly change the way farm decisions are made and can present significant new legal and financial risks many farmers have not encountered before. In most cases, the company asks the farmer to sign a printed form contract with little or no opportunity to negotiate different terms. The contracts are usually developed in situations where there is great inequality in bargaining power and information between the parties. Such imbalances can create the opportunity for companies to take unfair advantage of farmers with one-sided, poorly-written, or oppressive contracts.

These are among the reasons why an increasing number of states have enacted or considered legislation or regulations concerning the use of agricultural production contracts. The purpose of this Article is to consider the development of the use of production contracts and to review how and why state legislation may be needed. The Article begins with a brief introduction to production contracts and considers the options for how and why states might regulate them. The Article looks at laws from Minnesota, Wisconsin, and Kansas to consider what has been done. Recent proposals from states, including Iowa, North Dakota, Alabama, and Louisiana, are also discussed to illustrate other ideas under consideration. The Article takes a brief look at the potential for federal action in this area, in particular, the

Packers and Stockyards Administration's authority to address poultry contracts. The Article concludes by considering some alternatives to state legislation which may help ensure fairness and equity in the use of production contracts.

A. What is Behind the Trend Toward Contract Production?

Access to improved genetic materials, new technologies, and profitable markets plays a fundamental role in the productivity of American agriculture. If breeders can produce better, high-yielding seeds or faster-growing animals, then farmers prosper, as do companies. History shows that if farmers can locate new marketing opportunities which allow them to increase returns, they will explore them. The marketing of corn for ethanol is a good example. Another factor in modern agriculture, especially in light of the rising capital costs of farming and the potential for market fluctuations, is the issue of risk management. All parties involved in agriculture, from producers to the largest processors and food marketers, are looking for ways to reduce or manage the financial risks associated with their activities. The use of production contracts relates to all of these factors—access to technology, market development, and risk management.

Several developments are contributing to the rapid increase in the use of production contracts in American agriculture. Production contracts have traditionally been used in the reproduction of seeds and for many vegetable and horticultural crops. In addition, in the last thirty years, most of the poultry production in the United States has been reorganized around production contracts by large, vertically-integrated operations. Today, over 90% of broilers produced in the United States are raised under contract, with the remaining share owned directly by large processors who are vertically integrated, owning the bird from the time it is hatched until it is sold to the consumer. However, use of contracting is now spreading into other commodities, most notably swine and grain crops, as companies involved in processing or marketing these products decide to become more directly involved in production.

The trend toward contracting has recently received increased

public attention in relation to changes in midwestern swine production. A recent report estimates that over 20% of swine are now produced under contract, up from only 2% in 1980. The same report indicates that 7% of both food grain and feed grain production is raised under production or marketing contracts, an increase from less than 2% in 1970.[2] Some observers estimate that by the year 2000, as much as 20% of the nation's corn and soybean crops could be value-added or identity-preserved crops, which would mean a sharp increase in the use of contracting in grain production.[3]

In recent years, several large agricultural input supply companies, such as DuPont, have moved into production of identity-preserved or value-added crops. In 1993, DuPont Company, traditionally known for producing agricultural chemicals, announced it was expanding into identity-preserved production of grain. The company constructed a 35,000-square-foot office-laboratory in Des Moines, Iowa, and opened a new division called Optimum Quality Grains (OQG) to contract with producers to raise value-added grains. The company is collaborating with several major seed companies, including Asgrow Seed and Holden Seed, to develop corn and soybeans with characteristics sought by end users. In 1993, the company contracted with growers to plant 25,000-30,000 acres of grain. The most important crop being produced so far is high-oil corn, much of which is being marketed directly to poultry producers in Mexico.[4] "Value-added" or "identity-preserved" production often relies on using production contracts with growers who produce the "end-use-tailored varieties" under contract for the seed com-

2. For a discussion of current national data on contracting in American agriculture, see Patrick M. O'Brien, *Implications for Public Policy*, *in* FOOD AND AGRICULTURAL MARKETS: THE QUIET REVOLUTION 296, 301 (Lyle P. Schertz & Lynn M. Daft eds., 1994). Mr. O'Brien is an economist with the Economic Research Service of the United States Department of Agriculture.

3. *See* Greg D. Horstmeier, *Farming By Invitation Only*, TOP PRODUCER, Feb. 1993, at 36.

4. *See* Veronica Fowler, *DuPont Lab Set for Iowa*, DES MOINES REG., June 4, 1993, at 8S; Dale Johnson, *DuPont to Start Value-Added Grain Market in Iowa*, IOWA FARM BUREAU SPOKESMAN, June 12, 1993, at 3; Karol Wrage, *DuPont Enters the Seed & Grain Industry*, SEED & CROPS INDUSTRY, Dec. 1992, at 8.

pany or the end user. Many farmers and companies have greeted contract production of "identity-preserved" crops as the future of agriculture, noting it will create opportunities for new markets and additional price premiums for farmers. Use of contracts to control production is part of a larger trend throughout agriculture, a trend which has been labeled as part of the industrialization of agriculture.[5]

B. Defining the Term—What is an Agricultural Production Contract?

In order to understand state legislation of "agricultural production contracts," it is necessary to know what is meant by the term. There is not a good working definition of "production contract" in any dictionary or statute. However, the following definition was developed by considering how production contracts work: an agricultural production contract is a legally binding agreement of a fixed term, entered before production begins, under which a producer either agrees to sell or deliver all of a specifically designated crop raised on identified acres

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5. The use of contracting is part of the ongoing process of the industrialization of agriculture. Perhaps the best description of industrialization and how it relates to contract production is found in Thomas Urban's article, *Agricultural Industrialization: It's Inevitable*. Mr. Urban, the president of Pioneer Hi-Bred International, Inc., the world's largest marketer of agricultural seeds, describes industrialization as the process whereby the production of goods is restructured under the pressure of increasing levels of capital and technology in a manner which allows for a management system to integrate "each step in the economic process to achieve increasing efficiencies in the use of capital, labor, and technology." Thomas N. Urban, *Agricultural Industrialization: It's Inevitable*, CHOICES, 4th Quarter 1991, at 4. He has this to say about the change: "Production agriculture in the Western World is now entering the last phase of industrialization—the integration of each step in the food production system. The production segment is rapidly becoming part of an industrialized food system." *Id.* Without advocating the changes, Urban views the development optimistically, noting it will maximize uniformity and predictability in agricultural production allowing for branding of food and marketing of "identity-preserved" products, a development his plant breeders are actively pursuing. He believes it will attract new capital to agriculture and lead to more rapid adoption of new technologies. He is also optimistic it will create opportunities for agriculture—possibly giving rise to a new family farm—one that is "dependent as much on financial management skills *and contract marketing* as on production and agronomy know-how . . . [a] 'super farmer' who will respond quickly to new opportunities to increase income and reduce risk." *Id.* at 5 (emphasis added).

in a manner set in the agreement to the contractor and is paid according to a price or payment method, and at a time, determined in advance, or agrees to feed and care for livestock or poultry owned by the contractor until such time as the animals are removed, in exchange for a payment based on a formula using the performance of the animals. Under the agreement, the producer typically has no legal title to the crop or livestock but, instead, is a bailee, and the producer is declared to be an independent contractor and not an employee or joint venturer with the contractor. Although this definition is complicated, it is easier to understand broken down into the main elements: (1) the agreement is legally binding between two parties, the producer and the contractor; (2) the agreement is for a fixed term, either one crop a year or a fixed number of production cycles; (3) the agreement is signed or entered into before production begins; (4) the contract calls for either the production of a crop or the care and feeding of animals on land owned or controlled by the producer; (5) all of the animals or all of the crop from a designated number of acres, which may be specifically identified, will be delivered or sold to the contractor; (6) the crops or livestock must be produced or cared for according to the terms of the agreement to be acceptable for payment; (7) the producer will be paid in an amount and at a time according to a schedule or term agreed to in advance, which may include premiums or deductions for quality or performance; (8) the producer generally has no legal title to the crop or livestock but is considered to be in a bailment relation with the contractor owner; and (9) the producer is described in the agreement as an independent contractor rather than an employee, partner, or other joint venturer with the contractor.

Production contracts are not a new legal relation. In 1963, Ewell Paul Roy wrote one of the first books on the subject, *Contract Farming, USA*.[6] Even swine production contracts, much in the news today, have been in existence for almost fifty years.[7] The importance of production contracts is that

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6. EWELL P. ROY, CONTRACT FARMING, USA (1963).

7. *See, e.g.*, *In re* Bauldry, 78 F. Supp. 412, 416 (N.D. Iowa 1948) (regarding an

they are a unique type of legal agreement that involves the creation of a different relation between the parties. As is apparent from the elements listed above, production contracts involve a much greater sharing of both control and risk between the parties than most traditional marketing tools do.

C. Distinguishing Production Contracts from Other Agricultural Contracts

There is a rich variety of different marketing methods and forms of contracts farmers can use for selling crops and livestock. These include the following: (1) forward contracts—which involve the sale of a fixed amount of the actual commodity at a set price, at some point in the future; (2) marketing agreements—in which a member of a cooperative agrees to sell all of a particular commodity produced through the organization; and (3) futures contracts—which involve the sale or purchase of a standardized quantity of a commodity for future delivery on a regulated commodity exchange. These forms of marketing contracts are important, but they *are not* the subject of the Article or the legislation in question. While each type of marketing arrangement differs from the others, they all differ from production contracts in many key ways. The most important distinctions are that these agreements do not include producing the commodity under the control of another, they do not involve the passage of title to the commodity before it is produced, and they may not even necessarily require production or sale of any commodity by the producer. The key similarity is that these different contracts are all forms of marketing arrangements for the commodities produced and owned by the farmer. In contrast, the key distinction of a production agreement is the sale or production of specified commodities, raised in designated manners, to a party under an agreement signed in advance. The distinctions are what make a production contract a unique and different form of legal rela-

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early swine production contract case which involved the issue of whether the producer actually owned the swine).

tion.

II. WHY STATES ARE CONSIDERING LEGISLATING USE OF AGRICULTURAL PRODUCTION CONTRACTS

To understand the role of legislation concerning production contracts, it is necessary to consider why states might want to enact laws to regulate contracting practices and the various options available to the states. The increased use of contract production has begun to receive attention in the agricultural press. Recent articles have ranged from general discussions of the trend, designed to educate potential players,[8] to articles sounding the alarm about the types of problems production contracts can present for farmers.[9]

The main issues which have triggered public debate and legislative proposals are questions about the fairness of the contracts being offered producers and the economic effect of vertical integration in agriculture. Critics charge that contracting can reduce farmers to low-wage employees who assume most of the financial risks without the potential for increased returns.[10] However, there is some information that indicates many producers are happy with contracting. The article *"Super Farmers" Grab Crop Contracts*[11] discusses a survey done by a graduate student, Karen Coaldrake, at the University of Illinois' Food and Agribusiness Management Program. Of the 250 farmers surveyed in east-central Illinois, over 30% had at least one production contract. While growers noted the difficulties in satisfying contract terms, such as high quality standards, over 90% of those with contracts expressed an intention to continue contracting.

Interestingly, some agribusiness publications, most notably

8. *See* Christopher R. Kelley, *All Sides Should Know Pitfalls of Agricultural Contracting*, FEEDSTUFFS, June 6, 1994, at 19.

9. *See* Laura Sands, *Time Bombs in Your Contract: What You Don't Know About Your Specialty-Crop Contract Could Hurt You*, TOP PRODUCER, Mid-Feb. 1994, at 13.

10. *See, e.g.*, Dan Looker, *Hog-Feeding on Contract: Safe Money or Servitude?*, DES MOINES REG., Aug. 15, 1989, at 1A.

11. Robin Hoffman, *"Super Farmers" Grab Crop Contracts*, TOP PRODUCER, May-June 1992, at 24.

Feedstuffs, have published editorials raising questions about the impact of contracting on the larger agricultural community. On April 18, 1994, *Feedstuffs* ran an editorial, *Contracts Will Change Fundamentals of Agriculture*, which raised questions about the impact contracting would have on the traditional price discovery functions of the open market. The editorial ended:

> The increasing use of contracts is changing everything we know about agriculture—growing commodities, shipping them, selling them and using them. Everything is changing, including the rules and procedures that keep the markets honest. We must start thinking now how we will adapt to the changes—whether we include more government or better use of private-sector devices—to keep our system functioning properly.[12]

Three months later, on July 18, 1994, *Feedstuffs* ran another editorial, *Industry Must Develop Contract Policemen*, which raised concerns about how contracting presents opportunities for unfairness in the relations between contractors and producers.[13] The editorial noted, "The contracts might be written so that they are completely fair and cover all possibilities, but chances are they won't be."[14] The editorial raised concerns that, if contracting practices are perceived as unfair to some parties in the system, there is greater likelihood for government intervention and regulation of practices. The editorial stated:

> We need someone outside of government to come forward now and establish the forum for deciding such issues. The demand for that sort of activity must be growing rapidly, because the specialty crop market is becoming quickly established. Also, no one wants the trouble that could come from poor—or even perceived to be poor—contracts. The poultry growers are already teaching agriculture what can happen if one side of the contract believes it has been

12. *Contracts Will Change Fundamentals of Agriculture*, FEEDSTUFFS, Apr. 18, 1994, at 8.

13. *Industry Must Develop Contract Policemen*, FEEDSTUFFS, July 18, 1994, at 8.

14. *Id.*

treated unfairly.[15]

The editorial concluded by urging the industry to develop a system to police use of contracts so the function would not fall into the hands of the government.

The reasons that states may consider when enacting legislation on production contracts vary with the states. Southern states are considering such laws because of concerns about problems in the broiler industry and the results of efforts such as those by the National Contract Poultry Growers' Association (NCPGA).[16] States in the Midwest, such as Iowa and Kansas, are considering such issues because of concern about increased vertical integration and use of contracting in the pork industry. In other states, Wisconsin and Minnesota for example, legal reforms were enacted in response to problems which developed in contracting for other commodities, such as vegetables. The situation in the broiler industry is an example of why states may consider legislation. Consider these recent developments in poultry production.

A. Increase in Litigation Involving Poultry Contracts

A rapidly growing number of court cases are being filed in disputes over poultry growing arrangements. These cases could begin to play a significant role in defining the rights and obligations of both growers and integrators and are important in understanding livestock contracting. In the last three years there has been an explosion in litigation involving poultry contracts.[17] Several recent lawsuits have resulted in juries awarding growers multi-million-dollar damage awards. The decisions have usually involved cases where it was shown that contractors' employees engaged in schemes to intentionally defraud growers, such as by misweighing birds and feed.[18]

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15. *Id.*

16. *See infra* text accompanying notes 27-28.

17. *See* Juliet M. Tomkins, *Poultry Litigation Update*, 8 MINN. FAM. FARM L. UPDATE, Autumn 1993, at 9-11.

18. *See* Clay Fulcher, *Vertical integration in the poultry industry: the contractual relationship*, AGRIC. L. UPDATE, Jan. 1992, at 4: Steve Marbery, *Lawsuit shows tension*

Contract production and the treatment of growers by poultry integrators were major issues in the Alabama case of *Braswell v. ConAgra, Inc.*[19] Braswell and other contract growers of broilers brought suit, alleging fraud and breach of contract by ConAgra employees for deliberately misweighing trucks and, as a consequence, paying growers less than the growers were entitled to.[20] A federal district court jury awarded plaintiffs $4.55 million in compensatory damages and $9.1 million in punitive damages.[21] The judge reduced the compensatory damages by $111,589.51 but awarded $1,634,026 in prejudgment interest on the compensatory damages.[22] The United States Court of Appeals for the Eleventh Circuit heard the appeal of the decision and affirmed the district court's decision and damage award.[23] The award represents on of the largest financial recoveries ever received in a contract production case.

While the lawsuits being filed across the country are all different, depending on the facts and contracts involved, there are a number of common themes reflected in the suits. The types of issues or claims commonly made in the cases include the following:

(1) Early contract termination before the investments in buildings were paid off;
(2) Company requiring additional improvements at grower's expense;
(3) Manipulation of inputs such as birds and feed, as to quality, cost, and amount;
(4) Unprofitable contracts, the claim being the company

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between integrators, poultry growers, FEEDSTUFFS, May 17, 1993, at 9; Steve Marbery, *Poultry growers suing contractors, organizing for clout*, FEEDSTUFFS, Jan. 18, 1993, at 22.

19. 936 F.2d 1169 (11th Cir. 1991). For a further discussion of this case, see Randi I. 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 (1995).

20. *Braswell*, 936 F.2d at 1172.

21. *Id.*

22. *Id.*

23. *Id.*

knew the contract was unprofitable;
(5) Underweighing of poultry and feed;
(6) Failure to make payment, which can lead to an administrative action;
(7) False rankings under the system companies use to pay growers and terminate contracts;
(8) Retaliation against growers by terminating contracts for complaining and/or organizing;
(9) Being stuck with one company because of a lack of local competition; and
(10) Grading problems relating to payment factors, such as the number of condemned birds.[24]

Of course, in any lawsuit filed by a disgruntled grower, the defendant contractor will generally deny most, if not all, of these allegations. Companies involved in poultry contracting argue the vast majority of growers are pleased with the terms of the contracts and happy with their companies. They claim the recent filing of lawsuits represents a few isolated incidents and does not reflect the industry practices. Poultry integrators argue they have a stake in the financial success of growers and want to maintain sound working relations for the benefit of both parties to the relationship. In recent years, several large integrators have taken steps to improve communication with growers. For example, the poultry giant Tyson Foods, Inc. recently completed a survey of all its growers to determine their satisfaction with the current contracts and relations. Also Wayne Poultry, owned by Continental Grain, recently made several changes in its contracting system, such as agreeing not to compare employee growers in rankings with independent growers, to help address grower concerns.[25] The main argument of contractors that poultry contracts must not be that bad a deal is the number of people on the waiting lists who want to become growers.

Cases such as the *Braswell* decision in Alabama and a

24. Adapted from Randi I. Roth, *Contract Farming Breeds Big Problems for Growers*, 7 FARMERS' LEGAL ACTION REP., at 12, 13-15 (1992).

25. *See Wayne Farms takes steps to improve grower relations*, POULTRY GROWERS NEWS, Oct. 1993, at 1.

similar state district court verdict in Mississippi (a decision now on appeal), which awarded six growers over $16 million in damages against Wayne Poultry, have resulted in an increase in new cases. Poultry growers who are unhappy with how they have been treated under their contracts appear to be responding to such recoveries by deciding to go to court.[26] At this time, there are more than a dozen major court cases being considered by courts in southern states dealing with allegations of misconduct by contractors and the rights of poultry growers. This increase in litigation has also resulted from the action of some poultry growers to organize and stand up for their legal rights. There are now several grower-oriented attorneys and legal action groups becoming more directly involved in contracting issues. Organizations such as the Rural Advancement Fund International (RAFI) in Pittsboro, North Carolina, and Farmers' Legal Action Group (FLAG) out of St. Paul, Minnesota, have played a leading role in helping organize and educate growers.

B. *Poultry Growers Form National and State Organizations*

The second important development in the poultry industry in recent years has been the success of growers organizing at the state and national levels to obtain more bargaining power and fairer and more profitable contracts. The recent formation of the National Contract Poultry Growers' Association (NCPGA) is the most significant result of the movement. This development, which has also seen the creation of state grower groups, is important in providing growers a stronger voice in dealings with contractors and in giving members the confidence and knowledge which comes from sharing common experiences with others.[27] The NCPGA has been active in promoting legis-

26. *See* Charles Johnson, *Ruffled Feathers: Littered with Problems, The Poultry Industry Can Teach Us Plenty About Contract Production*, FARM J., May/June 1994, at 14.

27. *See* Robert H. Brown, *Contract poultry growers begin nationwide organizing*, FEEDSTUFFS, Sept. 7, 1992, at 3; Charles Johnson, *Uproar in the chicken house*, FARM J., Feb. 1994, at AC-1; Steve Marbery, *Poultry growers suing contractors, organizing for clout*, FEEDSTUFFS, Jan. 18, 1993, at 22.

lation on growers' rights and has helped introduce legislation in North Carolina, Oklahoma, Alabama, Mississippi, Florida, and Louisiana. The organization has helped growers obtain information and advice about contracting matters and has helped obtain lower-priced inputs such as insurance and equipment. The organization has also helped growers contact attorneys who are interested in pursing possible legal claims growers might have. One important activity of the organization is the publication of *Poultry Growers News*, a monthly newsletter for members. The creation of the NCPGA and its continued growth as an economic and political force will undoubtedly impact the actions of contracting companies.[28]

III. Legal Options for States to Regulate Contract Production

Before reviewing legislation that has been enacted or proposed in selected states, it is helpful to consider the range of legislative options available to address concerns about use of production contracts and vertical integration in agriculture. After reviewing this array of possible approaches, it is clear there are many legislative opportunities for states to employ with varying levels of state scrutiny of contracting practices.

A. Direct Regulation of Contract Production

The most direct way to address contract production is to specifically regulate the practice. There are at least four different approaches which could be considered. The first approach, known as direct prohibition, which has not been enacted in any state with the exception of Iowa's restriction on packer feeding of livestock or contracting for pork, would ban the use of contract production for certain commodities.

The second approach, known as regulating contracting methods, would establish minimum requirements for parties who engage in contracting or would require inclusion of certain

28. For more information about NCPGA, contact John Morrison, Executive Director, P.O. Box 824, Ruston, LA 71273, or call 1/800-259-8100, FAX 318/251-2981.

terms in contracts used. An important component of direct regulation is empowering state officials to investigate contracting practices and to enforce the law. Several approaches are possible for regulating contracting methods. First, standardized contract terms and producer education would establish a standardized form contract for use in the state, similar to what was proposed in Iowa in 1990. It could require growers be given information concerning contract terms. Additionally, regulating the contract relation would establish legislative standards for contract production relations. This could include mandatory disclosure requirements, minimum duration, termination procedures, or other procedural protections, such as a seventy-two-hour cooling off period in which growers could reject a contract. Both approaches are found in the Wisconsin vegetable procurement rules. Further, a state may impose regulations regarding mandatory dispute resolution. While a state may not directly regulate the terms of production contracts, it could require legal disputes involving contracting to be submitted to mediation prior to filing a court action. In 1990, Iowa became the first state to require mediation to resolve disputes involving livestock production contracts. Under the Iowa law, a farm resident or other party may request mediation of a dispute involving "[t]he performance of either person under a care and feeding contract, if both persons are parties to the contract."[29] The term "care and feeding contract" is defined as "an agreement, either oral or written, between a farm resident and the owner of livestock, under which the farm resident agrees to act as a feeder by promising to care for and feed the livestock on the farm resident's premises."[30] Under the Iowa law, mediation is mandatory because courts cannot hear such cases until the parties present a release obtained from the mediation service. Finally, a state could identify certain "unfair practices" and prohibit their use in contracts. The Wisconsin vegetable contracting rules utilize this approach. The law proposed in Florida provides that there can be no contract termination with-

29. IOWA CODE ANN. § 654B.1(2)(a) (West 1995).

30. *Id.* § 654B.1(1).

out "due cause."

A third approach involves contract reporting requirements. In an attempt to gather more information about the extent of contracting in the state, states could require annual reports by contractors. Iowa currently requires such reports for swine and poultry contractors.[31]

A fourth approach would be a system to register entities engaged in contracting. Licensing would provide a mechanism to more directly control use of certain practices or require use of standardized contracts. Many state payment protections require licensing of parties who buy agricultural commodities. This means the application of laws such as state grain dealer statutes could provide a mechanism to regulate contracting practices beyond simply providing payment protections.

B. *Indirect Regulation of Contract Production*

Another approach to regulating use of contracting is to establish indirect methods of controlling its use or protecting the interests of producers who sign contracts.

1. Producer Bargaining Protections

Increased use of contract production raises concerns about the ability of contract producers to organize to bargain for more favorable contract terms. Several states, including Maine and Washington, have enacted state "Agricultural Marketing and Fair Practices" acts to protect the interests of producers who form associations to bargain for better contract terms.[32] An important aspect of such protections is a requirement that contractors not discriminate against growers who have joined such an organization.

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31. *See id.* § 9H.5B (West Supp. 1994).

32. *See* ME. REV. STAT. ANN. tit. 13, §§ 1953-1965 (West 1964); WASH. REV. CODE ANN. §§ 15.83.005-.905 (West 1993).

2. Using Contracts to Impose Environmental Requirements

In 1992, Arkansas considered proposed regulations on the disposal of waste from poultry houses. Poultry integrators made a proposal to include in their production contracts a requirement that growers comply with all state environmental rules. The provision was criticized by growers, who perceived it as a way for integrators to claim compliance with state environmental rules while shifting responsibility and costs for compliance to growers. In 1994, Kansas enacted such a provision for swine contracts, as discussed below.[33]

3. Regulating Contracts Through Payment Protections

Laws regulating the payment practices of grain dealers and wholesale produce buyers are common. The laws often do not deal directly with production contracts, but they provide important protections to growers in such relations because many of the laws clearly apply to production contract relations, regardless of whether the relation is called a sale or a service. The laws could provide the basis for the state to enact administrative rules to regulate the practices used by such parties.

C. Regulating Contracting Through Anti-Corporate Farming Laws

Nine states in the Upper Midwest and Great Plains have enacted some form of corporate farming law, either through legislation or constitutional amendment. These states are South Dakota, North Dakota, Minnesota, Wisconsin, Nebraska, Iowa, Missouri, Kansas, and Oklahoma.[34] The corporate farming

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33. *See infra* text accompanying notes 41-43.

34. *See, e.g.*, IOWA CODE ANN. §§ 9H.1-.15 (West Supp. 1994); MINN. STAT. ANN. § 500.24 et seq. (West 1990); MO. ANN. STAT. § 350 (Vernon 1991); NEB. CONST. of 1875, art. XII, § 8 (1982); OKLA. STAT. ANN. tit. 18, §§ 951, 954 (West 1986 & Supp. 1995); *see also* Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 DRAKE L. REV.

laws utilize two different forms of restrictions, focusing either on corporate involvement in "farming" or on corporate ownership of agricultural land. While each law contains a variety of exceptions, such as for family farm corporations or authorized corporations, the laws restrict the activities of certain business entities, generally large, publicly traded corporations. Both forms of corporate farming laws are important when considering possible legislative restrictions on contracting. First, laws such as Missouri's, which provides that "no corporation not already engaged in farming shall engage in farming; nor shall any corporation, directly or indirectly, acquire, or otherwise obtain an interest, whether legal, beneficial or otherwise, in any title to agricultural land,"[35] could be interpreted as prohibiting contract feeding of livestock by a corporation. The argument made is that the ownership of the livestock subject to the feeding contract is a form of engaging in agriculture; however, state officials have not taken that approach to enforcing the law. Second, laws such as Iowa's, which provide that a corporation "shall not, either directly or indirectly, acquire or otherwise obtain or lease any agricultural land in this state[,]"[36] could be interpreted as prohibiting contracting by restricted corporations, but only if contracting was viewed as an indirect form of land ownership. The argument is that the contract feeding of livestock allows the corporation to "indirectly . . . acquire . . . agricultural land."[37] This is a much more difficult legal argument.

In recent years, several states, most notably Oklahoma and Missouri, have amended their corporate farming laws to provide specific exemptions to allow corporate ownership of livestock feedlots and confinement facilities.[38] The amendments

393 (1992). For a discussion of how corporate farming is regulated in Canada, see Jane M. Glenn, *The Legal Status of Agro-Industrial Enterprises*, CONTEMP. L. 274 (Canadian Reports to the 1990 International Congress of Comparative Law 1990).

35. MO. ANN. STAT. § 350.015 (Vernon 1991).

36. IOWA CODE ANN. § 9H.4 (West Supp. 1994).

37. *Id.*

38. For example, in 1993, Missouri amended its corporate farming law by exempting three counties in the north-central part of the state to accommodate the plans of a

have increased tension in other states, such as Iowa, over what impact corporate farming laws may be having on the future of the swine industry.[39]

D. Direct Regulation of Packer Livestock Contracting and Feeding

One growing use of production contracts is by packers and processors of livestock products. There are several methods that states have considered to address concerns related to such forms of vertical integration activities.

1. Restrictions on Packer Feeding

Iowa and Kansas are the only two states in the nation to have ever specifically enacted prohibitions on packer feeding. The Nebraska law, however, which would prohibit most packers from engaging in contract feeding if the packers are corporations otherwise restricted from engaging in agriculture, is also an obstacle to packers interested in contracting.[40] The Iowa law, enacted in 1975, prohibits packers from direct feeding of beef and swine. It additionally prohibits packers, except cooperatives, from contract feeding of swine.[41] The Kansas law was enacted in 1988 and prohibited packers from contracting for the feeding of swine or from owning hogs directly.[42] The Kansas bill, however, was substantially amended in 1994.

In 1994, Kansas became the latest midwestern state to make significant changes in the corporate farming law. The

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large swine company, Premium Standard Farms. MO. ANN. STAT. § 350.016 (Vernon Supp. 1994). Oklahoma amended its corporate farming law in 1991 to make it possible for corporations to raise poultry and swine in the state. *See* OKLA. STAT. ANN. tit. 18, § 954 (West Supp. 1995).

39. *See* Libby Powers, *Second Thoughts: Midwestern States Begin to Rethink Their Anti-Corporate Farming Laws*, TOP PRODUCER, Mar. 1993, at 16.

40. *See* NEB. CONST. of 1875, art. XII, § 8(1) (1982). For a discussion of the constitutionality of such laws, see MSM Farms, Inc. v. Spire, 927 F.2d 330 (8th Cir. 1991).

41. IOWA CODE ANN. § 9H.2 (West Supp. 1994).

42. *See* KAN. STAT. ANN. § 17-5905 (1988).

Seaboard Corporation's decision to construct a large swine packing facility in Guymon, Oklahoma, led Kansas officials to amend the law so producers could have the opportunity to feed pigs for Seaboard and other packers. In April, 1994, Kansas enacted legislation to amend the provisions of the state's corporate farming law, which had prohibited meat processors and corporations from engaging in swine production.[43] The 1994 amendments authorize county governments to allow corporate hog operations. The issue must be put to a vote of county citizens only if, within sixty days of the county decision, a petition protesting the decision is signed by five percent of the "qualified electors of the county" (based on the number who voted in the preceding election for secretary of state). The law clears the way for corporate hog farming, through either direct ownership or the use of production contracts. Several Kansas counties have already acted to authorize such ventures, although several counties voted down such efforts in the November 1994 elections. The law specifically protects the use of swine production contracts from being considered a violation of the corporate farming law by providing such contracts "shall not be construed to mean the ownership, acquisition, obtainment, or lease, either directly or indirectly, of any agricultural land" in the state.[44]

In 1990, a bill to prohibit packers with sales of over $10 million from "owning livestock for contract feeding purposes" failed to pass in South Dakota.[45] In 1992, a bill was introduced in the Indiana legislature to prohibit packers with annual sales greater than $4 million from owning livestock or from "contract[ing] for or purchas[ing] more than ten percent (10%) of the packer's annual livestock purchases from one (1) person."[46] The bill was not enacted.

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43. The legislation, Senate Bill No. 554, was signed by the Governor, who had vetoed a version of the amendment in 1993. S. 554, 75th Leg., 2d Reg. Sess., 1994 Kan. Sess. Laws ch. 130.

44. *See id.* § 4, amending KAN. STAT. ANN. § 17-5904(b).

45. *See* S. 203, 67th Leg., 1st Sess. (1992).

46. *See* H. 1135, 107th Leg., 2d Reg. Sess. (1992) (introduced by Representative Stephan).

2. Packer Reports on Contract Feeding

One method of obtaining information on the extent to which packers are involved in contract feeding is to require annual reports of their activities. In 1991, the South Dakota legislature enacted a law that requires any packer with gross annual sales of more than $100 million to

> annually report or submit a list of all livestock producers with whom the packer has entered into livestock contracts or amended existing livestock contracts during the reporting year, copies of standard contracts used by the packer in South Dakota during the reporting year, and information by plant location on the type of livestock contracted or purchased in this state, including method of purchase, price, distance transported, weight, sex, species, other characteristics, grade and yield discounts, prices paid to producers, and other discounts or premiums.[47]

3. Filing of Contract Feeding Agreements with State Officials

Another method of obtaining information about contract feeding in a state is to require parties using contracts to file copies of them with the state. In 1990, Minnesota became the first state to do this when a provision was added to the Minnesota Packers and Stockyards Act which requires a packer to file with the Commissioner of Agriculture "a copy of each contract a packer has entered into with a livestock producer and each agreement that will become part of the contract that a packer has with a livestock producer for the purchase or contracting of livestock."[48] A bill introduced in Indiana in 1992 also included a provision on packer reporting of contracts: "Each packer shall file annually with the commissioner a copy of each contract or agreement between a packer and a livestock

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47. *See* S.D. CODIFIED LAWS ANN. § 40-15A-14 (1991).
48. MINN. STAT. ANN. § 31B.03 (West Supp. 1995).

producer."[49]

IV. State Laws Enacted to Regulate Use of Production Contracts

While laws regulating contract production have only been enacted in three states—Minnesota, Wisconsin, and Kansas—many other states have considered legislative proposals. In addition, agencies in several states have enacted administrative rules that regulate the use of certain contracting practices.

A. The Minnesota Production Contract Law

In 1990, Minnesota became the first state to enact legislation directly regulating many of the provisions of agricultural production contracts.[50] The legislation was the result of a report prepared by the "Agricultural Contracts Task Force" created by the 1988 legislature to explore the subject. The task force met fifteen times in preparing its final report, which included a series of legislative proposals. The laws enacted as a result of the task force's effort establish a number of requirements for all "agricultural contracts."

(1) Dispute Resolution—The law requires that a "contract for an agricultural commodity between a contractor and a producer must contain language providing for resolution of contract disputes by either mediation or arbitration."[51]

(2) Recovery of Investment—When a producer is required by a contract "to make a capital investment in buildings or equipment that cost $100,000 or more and have a useful life of five or more years," the contractor must not cancel or terminate the contract until

> (1) the producer has been given written notice of the intention to terminate or cancel the contract at least 180 days before the effective date of the termination or cancellation . . . [except when the producer abandons the contract

49. *See supra* note 46, at § 13(a).
50. MINN. STAT. ANN. §§ 17.90-.98, § 514.945 (West Supp. 1994).
51. *Id.* § 17.91.

> or is convicted of an offense related to the contract business], and
> (2) the producer has been reimbursed for damages incurred by an investment in buildings or equipment that was made for the purpose of meeting minimum requirements of the contract.[52]

(3) Right to Cure—If the producer breaches the contract, the contractor must give the producer ninety days notice before terminating and must give the producer sixty days to correct the breach.[53]

(4) Parent Company Liability—Parent companies of subsidiaries licensed to purchase agricultural commodities are "liable to a seller for the amount of any unpaid claim or contract performance claim if the contractor fails to pay or perform . . . the contract."[54]

(5) Implied Promise of Good Faith—All agricultural contracts must be interpreted by the courts as including a statutorily-implied promise of good faith. If the court finds there has been a violation of the implied promise of good faith, the court may allow the party to recover good faith "damages, court costs, and attorney fees."[55]

(6) Return of Prepayments—

> If a producer makes a prepayment for agricultural production inputs that include but are not limited to seed, feed, fertilizer, pesticides, or fuel for future delivery, the producer may demand a letter of credit or bank guarantee from the provider of the inputs to ensure reimbursement if delivery does not occur.[56]

The Minnesota law creates a position within the Department of Agriculture "to provide information, investigate complaints arising from this chapter, and provide or facilitate dis-

52. *Id.* § 17.92 subd. 1.
53. *Id.* § 17.92 subd. 2.
54. *Id.* § 17.93 subd. 2.
55. *Id.* § 17.94.
56. *Id.* § 17.97.

pute resolutions" relating to contract production.[57] The law also authorizes the Department to adopt rules to implement the various contracting provisions.[58] In 1991, the Department adopted rules that provide further guidance on the interpretation of the provisions.[59] One requirement added by the rules is that contractors using written commodity contracts must submit samples of contracts they propose to offer producers for Department review at least thirty days prior to offering the contracts to producers for signature.[60]

The Minnesota law contains a number of important legal protections. The requirement of notice of termination and the right of a grower to cure any problem provide more security in the relations. Similarly, the prohibition of early termination of contracts requiring large investments addresses an issue of fairness raised by growers in a number of cases. Of course, there are weaknesses in the Minnesota law, as there are in any new legislative approach, but the Minnesota law is a valuable example of how states can address legal issues in contract production. It is no surprise the Minnesota law has served as a model for legislation considered in several other states.

B. Wisconsin Department of Agriculture, Trade and Consumer Protection Issues Rules Regulating Vegetable Procurement Trade Practices

The state of Wisconsin became the second state to enact significant restrictions on some forms of agricultural production contracting when the Department of Agriculture, Trade and Consumer Protection issued rules regulating vegetable procurement trade practices. The law became effective on January 1, 1993.[61] The rules were primarily designed to address the use of "passed acre" clauses. "Passed acre" clauses allow contrac-

57. *Id.* § 17.95.

58. *Id.* § 17.945.

59. Minnesota Administrative Code, Chapter 1572 Department of Agriculture, Agricultural Contracts.

60. *See id.* 1572.0020 Subpart 7.

61. WIS. ADMIN. CODE § Ag. 101 (Dec. 1992).

tors to determine that acres of vegetables otherwise suitable for harvest will not be harvested and that the producers will receive only partial payments from funds contributed to "passed acre pools."[62] The Wisconsin rules go much further than simply regulating this practice, however. The rules define "vegetable procurement contracts" and create a number of mandatory steps in the creation of such contracts.[63] In addition, the rules also prohibit use of certain contract provisions and establish a list of "prohibited practices" concerning the performance of such contracts. The rules define "vegetable procurement contract" as "an agreement between a contractor and a producer, under which the contractor buys vegetables from the producer or contracts with the producer to grow vegetables in this state."[64] The term "contractor" is defined as

62. In Myron Soik & Sons, Inc. v. Stokely USA, Inc., 498 N.W.2d 897 (Wis. Ct. App. 1993), growers of sweet corn brought a class action suit against Stokely, a canning company, over interpretation of their production contracts. The dispute arose over the amount farmers were paid for "passed acres," which are crop acres fit for harvest but not accepted by Stokely. *Id.* at 898. The contract specified that growers would be paid for "passed acres" from a fund created with contributions from growers and the company based on the total tons of harvested crop. *Id.* at 898-99. The contract provided that if the fund was not sufficient to provide full compensation for unharvested acres, the payments would be prorated. *Id.* at 899. Following harvest, the company notified the growers that the fund was insufficient for full compensation and that the payments would be prorated on a calculation not yet determined. *Id.* Shortly thereafter, a second letter and checks prorating payments at 53.49% were sent to growers. *Id.* At this point, the growers initiated action against Stokely on the basis that the payments were inadequate; however, some of the plaintiffs cashed the checks. *Id.* Stokely raised the defense that the checks had been calculated under the terms of the contract. Therefore, Stokely argued that when growers accepted the checks, this operated as an accord and satisfaction of the contract. *Id.* at 900. Stokely moved for summary judgment to dismiss all of the plaintiffs who had accepted the checks. *Id.* at 899. The trial court denied summary judgment after concluding that Stokely could not use accord and satisfaction as a defense. On appeal, however, the court of appeals reversed and remanded. The appellate court concluded that there was a dispute at the time the checks were cashed and that the letters and correspondence gave growers notice that the checks were meant as full payment for "passed acres." *Id.* at 901. The court ruled that Stokely could use accord and satisfaction as a defense, even though the letter accompanying the check made no specific reference to the provision or to the effect cashing the check would have on a grower's right to bring a subsequent claim. *Id.* The State of Wisconsin subsequently enacted administrative rules to limit the use of "passed acres" clauses.

63. WIS. ADMIN. CODE § Ag. 101.01(13) (Dec. 1992).

64. *Id.*

> a person who buys or offers to buy vegetables in this state from a producer, or who contracts or offers to contract with a producer to grow vegetables in this state, regardless of whether the contractor is located in this state or is engaged in food processing. "Contractor" does not include any of the following:
>
> (a) A person who procures vegetables primarily for unprocessed fresh market use and is licensed under the federal perishable agricultural commodities act, 7 USC 499.
>
> (b) A restaurant or retail food establishment that procures vegetables solely for retail sale at the restaurant or retail food establishment.[65]

A "producer" is "a person who produces and sells vegetables, or who grows vegetables under contract."[66] Under Rule Ag. 101.02, the following requirements are established for vegetable procurement contracts:

(1) Contracts Must be in Writing and Copies Given to Producers—First, every such contract "shall be in writing" and must include the name, address and telephone number of the contractor. The contractor must provide the producer with a copy of the signed contract.

(2) Seventy-Two-Hour Period for Producer to Cancel—Second, the rules give producers a minimum of a seventy-two-hour cooling off period, after receiving the signed contract, during which time producers "may cancel" the contract by mailing a written cancellation notice to the contractor. If the contract provides a later deadline for when the contract becomes effective, the cancellation must be prior to that deadline. The contract must clearly disclose the producer's right to cancel, the method for cancellation, and the deadline for cancellation.

(3) Terms Required to be Clearly Disclosed—The third major requirement under the rules is the identification of a list of terms which must be "clearly and conspicuously" disclosed

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65. *Id.* § Ag. 101.01(2).
66. *Id.* § Ag. 101.01(8).

in the contract. These include: (a) the amount which the contractor agrees to pay the producer, including payments for unharvested suitable acreage; (b) the amount to be paid, if any, for abandoned acreage (if no payment is given this fact must be clearly disclosed); (c) if either of the above amounts is variable, the contract must disclose the formula or method for determining the amounts; and (d) the contract must disclose every charge or deduction which may affect the net amount paid the producer.

(4) Disclosure of Participation in Unharvested Acreage Pool—If the contract requires a producer to participate in an unharvested acreage pool, the contract must clearly specify the terms and conditions of the pool, as regulated by the rules. The rule provides that, other than for contributions to the pool, contracts may not provide for deductions or reduced payments to a producer because of a contractor's obligations to other producers. The main goal of the Wisconsin rules was regulation of passed acre clauses and pool payment systems. The rules set out extensive, detailed procedures for such arrangements and restrict the amount of contributions producers can be required to make.

(5) Identification of Harvesting Responsibilities—Under the rules, each contract must clearly specify whether the producer or the contractor is responsible for harvesting the crop. If the producer is responsible for harvest, the contract cannot state or imply that the contractor will provide harvest equipment or services unless the contractor can do so on a timely basis.

(6) Arbitration of Disputes Required—The rules require that contractors must agree to submit contract disputes to impartial arbitration at the request of the producer.

In addition to the provisions concerning what must be in vegetable procurement contracts, the rules also identify and prohibit the use of a number of contract provisions and contracting practices. Prohibited contract provisions include those which (1) "[r]equire any producer to purchase seed, pesticide applications, harvest services, hauling services, or other supplies or services from the contractor if the charges for the supplies or services exceed the reasonable market value of those sup-

plies or services"; (2) "[r]elieve, or purport to relieve a contractor from liability for property damage or personal injury caused by the negligent acts or omissions of the contractor"; and (3) "[i]mpose, or purport to impose liability on a producer for personal injury or property damage caused by the contractor."[67]

The list of prohibited practices is similar to those found in other lists of "unfair or deceptive practices," such as the Packers and Stockyard Act.[68] Prohibited practices include (1) failing to pay according to the terms of the contract; (2) knowingly misrepresenting the terms of a vegetable contract or the procedures used or the services provided in order to induce a producer to sign; (3) conspiring with other contractors to "fix prices or restrain trade in the procurement of vegetables from producers"; (4) "[f]ail[ing] or refus[ing] to offer a vegetable procurement contract to a producer" because of actions taken by the producer;[69] and (5) charging a producer for defective seed if the seed supplier reimburses the contractor for the cost of the seed.[70] The rules require the state department of agriculture to evaluate the rules after three years of operation and submit a report to the state board of agriculture.

C. *Kansas Enacts Regulations of Swine Contracting Patterned After Minnesota Law*

In 1994, Kansas became the second state to enact some of the Minnesota provisions, but only as they applied to swine production contracts.[71] The Kansas law was passed as part of

67. *Id.* § Ag. 101.06.

68. 7 U.S.C. §§ 181-229 (1988).

69. Such actions include: (a) "fil[ing] a complaint with the contractor or a government agency"; (b) "request[ing] arbitration of a contract dispute"; (c) "fil[ing] suit alleging a violation of this chapter"; (d) joining a producer association or advising or attempting to organize producers, or participating in any discussion or meeting related to vegetable issues; (e) negotiating or attempting to enforce the terms of a vegetable contract or representing producer interests in any matter; or (f) seeking government action or testifying or participating in developing or implementing any laws related to vegetable procurement issues. WIS. ADMIN. CODE § Ag. 101.07(4)(a)-(f) (Dec., 1992).

70. *Id.* § Ag. 101.07(5).

71. *See* Steve Marbery, *Hog Industry Insider: Kansas Legalizes Corporate Pork,*

a bill amending the corporate farming restriction to allow corporate involvement in swine production. It includes a number of provisions designed to regulate the manner in which swine production contracts are used. The law defines "contractor" as

> any corporation, trust, limited liability company, or limited partnership or corporate partnership other than a family farm corporation, authorized farm corporation, limited liability agricultural company, limited agricultural partnership, family trust, authorized trust or testamentary trust, as defined in K.S.A. 17-5903 and amendments thereto, which established a swine production facility in this state . . . and in either case which in the ordinary course of business buys hogs in this state.[72]

The law defines the term "producer" for purposes of a swine production contract as

> an individual, family farm corporation, authorized farm corporation, limited liability, agricultural company, limited agricultural partnership, family trust, authorized trust or testamentary trust, as defined in K.S.A. 17-5903 and amendments thereto, which raises hogs in this state or provides the service of raising hogs in this state and which is able to transfer title in such hogs to another or who provides management, feed, labor, facilities, machinery or other production input for raising hogs in this state.[73]

The law also provides that for purposes of the provisions on swine contracts, the term "production input includes, but is not limited to, management, labor, facilities, machinery or feed used in the raising of hogs in this state."[74] The law includes the following protections for producers who enter production contracts:

(1) If the contractor is a subsidiary, the parent company is liable to the producer for any unpaid claims arising from the

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FEEDSTUFFS, Apr. 18, 1994, at 18.

72. S. 554, 75th Leg., 2d Reg. Sess., 1994 Kan. Sess. Laws 8(a) (enacted).

73. *Id.* § 8(b).

74. *Id.* § 8(c).

contractor's failure to pay on the contract.[75]

(2) All contracts with producers are read to include "an implied promise of good faith as defined in subsection (19) of K.S.A. 84-1-201" which would allow for the recovery of damages, court costs, and attorney fees if a court finds the promise has been breached.[76]

(3) Contractors must include in all contracts a provision requiring producers to comply with applicable state and federal environmental laws, and contractors must provide information about how to comply with the laws at the request of producers.[77]

(4) Contracts which require a capital investment of $100,000 or more and with a useful life of five years or more are subject to a notice of cancellation and right to cure procedure which requires the contractor to give the producer ninety days notice prior to cancellation or termination and affords the producer an additional sixty days after receipt of the notice to "correct the reasons" given. Notice of cancellation is not required in certain situations, including abandonment of the relation by the producer, material breach, or failure to use good animal husbandry practices.[78]

(5) The law authorizes the formation of swine marketing pools by producers[79] and requires swine contractors to deal with registered pools. The law requires that they must "actively negotiate in good faith" with such pools, pay a "fair price," and make prompt payment. It does not require contractors to deal with swine marketing pools if the pools cannot meet quality specifications or delivery terms.[80]

(6) All swine production contracts must "contain language providing for resolution of contract disputes by either mediation or arbitration."[81]

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75. *Id.* § 8(d).
76. *Id.* § 8(e).
77. *Id.* § 8(f).
78. *Id.* § 9.
79. *Id.* § 10.
80. *Id.* §§ 10(6), 11(3), (4).
81. *Id.* § 12.

D. Other Forms of Direct State Regulation of Contract Production Relations

There are a variety of ways in which states may regulate some forms of agricultural contracting. States' laws can range from protecting the rights of producers to form bargaining associations to regulating who can become a dealer of agricultural products. These laws differ from those already discussed, primarily because their provisions relating to production contracts are incidental. The following are examples of such laws.

1. Producer's Lien to Protect Payment

To help ensure that producers get paid, a Minnesota law enacted in 1990 creates an agricultural producer's lien.[82] The lien is perfected by delivery of the commodity and is good for twenty days after delivery.[83] It may be extended by filing within the twenty days but becomes void six months after filing.[84] The agricultural producer's lien has priority over all other liens and encumbrances on the commodity.[85] The lien extends to proceeds from the commodity, the proportionate share of the commingled commodity, and products manufactured from the commodity.[86] Other states provide for a priority producer's lien, which attaches at the time of delivery of the agricultural product.[87] In most cases, a producer must file notice or a lien statement in order to perfect or to continue the lien. One question under the Minnesota laws is whether the lien is available to unpaid producers whose production contract involves the provision of services rather than a sale.

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82. MINN. STAT. ANN. § 514.945 (West Supp. 1994).
83. *Id.* § 514.945 subd. 2.
84. *Id.*
85. *Id.* § 514.945 subd. 4.
86. *Id.* § 514.945 subd. 1(b), (c).
87. *See* CAL. FOOD & AGRIC. CODE § 55631 (West 1986); IDAHO CODE § 45-1802 (Supp. 1994); MONT. CODE ANN. § 80-4-420 (1993); OHIO REV. CODE ANN. § 1311.55 (Anderson 1993); OR. REV. STAT. § 87.705 (1988).

2. Agricultural Commodity Dealers

Many states require dealers, handlers, or commission merchants of agricultural commodities to be licensed and bonded, as is required of livestock dealers under the Packers and Stockyards Act.[88] Some states, such as Idaho, lump together all dealers in farm produce (vegetable, dairy products, livestock, etc.) and require general licensing and bonding provisions.[89] Other states, such as Washington, separate the licensing requirements according to commodities.[90] States that specialize in certain agricultural products, such as Florida citrus, have licensing and bonding requirements particular to those industries.[91] In addition, many of these statutes require "dealers" to keep certain records, including records of all contracts. In some cases, dealers must submit the records to state commissioners.[92]

3. Other Payment Protections

Several states set out specific provisions to ensure payment, such as those establishing a trust fund for producers.[93] Some states also provide for when payment for agricultural produce is due absent any contractual provision.[94]

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88. 7 U.S.C. § 181 (1988).

89. *See* IDAHO CODE § 22-1301(c) (Supp. 1994).

90. WASH. REV. CODE ANN. §§ 20.01.038, 20.01.040 (West 1993).

91. FLA. STAT. ANN. § 601.61 (West 1993); *see also* GA. CODE ANN. § 2-9-2 (1993).

92. VA. CODE ANN. §§ 3.1-722.8, 3.1-722.14 (Michie 1994); *see also* WASH. REV. CODE ANN. § 20.01.520 (West 1993).

93. CAL. FOOD & AGRIC. CODE § 56701 (West 1986); MINN. STAT. ANN. § 27.138 (West Supp. 1995).

94. *See, e.g.*, CAL. FOOD & AGRIC. CODE § 56302 (West 1986) (payment due in 30 days); GA. CODE ANN. § 2-9-11.1(b) (1994) (payment due 20 days following delivery); LA. REV. STAT. ANN. § 3:3414.1 (West 1992) (10 days for delivery of grain); WASH. REV. CODE ANN. § 20.01.390 (West 1993) (30 days).

4. Regulating Contract Practices

In several states there are other forms of specific contractual regulations. For example, a Tennessee statute requires that contracts not exceed three years.[95] Other states' regulations also contain detailed requirements of agricultural contracts, such as including a clear indication of duration.[96] California, Illinois, Louisiana, and South Carolina all require written contracts between producers and dealers.[97] A few states require certain clauses in agricultural contracts, such as Florida's clause that bonds do not ensure full payment of contractual claims.[98] Several states have regulations regarding credit sale contracts of grain.[99]

V. RECENT EFFORTS TO ENACT CONTRACTING LAWS IN OTHER STATES

In the last three years, legislative proposals to regulate the use of production contracts have been introduced in a number of states. The legislatures in Alabama, Florida, Louisiana, North Carolina, North Dakota, and Oklahoma have seen the introduction of such proposals. Many of the bills have been developed and introduced by members of the National Contract Poultry Growers' Association, who are aggressively seeking to have growers' rights legislation enacted throughout the South. While

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95. TENN. CODE ANN. § 43-15-101 (1993).

96. *See, e.g.*, MONT. CODE ANN. § 80-4-422 (1993); S.C. CODE ANN. §§ 46-41-200 to -240 (Law. Co-op. 1987) (requirements of grain dealer contracts); WASH. REV. CODE ANN. § 15.48.270 (West 1993) (issues relating to seed bailment contracts); WASH. ADMIN. CODE § 16-212-170 (1992) (requirements for including when title passes). California specifically provides for grape purchase contracts, CAL. FOOD & AGRIC. CODE § 55601.5(g) (West 1986); packout basis contracts, *Id.* §§ 55602-55604 (West 1986); and consigned basis contracts, *Id.* § 55605 (West 1986).

97. CAL. FOOD & AGRIC. CODE § 56619 (West 1986); ILL. REV. STAT. ch. 110, para. 11.1 (1994) (for Illinois seed contracts); LA. REV. STAT. ANN. § 3:3414 (West 1992); S.C. CODE ANN. §§ 46-41-90 to -200 (Law. Co-op. 1987).

98. FLA. ADMIN. CODE ANN. r. 20-2.007 (1993).

99. *See, e.g.*, COLO. REV. STAT. ANN. § 12-16-208 (West 1994); IOWA CODE ANN. § 203.15 (West 1994).

the bills have faced serious opposition and have not been enacted, they have had a significant effect on the contracting practices used. In addition, the proposals may be a good indication of what may be considered by states in the years ahead. The following discussion considers the efforts in several states to enact contracting laws.

A. The Louisiana Proposal for Growers' Rights Legislation

A good example of recent state efforts to enact grower legislation is the Louisiana Contract Poultry Growers' Act of 1993.[100] While the bill was not enacted, its consideration led the major broiler contractor in the state, ConAgra, to agree to a compromise with state officials under which the company made several major changes in the contracts it offered growers.[101] The purpose of the proposal was to give growers more bargaining strength by regulating the terms of contracts they are offered. The proposal defined "integrator," "poultry grower," and "poultry growing arrangement." The bill defined a poultry growing arrangement as "any growout contract, marketing agreement, or other arrangement under which a poultry grower raises and cares for live poultry or produces eggs, for delivery in accord with another's instructions."[102] The main focus of the proposed bill was to require poultry integrators to include a number of specific terms in the contracts they used. Section 4704 of the bill dealt with the terms that would be required in an agreement, including clauses on the following issues: (a) duration of the contract; (b) conditions for termination; (c) terms relating to payment; (d) the party liable for condemnations; (e) methods for figuring feed conversion rations; (f) formulas used to convert condemnations to live weight; (g) per unit charges for feed and other inputs; (h) factors to be used in grouping or ranking growers; (i) implied promise of good faith

100. H. 1296, 1993 Leg., Reg. Sess. (1993) (an Act to amend Chapter 31 of Title 3 of the Louisiana Revised Statutes of 1950, filed Apr. 132, 1993, and amended May 17, 1993, in the Louisiana State Legislature).

101. *See, e.g.*, *Victory in Louisiana!*, POULTRY GROWERS NEWS, June 1993, at 1.

102. Proposed § 4702(7).

by both parties; (j) availability of dispute resolution through mediation or arbitration; and (k) proper execution by both parties.[103]

The proposed law included a number of protections concerning payment and records. Section 4705 dealt with such issues as (a) prompt payment; (b) preparation of accurate settlements sheets; (c) duty to give information to the state agriculture commissioner; (d) records of integrators open to inspection by the state officials; (e) integrators' requirement to provide growers with information about the "growers bill of rights"; and (f) parent company liability.

The bill also included a number of requirements concerning the services integrators provide to growers under the contracts. Specifically, the issue of weighing for both live poultry and feed was addressed at length. The bill required the inclusion on the weight ticket of information such as weather conditions and whether the driver was in or off the truck. This type of information directly determines the rankings, payment, and, thus, incomes of growers. The proposal also included a number of duties of integrators in conducting their relations with growers. For example, the bill would have imposed a duty or standard to exercise reasonable care and promptness with respect to a number of activities, including loading, transporting, holding, yarding, feeding, watering, weighing, hatching or otherwise handling live poultry or eggs so as to "prevent waste of feed, shrinkage, injury, death, or other avoidable loss."[104] Section 4708 of the bill also incorporated for both parties an implied promise of good faith.

The proposal set out a list of activities integrators were not to engage in. These included using any unfair, unjustly discriminatory, or deceptive practice or device and coercing a grower not to join an organization; discriminating against growers who belong to associations; giving undue preference to some growers; issuing false reports about the financial conditions of growers; trying to prevent growers from using outside experts or

103. Proposed § 4704.
104. *Id.* § 4707.

tests; and using a ranking system which included employees of the company.

The proposal also contained enforcement measures. A process was created for the state to investigate violations and issue cease and desist rulings against contractors found in violation. If the rulings were not followed, the Commissioner could refer the matter to the Attorney General for enforcement of civil penalties. Section 4710 provided for fines of up to $10,000 a day for each violation. The proposal also authorized growers to bring their own legal actions alleging violations of the Act and allowed growers to recover damages and attorneys' fees. This is known legally as an "express private right of action" and would be very important in allowing for future lawsuits to enforce the law.

B. North Dakota Commissioner of Agriculture Pushes Contracting Law

In 1994, Sarah Vogel, the North Dakota Commissioner of Agriculture, developed a legislative proposal for regulating production contracts. The bill, which was the subject of a legislative hearing in late July, had four goals.[105] It would have (1) required mediation of any dispute over a production contract; (2) provided for parent company liability for agricultural contractors; (3) incorporated an implied promise of good faith, as contained in the UCC, in "all agricultural contracts"; and (4) required that any preprinted form contract used in the state for the raising of a commodity be filed by the contractor with the Commissioner.

The bill defined "contractor" as "a person who in the ordinary course of business buys agricultural commodities grown or raised in this state based upon a contract with a producer to grow or raise agricultural commodities in this state." The legislative hearing on the proposal resulted in a number of modifications, including the clarification that the definition of con-

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105. *See Draft for Discussion*, Fifty-fifth Legislative Assembly of North Dakota (copy on file with *The University of Memphis Law Review*).

tractor would not include grain elevators.

C. Alabama Poultry Growers Introduce Comprehensive Bill on Growers' Rights and Producer Bargaining Associations

In 1994, the Alabama Poultry Growers' Association developed and introduced one of the most comprehensive legislative proposals yet, dealing with protection of growers' rights and the formation of producer bargaining associations. The final proposal[106] stated the following "Legislative Intent and Policy":

> The Legislature finds and determines that many present contractual arrangements for the production of certain agricultural products by persons engaged in the production of farm products and livestock with large companies engaged in the processing, marketing, distributing, and retailing of such products, tend to create a business environment fostering anticompetitive trade practices in the agricultural industry, which practices may result in a reduction of the ability of the family farmer and small producer generally to survive and prosper. The Legislature declares that it is in the public interest that the family farm be preserved and that contract producers, as hereinafter defined, of certain products of the farms and forests of the state who contract for production of such products with large vertically integrated companies be protected from the financial hardships likely to be caused by trade practices that the legislature has determined to be unfair, harmful or unethical. This act shall be liberally construed to achieve these ends and shall be administered and enforced with a view to carrying out the above declaration of policy.[107]

The legislation, which was patterned after a 1979 federal proposal by Representative Leon Panetta of California, included major sections on a number of topics, including unfair trade practices, accreditation of producer associations, good faith

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106. The bill considered was titled a substitute for H.B. 412/S.B. 364 (copy on file with *The University of Memphis Law Review*).
107. *Id.* § 1.

negotiation of contracts, mediation, administration and enforcement by the Commissioner of Agriculture, judicial review, civil remedies, and investigative powers of the Commissioner. Consideration of the legislation was controversial and emotional. A highly charged public hearing in March led to additional support for the bill, but it ultimately died in committee. The defeat was aided in part by a $90,000 lobbying campaign by poultry processors.[108]

D. Other Recent State Contract Legislation Proposals

In the last three years, poultry growers in several other states have developed legislation concerning growers' rights. While these efforts have not been successful, they do illustrate the type of legislative ideas being considered. The bills also indicate that the possibility for state enactment of contract legislation may exist. In 1992, a bill was introduced in the Florida legislature to amend Chapter 583 of the Florida Code.[109] The legislation was titled "A Bill to Protect Poultry Growers From Unfair, Unjustly Discriminatory Practices and Devices, Including Termination of Poultry Growing Arrangements Without Economic Justification." Under the proposal, which died in committee, it would have been unlawful for a processor or dealer to terminate a poultry growing arrangement "without due cause." The bill then listed nine different actions or events which could amount to "due cause," all related to economic matters or non-compliance with the contract.

In 1994, the Oklahoma legislative sessions saw introduction of an Act titled "The Oklahoma Contract Growers Fair Practices Act."[110] The Act, which contained definitions for such terms as "integrator" and "producer," would have applied strictly to poultry production contracts. It included provisions pro-

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108. For a discussion of the bill and the legislative action, see C. Tom Greene, *Contract Poultry Farmers Get Double Whammy as Alabama Lawmakers Windup Special Session*, THE POULTRY PATRIOT, May 15, 1994, at 1 (Newsletter of the Alabama Contract Poultry Growers Association).

109. Copy on file with *The University of Memphis Law Review*.

110. S. 1094, 44th Leg., 2d Sess. (1994) (introduced by Littlefield).

hibiting the use of unfair or discriminatory practices by integrators and identified a series of prohibited actions. The law also dealt with such issues as notice of termination, dispute resolution, and notice to renegotiate contract terms. The law would have empowered the state Commissioner of Agriculture to investigate alleged violations of the law and to bring enforcement actions.

In 1993, the General Assembly of North Carolina considered a bill which would have added a new chapter to the state code titled the "Poultry and Poultry Products Producers Protection Act."[111] This proposal was very detailed and included a variety of protections for such things as the recapture of producer investments for contract termination, a producer's lien, guidelines for renegotiating contract terms, reimbursement of the costs of disposal of dead birds, and dispute resolution by mediation or arbitration. The legislation was assigned to the Judiciary Committee but not considered by the House.

E. 1990 Iowa Proposal to Require Model Contracts for Swine Feeding

In 1990, the Chair of the Agriculture Committee of the Iowa House of Representatives introduced a bill which would have required the state to develop model livestock production contracts.[112] Under the law, which was considered but not enacted, the producer would have to have been offered the model contract and given twenty-four hours before signing the contract being offered by an integrator. If the producer was not given the model, then the other contract was voidable. The law, however, did not require an integrator to adopt any provisions of the model contract. The model contract was to be developed by the lawyers in the Farm Division of the Iowa Department of Justice. The various types of provisions to be included in the model contract reflected the concerns of many people associated with the agreements. The list is still valuable

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111. H. 414., 1993 Leg., Reg. Sess. (1993).
112. H.F. 2529, 75th Leg., 1st Reg. Sess. (1990).

today as a checklist for parties interested in developing a model agreement. The bill provided that "[e]ach model contract shall provide terms expressing alternative methods of structuring an agreement, including but not limited to methods of compensation. A model contract shall not state a price to be paid under the contract. It shall provide for the division of expenses and losses."[113] Provisions included in the contract relate to the following: (1) the exchange of financial information, including any perfected security interests in the livestock (the contractor could grant the grower a security interest to secure the contractor's performance); (2) the party responsible for insurance; (3) the delivery of livestock to the feeder, including terms on notice, delays, and compensation for delays; (4) the grower's right to refuse livestock when delivered if it was in less than "normal" condition; (5) information on the payment of expenses related to feeding and sheltering the livestock; (6) a term on the use of veterinary care; (7) any requirements relating to construction of capital improvements required; (8) a term on death or loss of the livestock and who bears that risk (the law provided a shifting presumption related to timing of death from the date of arrival and that the cost of disposal was to be shared); (9) procedures for contract termination, including (a) the conditions or actions which could result in termination, but the contractor could not remove livestock merely due to a grower's refusal to agree to changes in the contract, and (b) grounds for termination could not be based on a subjective evaluation of the feeder's husbandry practices unless done by a person other than the owner (the provision was to require a method for notice of termination and a minimum period of notice, as well as providing terms for automatic renewals); (10) compensation paid to the feeder, including the manner of compensation and when it was due (if the contract included profit sharing, then information on the sale of the animals was required to be given to the feeder); and (11) a mediation or arbitration requirement. Although Iowa did not enact the proposed law, the Iowa Pork Producer's Association

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113. *Id.* § 3.

undertook an educational program on contracting as a result of the proposal. This campaign resulted in a detailed legal review of various hog contracting provisions.[114]

Whether state legislation such as these proposals is necessary to regulate use of production contracts will largely be determined by the experience farmers have with such relations. As use of the agreements increases, the role of state legislation in standardizing the contracts or enforcement practices used will become clearer.

VI. FEDERAL INVOLVEMENT IN CONTRACT PRODUCTION RELATIONS

This Article has focused primarily on the legislative activities of the states, but there remains a question concerning the possibility of federal action on the issue of contract production. As a starting point, it should be recognized that the movement of most grain, vegetables, and livestock in interstate commerce clearly provides a basis for possible federal legislative action on contracting, should Congress decide to consider such measures. There are at least two possible areas of federal activity: regulation of the marketplace, such as in the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, and protection of producer bargaining efforts. In addition, federal regulation of production contracts may come about indirectly, as seen recently in the 1994 amendments to the Plant Variety Protection Act, which provided a prompt payment requirement for certain types of grass seed production contracts.[115]

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114. A copy of the study, IPPA Swine Contract Approaches, may be obtained by calling the IPPA at 1/800-372-7675 or writing IPPA, P.O. Box 71009, 1636 NW 114th St., Clive, Iowa 50325-0009.

115. Congress recently passed Pub. L. No. 103-349, 108 Stat. 3136 (1994), which makes several amendments to the Plant Variety Protection Act, 7 U.S.C. § 2321 (1988). The amendments relate primarily to the ability of producers to save and sell protected varieties of seed, a practice commonly known as brown bagging. The law repealed an exception which allowed farmers to save *and* sell such seed to other farmers. The law added a new exception, however, for producers who raise lawn, turf, or forage grass seed or alfalfa or clover seed under contract. If the owner of the variety does not pay the amount due under the contract within 30 days of when it is due, then

A. Agricultural Fair Practices Protections

Federal and state laws have been enacted to protect the rights of producers to organize and bargain in marketing commodities. The laws, in particular the Agricultural Fair Practices Act of 1967 (AFPA), have been used by poultry producers to challenge the manner in which their contracts were terminated. Congress passed the AFPA to protect the right of farmers and ranchers to join with other growers to form associations to bargain with handlers and processors for better prices and terms. The Act sets out a number of prohibited practices for handlers, who are defined to include persons engaged in "contracting . . . with . . . producers . . . with respect to the production or marketing of any agricultural product. . . ."[116] The Act focuses on prohibiting handlers from discriminating against or intimidating producers because of membership in organizations or exercise of the right to organize.

A federal court relied on the Act in a suit by Florida poultry producers against Cargill, which had terminated their poultry contracts, allegedly in response to their efforts to organize other Florida growers. In *Baldree v. Cargill, Inc.*,[117] the Florida Poultry Growers' Association and the U.S. Department of Justice sought a preliminary injunction forcing Cargill to reinstate its growers' agreement with Arthur Gaskins, president and organizer of the association. The federal district court granted the preliminary injunction because it found there was a substantial likelihood that the Growers' Association and the Department would succeed in showing that the agreement was terminated by Cargill. Cargill's motivations in terminating the agreement were "to discourage and prevent Gaskins from supporting the Association," to hamper the Association's claim

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the producer can notify the owner of the variety of his intention to resell the seed as seed. *See* Plant Variety Protections Act Amendments of 1994, Pub. L. No. 103-349, § 9, 108 Stat. 3136, 3143 (1994). If payment does not occur within 30 days of the notice, the seed can be sold without violating the act. *Id.*; *see* 7 U.S.C. § 2541(b)(2) (1988), *as amended by* H.R. 2927, 103d Cong., 2d Sess. § 9, 40 CONG. REC. H8030 (1994).

116. *See* 7 U.S.C. § 2302 (1988).

117. Baldree v. Cargill, Inc., 758 F. Supp. 704 (M.D. Fla. 1990).

against Cargill, and "without economic justification, in an unfair and . . . unjustly discriminatory and deceptive practice."[118] The court cited the Packers and Stockyards Act and the Agricultural Fair Practices Act as authority for its decision.[119] The dispute underlying the case stemmed from another action Gaskins and other growers had filed against Cargill, alleging various forms of fraudulent practices, such as misweighing.[120] The AFPA statute and cases such as *Baldree*, in the context of production contracts, might protect growers who decide they need to organize to bargain for better contract terms.

B. Other Possible Applications of Federal Law

The main source of federal protection for livestock producers who feel the actions of their contractors have affected the prices they receive or their ability to enter into fair contract relations is the Packers and Stockyards Act of 1921.[121]

1. Application of the Packers and Stockyards Act

The Packers and Stockyards Act of 1921 (P&SA) lists a number of "unlawful practices" for any packer or live poultry dealer or handler, including:

> (a) Engag[ing] in or us[ing] any unfair, unjustly discriminatory, or deceptive practice or device; or
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> . . .
>
> (e) Engag[ing] in any course of business or do[ing] any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or
>
> (f) Conspir[ing], combin[ing], agree[ing], or arrang[ing]

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118. *Id.* at 706.
119. *Id.* at 707.
120. *Id.* at 705-06.
121. 7 U.S.C. §§ 181-229 (1988).

> with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices.[122]

For these provisions to have any effect in connection with the use of contract feeding, federal officials would have to determine that a practice was a violation of the Act. Such a determination could either come in a specific complaint, or if the concerns about the practice were widespread, the USDA could undertake rulemaking on the subject. For example, in November, 1992, the Farmers' Legal Action Group, acting as the counsel for the National Contract Poultry Growers' Association, submitted suggested rule changes to the Administrator of the Packers and Stockyards Administration (P&S). The proposals related to such matters as the use of ranking systems for payment and the procedures and recordkeeping for weighing of inputs.

A recent news story indicates the Packers and Stockyards Administration may have the opportunity to increase scrutiny given to terms of poultry contracts now in use. In the summer of 1994, P&S was reported to have found that a contract used by a Mississippi poultry company was in violation of the Act. In particular, two sections of the contract led growers to complain to P&S. Under section 11 of the contract, either party could terminate the agreement without cause. Under section 12, any legal action concerning the contract had to be addressed in state court in Simpson County, Mississippi. The growers were concerned that the provisions violated the Act by allowing non-economic justifications for termination, an arguably unfair and discriminatory practice. Also, by limiting jurisdiction to the state court, the contract denied growers the protections of the federal law. Officials of P&S reportedly said that the parties could not make a legal contract for illegal matters and that, because the Act is a federal law, they would investigate possible violations. Attorneys for the USDA's Office of General Counsel are reported to be in negotiations with the company concerning the terms of the contract. Representatives of the

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122. *Id.* § 192.

National Contract Poultry Growers' Association noted how this action should help encourage growers to report what they believe are illegal terms in their contracts so those terms can be investigated.[123]

One serious limitation on the ability of the P&S to take action involving poultry contracting arrangements is the lack of administrative enforcement authority relating to unfair practices.[124] When the Packers and Stockyards Act was amended in 1987 to add the Poultry Producers Financial Protection Act, the amendments did not extend administrative authority over such practices in the poultry sector. The National Contract Poultry Growers' Association is reported to be initiating a federal legislative effort, one component of which will be the correction of this discrepancy.

2. The Perishable Agricultural Commodities Act (PACA) and Production Contracts

Congress has implemented a federal law to help ensure that growers of perishable commodities who sell their products in interstate commerce are paid for their goods. The law, known as the Perishable Agricultural Commodities Act (PACA),[125] is administered by the USDA and protects the integrity of the nation's fruit and vegetable industry.[126] The PACA regulates a number of different parties involved in the trade of produce in interstate commerce. These include: (a) commission merchants—defined as "any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another";[127] (b) dealers—defined as "any person engaged in the business of buying or selling in whole-

123. *See* Michelle M. Jones, *McCarty Farms Contract Violates Packers & Stockyards Act*, POULTRY GROWERS NEWS, July 1994, at 1.

124. *See* 7 U.S.C. § 193 (1988).

125. *Id.* § 499 (1988).

126. *Id.* § 499a.

127. *Id.* § 499a(5).

sale or jobbing quantities";[128] and (c) brokers—defined as "any person engaged in the business of negotiating sales . . . of perishable agricultural commodity."[129]

The PACA covers fresh fruits and vegetables ("whether frozen or packed in ice") and "includes cherries in brine."[130] The most important benefit of PACA is that, if a sale of produce is covered, the law provides important statutory protections to ensure that the grower is paid.[131] The law also provides an administrative reparations procedure for handling complaints. Of further importance is the requirement that buyers hold all inventories, receivables, or proceeds received from the sale of the perishable commodities in trust for the benefit of unpaid sellers until full payment is made.[132]

Producers must take affirmative action to reap the benefits of the PACA statutory trust. The Act provides that the seller must give written notice of intent to preserve the benefits of the trust to the buyer and must file the notice with the Secretary of Agriculture within thirty days after the payment due date.[133] Generally, courts require strict compliance with the notice provision.[134] Under the regulations, the payment due date is ten days after acceptance of the commodity. Oral agreements that extend this time are not binding because the Act specifically requires that different payment due dates must be agreed to in writing and cannot exceed thirty days. Producers should be aware of this in order to timely file their notice and obtain the PACA trust benefits. Any payment arrangement other than the ten-day period must be disclosed on invoices according to the Act. Failure to so disclose may void a producer's rights in the PACA trust.[135]

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128. *Id.* § 499a(6).
129. *Id.* § 499a(7).
130. *Id.* § 499a(4).
131. *Id.* § 499a(5).
132. *Id.* § 499e.
133. *Id.* § 499c(3).
134. *See* J.W. Looney, *Protection for Sellers of Perishable Agricultural Commodities: Reparation Proceedings and the Statutory Trust Under the Perishable Agricultural Commodities Act*, 23 U.C. DAVIS L. REV. 675 (1990).
135. *See In re* San Joaquin Food Serv., Inc., 958 F.2d 938 (9th Cir. 1992).

Passage of the PACA and P&SA exemplifies the role of Congressional action in regulating relations in the agricultural marketplace. Proposed federal legislation regulating some aspects of contracting was introduced in the late 1970s.[136] In light of the recent organizing activities of growers, it may only be a matter of time before Congress has another opportunity to consider such a law. Alternatively, the USDA, through the P&SA, could be asked to address poultry contracts by applying administrative rules relating to "unfair practices."

VII. Role of Producer Groups and Industry in Promoting Fair Contracts

The question whether use of production contracts should be more closely regulated can only be answered based on the perspective and experience of the person being asked. The goals of fairness, equity, full disclosure, and reasonable allocation of the risks and benefits of agriculture are the underlying issues. Contracts can be written which are balanced and equitable and which attract good growers. In 1993, for example, InterMountain Canola contracted for production of over 75,000 acres of canola in Western states, an increase in production from only 30,000 acres the preceding year.[137] The reason for the increase was the company's decision to use an innovative contract which offered growers, among other things, a guaranteed per-acre payment, a guaranteed market for the harvested crop regardless of quality, a guaranteed contract price, and oil and yield bonuses.[138] Contracts which share the risks rather than simply shifting the risks to the producer are possible if producers and their attorneys work to ensure such terms.

Failure to develop fair contracts for agricultural production relations will lead to an increase in litigation, as is now being

136. Representative Panetta of California introduced a bill, H.R. 3535, titled "National Agricultural Bargaining Act of 1979," which identified a series of unfair practices on the part of handlers of agricultural commodities.

137. *See* Ed Narigon, *InterMountain Canola Doubles Contracted Acreage with a Contract Growers Can't Refuse*, SEED & CROPS INDUSTRY, June/July 1993, at 30-31.

138. *Id.*

seen in the poultry industry, and to new proposals for stricter regulation of contracting practices. Producer organizations may be well-suited to a role in mediating the growing tension between producers who find themselves as growers and other "producers" who may be integrators using production contracts. Failure of producer groups to play such a role will make it increasingly difficult for them to adequately represent both types of producers as members. The tensions between "growers" and "integrators" are increasing in several states. One opportunity that exists, still largely untested, is for producers, working with their organizations and with the companies who use production contracts, to develop workable and sensible standards.

One proposal would be for an organization, such as the National Pork Producers Council, to undertake an effort to identify guidelines for fair contracting practices. By bringing together large and small growers, processors, integrators, attorneys, and others, the industry could try to address concerns before legislation is needed. There are many innovative approaches which could be used in such an effort. Perhaps the organization could certify those members or processors who agree to adhere to the code of fair contracting practices. Perhaps the organization could develop model contract language. While only a modest proposal, it is clear that use of contract production will continue to evolve, bringing important changes to agriculture as it develops. The response to agriculatural development from traditional institutions in agriculture—cooperatives, farm organizations, producer groups, agencies, companies, as well as farmers—will in many ways determine the future shape of farming.

Another possible source for legislative ideas is to consider how production contracts are handled in other agricultural countries. Regulation of use of production contracts and protection of growers have been a concern in other nations for years. In 1964, France first enacted a law specifically regulating contracts of vertical integration in connection with developments in broiler production. Since that time, hundreds of court cases have addressed issues such as the definition of a contract for

vertical integration and the damages a grower experiences if one is terminated. The French approach has been to treat the contracts as a matter of consumer protection. Rather than regulate the relation created between the parties, such as by treating it as an employment, French law requires full and detailed disclosure of the terms in the contract. If a contract for vertical integration into production meets the tests for detailed disclosure, it is legal. If it does not, it is subject to annulment by the farmer, who may be entitled to the payment of damages.

In Great Britain, the approach is somewhat similar. Production contracts are considered an issue of consumer protection best regulated by full disclosure of the risks and terms of the agreement. In the United Kingdom, there has been a great effort spent on developing standardized contracts used throughout the country. The National Farmers' Union, the Grain & Feed Trade Association, and the United Kingdom Agricultural Supply Trade Association have been involved in the formulation, preparation, and control of commodity contracts. The involvement of producers and trade organizations in developing contracts provides a way to standardize industry practices and develop predictable answers to common matters. Neither approach, applying consumer protection disclosure standards or using producer groups to negotiate improved contracts, has been used in the United States.

VIII. Considering the Future and Effectiveness of State Legislation on Contract Production

To conclude the discussion of state legislation of contract production it is worthwhile to consider several questions concerning the future and effect of such laws. There is a variety of ways state regulation of production contracts could come into existence. It could result from enactment of new, direct, and purposeful legislation, such as that being proposed by the Southern states, or it could result from state officials exercising existing authority which might cover production contracts, such as grain dealer or produce buyer laws. Regulation of contracting could result indirectly, such as by enforcement of anti-corporate farming laws. Private litigation, now going on in the

broiler sector, may establish common law interpretations or precedents as to contracting terms and practices which would have the effect of "legislation." Similarly, cases interpreting UCC provisions, such as the "implied promise of good faith," could be important in contracting.

A. *What is the Likelihood Additional States Will Enact Legislation?*

This question is on the minds of many people in agriculture. The answer varies by circumstances in each state. The potential for legislation is a function of state politics, the level of existing integration, the economic and political power of integrators, the nature of the crops raised under contract, the history of how contract relations have worked, the heritage of the agricultural sector, and a state's level of activism in farm legislation. When considering these factors, it is no surprise Minnesota and Wisconsin have enacted laws. It is also no surprise southern poultry growers have faced strong opposition to their efforts. In states dominated by existing integrated structures, the politics of enactment will no doubt continue to be difficult, as is seen in the Alabama and Louisiana experiences, where well-organized grower efforts ran into well-financed and vigorous opposition from the integrators.

The politics of such state legislative efforts are usually quite divided. Growers promote the laws by painting horror stories about how the contractors treat them, while companies commonly depict growers active in organizing as "troublemakers" or disgruntled "bad" growers. For example, an internal Tyson memo dated February 26, 1992, to Division Managers and Complex Managers, included the following:

> The drive to organize poultry growers is being funded and led by a network of shady characters and organizations who have a much broader agenda than simply helping growers. . . . The bottom line is this. These groups all are pursuing their own view of progressive social change. They will use growers' dissatisfaction to suit that purpose, but they really don't care about the growers. We do, because we have a vested economic interest in our growers,

as they do in us.[139]

State efforts to enact legislation will also be affected by producer concerns over being "regulated" out of "opportunities," even risky ones. This was partly the response of farmers in North Dakota in the summer of 1994 to development of contracting legislation.

B. *Are There Reasons to Distinguish Between Crops or Contracts When Enacting Legislation?*

Each crop or enterprise has unique features as to the production methods, the production cycle, and the marketing patterns which affect the nature of the contracts used. One distinction may be found between livestock and poultry contracts and contracts for production of grains. A number of factors illustrate the differences in these production contracts, including the length of the relations, the nature of the required investments, the lack of alternative marketing opportunities in closed production systems such as broilers, the level of control commonly placed over "grower" activities, and the nature of the financial terms. With grain contracts, the contract is usually for a premium added to the revenue received from a traditional sale as a commodity. With livestock and poultry contracts, however, the grower's payment is the only income from the enterprise. There is nothing to sell. The effect of the relation is to replace market sales of commodities with service payments for labor. These distinctions indicate there may be sufficient justification to have a different focus in legislation depending on the commodities involved.

C. *Should the Subject Be Addressed Through Regional or National Action?*

If the issue of legislating contract terms remains a topic handled on a piecemeal basis by individual states, there will be

139. Memorandum from Bill Jaycox to Division Managers and Complex Managers (Feb. 26, 1992) (photocopy on file with *The University of Memphis Law Review*).

opportunities for companies to shift production to other geographic regions to avoid regulation. This possibility will be a factor limiting the willingness of states to consider enacting such laws and will have an effect on the strength of ideas developed. This has been the recent experience concerning the operation of state anti-corporate farming laws, as actions by Missouri, Kansas, and Oklahoma to weaken their restrictions on corporate hog feeding have placed pressure on other states, most notably Iowa, to amend their laws.[140] One issue which may be worthy of consideration by the states would be the possibility of an interstate compact or development of a uniform law on this issue.

The potential impact of state contract regulation on shifting sites for production was noted by Purdue agricultural economist, Michael Boehlje, who recently wrote:

> Public policy might also constrain increased use of contract/ownership coordination mechanisms. Concerns about market power and concentration might result in increased scrutiny under anti-trust laws and regulations. More likely, state legislators concerned about the future of family farmers and the threat of "corporate farming" may constrain forms of coordination arrangements such as contract farming or integrated ownership of various stages of production. Note however that such limitations and/or regulations are more likely to influence the geographic location of various activities in the food production and distribution chain rather than the method of coordination *unless such legislation is uniform from state to state.*[141]

Finally, there is an indication of the need to consider developing either uniform legislation or an interstate compact among agricultural states to address contracting.

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140. *See* Libby Powers, *Second Thoughts: Midwestern States Begin to Rethink Their Anti-Corporate Farming Laws*, TOP PRODUCER, Mar. 1993, at 16.

141. Mike Boehlje, *The Industrialization of Agriculture: Questions of Coordination*, EMERGING ISSUES IN THE AGRIC. MARKETPLACE (Purdue Univ. Center for Agric. Bus., West Lafayette, Ind.), undated, at 1, 2 (emphasis added).

D. Are There Risks or Limits with State Enactments?

If state legislation on production contracts becomes too restrictive, there will be risks, including the effect on producer opportunities and the risk that laws could be subject to challenges as violative of the "freedom of contract." The latter claim could be an issue if states attempt to intervene in contracting relations, such as by declaring certain contracts to be for "employment" and not for "independent contractors." It is also possible that state efforts to regulate contracts could backfire against producers. This could be the result if Kansas contract law includes a requirement for growers to protect the environment and follow all state laws. The question is whether integrators will pay for this or just pass the obligation to producers. State laws requiring arbitration can also be troublesome if producers find arbitration to be expensive or a procedure used by contractors to avoid legal precedents concerning unfair practices.

E. Will State Laws Be Effective in Achieving Their Purposes?

The answer to this, of course, depends on how one views the purpose of such laws. If the goal is to have fair, informed business relations, the laws can have some effect. If the laws are designed to make the parties equal as to their economic power, or to make them share the economic benefits of the contract, their purposes are not likely to be acheived. The parties will always carry their economic differences into the relation, and if laws try to make companies share the benefits, the companies will look for alternatives to do it themselves. This is a reason some observers believe poultry companies may move production to Mexico if state laws on issues such as environmental protection or growers' rights become too restrictive.

If the goal of the state laws is to provide procedural protections, such as notice of termination, right to prompt payment, and alternative dispute resolution, the laws may work fairly well. This is also true if the purpose is to prohibit certain especially unfair actions. Of course, the laws will require mechanisms for enforcement for this to be true. Finally, if the

goals of the laws are structural, addressing such concerns as how to maintain producers' independence or obtain a more equitable share of agricultural income, then the laws by themselves will not work. These goals will be difficult to achieve under any legislative approach, and if they are attempted through regulation of production contracts, integrators will move production somewhere else or organize it differently. If these are a state's goals, then state regulation of production contracts must be a part of a much larger legislative package with other laws, such as incentives for cooperatives, creation of alternative markets, and formation of bargaining associations.