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Contract Ground Rules

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CHAPTER QUICK TIPS

Confidentiality Applies After Signing

Confidentiality provisions in a contract do not apply until after the contract takes effect. You are generally free to show a contract containing a confidentiality requirement to an attorney and/or other advisors before signing.

Communicate In Writing

Even if the contract does not require communication with the buyer to be in writing, you should still communicate important contract-related information in writing. It is also a smart practice to write a short letter or email to the buyer restating any important information the buyer communicates to you in a meeting or over the phone. In the letter, ask the buyer to respond promptly if it does not agree with your restatement of the information.

CONTRACT GROUND RULES

The contract provisions described in this chapter create the ground rules for the farmer/buyer contract relationship.

What happens if disaster strikes?

Does the contract have a clause excusing you (and/or the buyer) from carrying out the contract provisions if a disaster occurs? Such a clause may be labeled "Disaster," or may be labeled with disaster "code words" such as "Force Majeure," "Commercial Impracticability," or "Acts of God." These disaster clauses usually allow the parties to cancel or modify the contract if conditions occur that make contract performance difficult or impossible. Commonly covered disaster conditions include events like extreme weather events (for example, flood, hail, or excessive heat) and national emergencies.

Add a Disaster Clause If You Don't See One

Because extreme weather conditions can have a devastating effect on crop, dairy, and livestock production and your ability to fulfill contract requirements, you should seriously consider adding a disaster clause to your contract if it does not already have one. See the organic-friendly disaster clause recommendations and example on pages 4–8 and 4–9 of this chapter, respectively.

No Protection From Market Changes

Keep in mind that disaster clauses generally do not protect farmers or buyers from market fluctuations. Unless the contract explicitly states otherwise, you will not be excused from contract performance if the market price skyrockets and you are locked into a low contract price.

Example: Standard Disaster Clause

```
Force Majeure: If the performance of the party suffering a disaster as described herein is delayed for more than 60 days and/or is substantially impaired, either party may cancel the contract upon written notice. Neither party shall be liable for damages due to delay or failure to perform any obligation under this Agreement if such delay or failure results directly or indirectly from acts of war, civil commotion, riots, strikes, lockouts, interference in telephone communications, carrier delays, fire, flood, windstorms, or other extreme weather events or acts of God, delay or failure to receive raw materials, or any cause of a like or different kind beyond the reasonable control of either party.
```

The standard disaster clause example above allows for cancellation of the contract after a 60-day delay or if one party's performance is substantially impaired due to one of the listed disasters. To trigger cancellation, the only requirement is some type of written notice to the other party.

In contrast, many organic contracts include disaster clauses that require the farmer to take some actions in addition to written notice before the farmer can take advantage of the protection offered by the disaster clause.

- *Attempt to Minimize Disaster Effects May Be Required*

  Your disaster clause might require you, if feasible, to make some sort of effort to overcome a disaster situation and perform under the contract. This could include delivering the portion of your production that was not harmed by the disaster. For example, if half your contracted crop suffered hail damage, you could still be required to deliver the other half of the crop if you retain harvest and delivery capabilities.

  You could also be required to provide evidence that you attempted to minimize disaster losses but were unable to do so. If you have this kind of requirement, make sure you take the necessary steps required to respond to the disaster or to show

that the disaster cannot be overcome. You may also wish to delete or modify this requirement before signing the contract if it seems like it could be too burdensome.

Example: Attempt to Minimize Disaster Effects Required

```
The party suffering disaster damage shall be excused from contract obligations only after providing proof of reasonable efforts to avoid or remove impediments to performance.
```

- *Immediate Written Notice to Buyer May Be Required*

  Some contracts require written notification or evidence of a disaster before you can take advantage of disaster clause protections. You might be required to provide this notification to the buyer within a specific time frame. Failure to provide the notification within the time frame could result in waiver of your right to the benefit of the disaster clause.

  If your contract contains a time-sensitive disaster notification requirement, consider whether you feel the stated time frame would be reasonable in the case of a serious disaster situation. In the worst of disasters (for example, a Hurricane Katrina event or a tornado like the one that hit Joplin, Missouri in 2011), it might be impossible to provide notice to the buyer within a few days or even a few weeks.

Example: Immediate Notification Required

```
Seller will contact Buyer immediately
should the crop be damaged in any degree by
any mechanism (human or natural). Should
there be a yield 10 percent smaller or
larger than Seller has represented as an
expected yield, Buyer will be contacted
immediately by seller.
```

It would be better to replace "immediately" with the phrase "as soon as reasonably practicable."

- *Farmer May Be Required to Hold Farm Products Until Buyer Able to Receive*

  A disaster provision might require a farmer to delay delivery in the case of a disaster suffered by the buyer. This delay may require you to hold or store a crop, livestock, or livestock products until the disaster is over and the buyer can accept delivery. This might be difficult for you if you produce perishable commodities or do not have low-cost storage options available. Consider deleting this kind of requirement if it does not make sense for your operation.

You may wish to include language allowing you relief from contract obligations if you suffer crop losses due to insect, weed, or disease pressures.

To do this, just add "crop losses due to insect, weed, or disease pressures" to the list of disasters in an existing disaster clause. These are common issues for both organic and conventional farmers, but are not often included in standard disaster clauses.

Is your disaster clause organic-friendly?

Be aware that even a well-written conventional disaster clause may not go far enough to fully protect organic farmers. That's because, in addition to classic disaster situations, organic farmers should consider:

1) the additional occurrences that qualify as disasters for organic farms, and

2) the additional consequences that conventional disasters can have for organic farms.

Organic Farmers Risk Additional Types of Disasters

Pesticide contamination and GMO pollen drift are occurrences that could qualify as disasters for organic crops but wouldn't be disastrous for nonorganic or conventional crops. Similar to a natural disaster, pesticide or GMO contamination could make a farmer entirely unable to fulfill organic contract obligations. Also similar to a natural disaster, farmers are unable to fully protect against pesticide or GMO contamination. Thus, it is wise to consider adding these occurrences to the list of disasters in your disaster clause—or include a separate provision excusing you from performing under the contract if an organic-specific disaster occurs.

Organic Farms Are More Sensitive to Consequences From Conventional Disasters

Disasters can also have consequences for organic farms that go beyond the consequences nonorganic farmers might face. For example, in addition to general flood damage to farm property and crop yields, polluted flood waters could contaminate surviving crops, livestock feed, or soil (with garden-variety pollutants, pesticides, petroleum products, or GMOs) beyond levels acceptable under the National Organic Program (NOP) regulations or your contract requirements.

This kind of disaster-related contamination could also result in revocation of your organic certification for at least the crop under contract. If the contamination is too widespread or persistent, you could be forced to take fields out of organic production for up to three years, and some livestock permanently out of organic management.[1]

Temporary Variances From NOP Regulations

As noted above, a disaster can make it impossible to comply with your contract. Disasters can also make it impossible to fully comply with NOP requirements. Anticipating disaster-related issues, the NOP regulations allow for "temporary variances" as a way to help organic farmers affected by natural disasters, extreme weather, and other organic farming business interruptions.[2] Under these conditions, the regulations allow NOP to create temporary exceptions from organic practices, such as those related to crop rotation, soil fertility, seed, and access to pasture.[3] Note that even in a disaster situation, NOP cannot grant variances to permit the application of prohibited substances; so organic farmers who suffer pesticide or GMO contamination as a result of disaster likely cannot benefit from a variance.[4]

NOP variances are almost always limited to a specific place, crop or livestock type, and time period. For example, due to severe drought in August 2011, NOP granted a temporary variance from the access-to-pasture regulations for organic producers in certain Colorado counties. The variance was limited to those producers with non-irrigated pasture, and expired at the end of the Colorado grazing season.[5]

While you may be able to take advantage of an NOP variance in a disaster situation and maintain continuous organic certification, your contract may not allow the same flexibility. Taking advantage of an NOP variance could cause you to violate contract standards. Consequently, you may wish to consider including language in the contract disaster clause or a separate provision stating that if you take advantage of a temporary NOP variance due to disaster, the buyer will waive any contract provisions that conflict with the terms of the temporary variance.

Livestock producers appear to be the organic farmers most commonly affected by conditions requiring temporary variances, so organic livestock producers should make a special effort to include a contract provision allowing producers to take advantage of NOP temporary variances without violating contract standards.

Recommendations for Organic-Friendly Disaster Clauses:

- Consider adding language to your contract stating you are released from the contract if your organic crops or livestock are contaminated by a natural or human-caused disaster that is not your fault.
- Consider adding language stating you are released from the contract if your organic certification status is revoked due to a natural or human-caused disaster that is not your fault.
- Consider adding a provision stating that if you take advantage of a temporary NOP variance due to disaster, the buyer will waive any contract provisions that conflict with the terms of the temporary variance.

Examples: Organic-Friendly Disaster Language

Force Majeure: If the performance of the party suffering a disaster as described herein is delayed for more than 60 days and/or is substantially impaired, either party may cancel the contract upon written notice. Neither party shall be liable for damages due to delay or failure to perform any obligation under this Agreement if such delay or failure results directly or indirectly from acts of war, civil commotion, riots, strikes, lockouts, interference in telephone communications, carrier delays, fire, flood, windstorms, or other extreme weather events or acts of God, delay or failure to receive raw materials, pesticide contamination, GMO contamination, revocation of organic certification, or any cause of a like or different kind beyond the reasonable control of either party.

NOP Temporary Variance: Buyer and Seller agree that Seller may take advantage of any applicable temporary variances announced by NOP without risk of violating the terms of the contract.

Consider How You Can Mitigate Disaster Losses

Think through the various disaster scenarios that could affect your organic operation, and consider whether the disaster clause in your contract is sufficiently clear and detailed—or whether you wish to delete requirements or include additional language.

If disaster does strike your farm, be sure to keep records of yields and sales to show the value of your organic farm products. Take and retain photographs of damaged crops. These records and photographs are important evidence of contract performance that can also serve as evidence of loss for any insurance claims or government disaster assistance you might seek.

In addition to your local Farm Service Agency (FSA) office and the FSA website, a good source of information about federal disaster relief

programs is FLAG's "Farmers' Guide to Disaster Assistance," available for free download at www.flaginc.org.

Does the contract require any level of confidentiality?

Confidentiality provisions appear in organic contracts with some regularity. Depending on the scope of the provision, they can be relatively harmless or a significant burden. Confidentiality provisions can be dangerous because they limit whom you can share contract information with once it the contract signed. It is important that you are able to share the contents of the contract with, at the very least, your spouse, your attorney, your financial advisers, and your lender. For instance, you do not want to end up with a serious contract issue and be faced with the choice between consulting an attorney or being in violation of your contract. You also do not want to risk being denied operating credit because you cannot show your contract to a lender who wants to see it.

Confidentiality provisions do not apply until after you have signed the contract. Therefore, a confidentiality provision in an unsigned contract does not prevent you from consulting with an attorney or other advisors before signing the contract.

Rare Exception: If you signed a nondisclosure agreement for the contract negotiation period or otherwise agreed not to disclose information revealed during the contract negotiation period, you are bound by that separate pre-contract confidentiality agreement.

Confidentiality provisions can vary widely, both in scope and in substance. Many confidentiality provisions bind only the farmer and do not bind the buyer at all. It is legitimate to question whether a confidentiality provision that binds only one party to the contract is fair.

Some organic farmers object to confidentiality clauses that restrict farmers' right to share price and contract information with other farmers. When farmers cannot share contract price information, it is very difficult for farmers to shop around for the best price among different buyers. This allows buyers to depress contract prices because they do not have to

compete for suppliers by offering farmers good prices. This situation has already arisen in conventional poultry and livestock markets.

Your state may protect farmers from confidentiality provisions in contracts by making them unenforceable and/or by requiring that farmers be allowed to share contract information with attorneys, lenders, spouses, or other important business advisers. For example, in Minnesota, contracts must not contain provisions that prohibit farmers from "disclosing terms, conditions, and prices" in agricultural contracts, and contract provisions that state otherwise are void and unenforceable.[6] This kind of state law automatically voids some confidentiality clauses, so farmers should check their state's laws instead of relying only on contract language if there is a question about the enforceability of a confidentiality provision.

If a buyer regularly does business in a state with contract confidentiality laws, the buyer's standard contract might include a confidentiality provision in one part of the contract but specifically recognize in another part of the contract that farmers in that state are not subject to the confidentiality provision in accordance with that state's law (see example below).

Example: Recognition of State-Specific Confidentiality Exemption

For Minnesota Producers Only: Producers who are residents of Minnesota or grow crops on land located in Minnesota possess specific legal protections set forth in Chapter 17 of the Minnesota Statutes. Minnesota producers are not prohibited from disclosing terms and prices contained in this agreement, and Minnesota producers have the further right to cancel this contract by mailing a written cancellation notice to the Buyer (at the address listed in Section 1 of this agreement) within three business days after receiving a copy of the signed contract. In case of dispute, Minnesota producers may also make a written request to the Commissioner of the Minnesota Department Agriculture for arbitration or mediation services as set forth in this agreement.

Common Features of Confidentiality Clauses

Some common features of confidentiality provisions are described below. Please note that a confidentiality provision could combine one or more of the following features to create any number of unique versions.

- *No restrictions* – neither you nor the buyer are required to keep any information confidential.
- *Total restriction* – neither you nor the buyer can share any information about the contract with any person not a party to the contract (third parties). This could even include a requirement to keep confidential the fact that the contract exists.
- *Restriction by individual* – the contract allows you (and/or the buyer) to share information about the contract solely with certain individuals. For example, the provision might require you to keep the contract information confidential as to all third parties except for an attorney, spouse, lender, accountant, employees, business partners, and/or other individuals who need to be informed for business reasons.

Example: Confidentiality Clause Allowing Limited Disclosure to Certain Individuals

`Buyer and Producer agree that all information received regarding the Contract, other than publicly available information, shall be held confidential and shall be disclosed only to those individuals necessary to the smooth operations of Producer’s organic farm. These individuals include, but are not limited to, legal counsel, immediate family members, financial advisors, lenders, business partners, and organic certifiers.`

Some confidentiality provisions might allow you to share contract information with certain advisers or employees, but might also require you to make those individuals sign separate confidentiality agreements. You should consider whether you are willing to ask employees or other individuals sign separate confidentiality

agreements, since this could be burdensome. Additionally, you should consider whether you are willing to enforce those agreements against these individuals on behalf of the buyer, should they be violated.

Example: Confidentiality Clause Requiring Separate Non-Disclosure Agreements

Buyer and Seller agree that all information received regarding the Contract, other than publicly available information, shall be held confidential and shall be disclosed only as required by law, or to individuals necessary to the smooth operations of Seller's organic farm. However, information held confidential shall only be released to said individuals after said individuals have executed separate non-disclosure agreements satisfactory to protect Buyer's confidential and proprietary information.

- *Restriction by type of information* – the contract prohibits you from sharing some information with third parties, but allows you to share other information. For example, the confidentiality provision may prohibit you from sharing pricing information, agricultural production methods, feed composition, trade secrets, or information not in the public domain. You may be allowed to share information already in the public domain (for example, information about the buyer that could be obtained with a Google search or a public records search), or other types of information.

Example: Confidentiality Clause Protecting Buyer's Information

```
Both parties agree that any of Buyer's
trade secret or otherwise proprietary
information is deemed confidential, and may
not be shared with third parties.
```

This provision might seem at first glance to bind both parties, but upon closer inspection it becomes clear that only the farmer is bound. The buyer does not agree to protect the farmer's confidential information, making this a one-sided provision in favor of the buyer.

- *Prior written approval required* before sharing any contract information – the contract might require you to obtain written approval from the buyer before sharing any information about the contract. This could be risky, especially if you end up in a contract dispute; the buyer will have an incentive to prevent you from releasing any information to an attorney or other adviser who could help you pursue claims against or defend claims by the buyer.

Example: Confidentiality Clause Requiring Prior Written Approval and Covering More Than Contract Terms

```
Seller agrees that all information obtained
in connection with the instant agreement
(including the terms of the agreement
itself) shall not be provided to third
parties without first obtaining the
express, written permission of Buyer.
```

In this case, not only are the terms of the contract confidential, but any additional information you receive from the Buyer during contract negotiations, contract performance, and any other contract-related activity is also confidential.

- *Extending beyond the term of the contract* – the contract might state that the confidentiality restrictions apply for a certain number of years after the termination or natural end of the contract. If this is the case, consider whether you think the time frame is reasonable.

> Example: Confidentiality Clause Extending Beyond Term of Contract
>
> Confidentiality Agreement. The parties agree that the operational information, facility information, transit and delivery processes, customer information, and any other information not in the public domain are proprietary information to be held confidential during the contract term. Moreover, this confidentiality agreement shall survive contract termination, and shall be fully enforceable for a period of three years after termination of this contract.

If you are offered a contract with a confidentiality clause, you could:

- Strike it out. A contract without a confidentiality clause is probably best in most cases.
- Negotiate a provision allowing you to share contract information with important advisers (see example on page 4–11 of this chapter).
- Negotiate a provision that only covers trade secrets or other truly confidential or sensitive information (but specifically excludes terms, conditions, and prices of contract).
- Make sure confidentiality is a two-way street. If you must agree to a confidentiality clause, at the very least both the farmer and the buyer should be equally bound to protect each other's confidential information.

Does the contract require you to guarantee that your farm product is free of security interests or liens?

Some contracts include language requiring the farmer to guarantee that there are no liens or other creditor claims on the farm products to be sold. The buyer's motivation for including a provision requiring freedom from security interests or liens is likely that:

(1) the buyer does not want to be held liable if you do not pay your lender from the money received from the buyer as payment for the organic farm products, and/or

(2) the buyer does not want the responsibility of ensuring that all lienholders are named on any checks paying you for the organic farm products.

If the contract requires that you guarantee your farm product is free of security interests or liens, consider whether you will be able to obtain credit for operating funds or inputs without giving a lender or a supplier a security interest in or lien on your crops, dairy products, or livestock. You should also double-check to be certain whether you have already granted a lender a security interest that would attach to the organic farm products under contract. Some examples of how this could happen include:

- You took out a loan for the current year's production and granted the lender a security interest in that production prior to signing the organic contract,
- You obtained an operating loan for a previous year's production which has not been fully repaid and for which a security interest in your production continues until the loan is paid off (note that some state laws limit the number of years for which a security interest can continue), or
- You obtained a loan in previous years that included a security interest in livestock purchased and its offspring.

If any conditions creating a security interest in the organic commodity under contract exist, you cannot in good faith sign a contract guaranteeing that your organic farm products are free of security interests or liens.

Example: Freedom From Security Interests or Liens Clause

```
Producer warrants that Producer holds good and marketable title to the contracted crop, and further warrants that said crop is free of any security interest and/or other liens or encumbrances of any kind. If the status of the commodity changes during the term of this agreement, Producer agrees to immediately provide Buyer with written notice and appropriate documentation.
```

It may be possible to negotiate toward a middle ground with respect to liens and security interests. If you cannot guarantee freedom from liens and security interests, consider promising that you will inform the buyer about any existing (or newly created) liens or security interests so it can include those lienholders or secured parties on its checks to you. If the buyer learns about a lien in the crops, dairy products, or livestock under contract, it will likely wish to make payment jointly to you and the lienholder(s) so as to avoid any involvement in future lawsuits the lienholders might decide to bring if they are not paid in full.

Example: Better Security Interest/Lien Clause

```
Seller agrees to notify Buyer in writing of
any security interest and/or other liens or
encumbrances of any kind, including those
that arise during the course of contract
performance.
```

If you have reason to trust the buyer and are willing to go further, you could agree that you will not give a new lien on the crop or livestock without the buyer's oral or written permission. This could be risky, though, especially if you need to acquire inputs in a short time frame and the buyer is slow about getting back to you with permission (or the buyer refuses to grant permission at all).

Requirement to Provide Personal Information

The contract might also require you to give the buyer your Social Security number, federal tax ID number, or other identifying information so that the buyer may conduct a Uniform Commercial Code (U.C.C.) lien search. Most states offer online U.C.C. lien search services allowing a search of any publicly recorded liens filed in that state. However, if giving the buyer this personal information for this purpose makes you uncomfortable, you could suggest language promising you will alert the buyer to all liens instead of agreeing to give the buyer information necessary for an independent search.

Does your contract require you to carry insurance?

Occasionally, organic contracts require farmers to maintain insurance policies. This could include federal crop insurance[7] or a private liability insurance policy.

Example: Insurance Required

Insurance Policy Required. Grower shall maintain in full force and effect for the duration of this Contract comprehensive general liability insurance coverage with minimum limits of one million dollars ($1,000,000.00). Grower's insurance carrier shall be acceptable to Buyer, and Buyer shall be named as a co-insured party under the policy. Grower will provide Buyer with proof of insurance, and Buyer shall be immediately notified by Grower of any changes in the policy status.

If your contract does require insurance, you will likely be required to keep the policy current for the duration of the contract (and sometimes longer, depending on the language of the contract). Some buyers will also require you to name them in the insurance policy as an additional insured (meaning that both you and the buyer are protected by the insurance policy). The contract will likely require a specific type of insurance, such as comprehensive general liability or product liability.

Prior to signing the contract, make sure you are actually able to obtain the necessary coverage from an insurance provider. Federal crop insurance is not available for all types of crops in all states, and coverage may not reflect organic market prices. Private insurance availability varies by insurance provider.

Furthermore, insurance can be expensive, and organic crop insurance premiums are often (unjustifiably) higher than conventional crop insurance premiums.[8] If the coverage required by the contract is too expensive, you could try negotiating with the buyer to lower the liability coverage limit (for example, $500,000 instead of $2 million) or agree to indemnify the buyer if any claim arises in the course of the contract (see the next section on limitation of liability and indemnification).

If you do agree to an insurance requirement, the contract might also require that you notify the buyer about any changes to the policy terms or coverage. Make sure to follow through on these requirements, or you will risk breaching the contract. To reduce any notice burdens, you could agree to notify the buyer of "major" changes instead of "any" changes.

Does your contract mention "indemnification" and/or limit the buyer's liability?

Indemnification and limitation-of-liability clauses are often intertwined in one long contract provision. It may be helpful to think of your indemnification obligations as having the potential to require you to pay the buyer a lot of money if a problem arises, while limitation-of-liability clauses have the potential to prevent you from recovering money from the buyer.

Many indemnification and limitation-of-liability clauses, as described above, are entirely one-sided in favor of the buyer. This means, for example, that while the farmer may agree to indemnify the buyer, the buyer does not agree to indemnify the farmer. If you must agree to an indemnification clause or a limitation-of-liability clause, it is fair to request that the indemnification and limitation-of-liability clauses bind both parties equally.

Example: One-Sided, Intertwined Indemnification and Limitation of Liability Provision Favoring Buyer

To the fullest extent permitted by law, Seller shall save and hold Buyer, its directors, officers, employees, agents, and representatives harmless from and indemnify, defend, and protect such parties against all liability, loss, claims, demands, damage (including damage to property or bodily injury), and expense (including reasonable attorneys fees) arising out of or in any way resulting from Seller's performance or non-performance hereunder, including any defect or nonconformity with Seller's warranties of the goods and services delivered hereunder, any act or omission of Seller, its agents, employees, or subcontractors; any act or omission of any carrier selected and employed to deliver goods ordered hereunder to Buyer; any failure by Seller, its agents, employees, carriers, or subcontractors to comply with the terms hereof; any infringement or claim of infringement of any patent, unpatented invention, copyright, design process, trademark, tradename, brand, slogan, unfair competition, or other adverse rights; or any litigation based on or arising out of the foregoing.

Indemnification involves protecting someone else from penalties or liabilities—usually by hiring a lawyer to defend that person and then paying any money that the person owes. Thus, if you sign a contract with an indemnification clause, you generally agree to pay the legal costs and other expenses involved in defending the buyer against a lawsuit by a person not involved in the contract (a third party). Additionally, if a court or settlement agreement requires the buyer to pay money to another person or entity, you would also have to pay that money on the buyer's behalf.

Under most indemnification clauses, the lawsuit against the buyer would have to be at least somewhat related to the contract relationship. For

example, if a truck driver gets in an accident delivering your organic product to the buyer's facility, the truck driver might try to sue the buyer. If you agreed to an indemnification provision, you would probably have to hire a lawyer to defend the buyer against the truck driver.

Indemnification provisions can also come into play in dealing with problems with your product. For example, if you sell sprouts to a buyer and those sprouts happen to be contaminated with E. coli and make the buyer's customers sick, you could be forced to hire a lawyer to defend the buyer against the sick customers' lawsuits, and be forced to pay damages to the sick customers who win their lawsuits. Other types of indemnification requirements could actually require you to sue a third party on the buyer's behalf in order to avoid or minimize damage to the buyer. As you can imagine, these kinds of provisions have the potential to bankrupt your farm with legal fees and payouts, so consider these clauses carefully.

Indemnification provisions might also include notice requirements, meaning you would be required to notify the buyer of any lawsuit or potential lawsuit against the buyer that you learn about.

As mentioned above, many indemnification provisions are one-sided in that they require the farmer to indemnify the buyer, but do not require the buyer to indemnify the farmer. At the very least, any indemnification requirement should be a "two-way street" requiring both the farmer and buyer to indemnify each other.

Example: Indemnification Provision

`Upon demand, Seller agrees to indemnify, defend, and hold harmless Buyer of and from any and all claims, demands, losses, causes of action, damage, lawsuits, judgments, including attorneys' fees and costs, arising out of or in any way related to the instant Agreement.`

As legal fees and costs can quickly reach thousands of dollars, you should pay close attention if you see the word "indemnify" or "indemnification" in a proposed contract. Indemnification provisions have the potential to bankrupt your farm operation and should be deleted, if possible.

Indemnification Provisions Can Be Limited and/or Capped

Although it is probably best for farmers to delete indemnification provisions before signing an organic contract, the risk of indemnification can be lessened by limiting or capping the provision. Common limitations include restricting indemnity to only those lawsuits caused by your non-performance under the contract, or the misconduct or negligence of you or your employees.

Example: Limited Indemnification Provision

Upon demand, each party agrees to indemnify, defend, and hold harmless the other party of and from any and all claims, demands, losses, causes of action, damage, lawsuits, judgments, including attorneys' fees and costs, but only to the extent caused by the misconduct or negligence of a party or a party's employees.

Note that indemnification is a "two-way street" under this provision. Both parties are agreeing to indemnify the other in a limited manner.

You could also try to negotiate a reasonable cap on any indemnity costs (in place of or in addition to limiting the scope). The cap can be any amount that you feel comfortable with.

Example: Capped and Limited Indemnification Clause

Upon demand, each party agrees to indemnify, defend, and hold harmless the other party of and from any and all claims, demands, losses, causes of action, damage, lawsuits, judgments, including attorneys' fees and costs, but only to the extent caused the misconduct or negligence of a party or a party's employees. In no event shall the maximum amount paid pursuant to this provision exceed the smaller of $200,000 or the amount actually paid to Seller under this Agreement, whichever is smaller.

Finally, if you do agree to an indemnification provision, it is wise to try to obtain insurance to help cover any potential costs. You may wish to check with an insurance provider prior to signing a contract to find out: (1) whether you qualify for this kind of coverage, (2) how much coverage (as a dollar amount) you can obtain, and (3) the cost of the coverage.

Limitation of Liability: Buyers often attempt to limit their liability, or exposure to lawsuits, by including a limitation-of-liability provision in contracts. These provisions generally list a variety of problems that could occur during the contract relationship and describe how the buyer will be protected from legal liability if any of the problems occur.

You should think about whether any limitation-of-liability provision in your contract seems fair and whether you are unnecessarily limiting your ability to recover from the buyer if something goes wrong. Additionally, the limitation of liability should not extend beyond actions directly related to the contract at issue.

Sometimes, the scope of the proposed limitation of liability far exceeds reasonable boundaries. In general, the buyer should be liable for problems that occur because of misconduct, negligence, or failure to act by the buyer or buyer's employees. It does not make sense for the buyer to be protected from actions the buyer could have prevented.

Make Limitation of Liability a "Two-Way Street"

Similarly, it is probably fair for you to be liable for your and your employees' misconduct, negligence, or failure to act. However, it may not be fair for the buyer to require you to agree that the buyer's potential liability may be limited while your liability is not limited. If you must agree to allow the buyer to limit liability, consider negotiating the same limitation of liability provision for your farm.

Does the contract create rules for your communications with the buyer?

It is not uncommon for an organic contract to require that the farmer communicate with the buyer regarding the contract in writing. The contract may even describe how the written communication must be transmitted (for example, by certified or registered mail, fax, email, courier, overnight delivery, etc.).

Although it may feel more natural for you to call the buyer to share information or ask questions, if your contract has a provision detailing how communications must be made, you need to follow those directions. If you want any notice or information you give to the buyer to have any effect under the contract, you must communicate according to the contract requirements. If you choose not to, it is possible the buyer could later claim never to have received information you provided. If a dispute arises, information you provide using a means other than what the contract requires may be deemed to have no legal effect under the contract, and may be treated as if the communication never happened. This can happen even if the buyer acknowledges receiving the information.

Thus, for anything important (such as notice of late delivery, disaster, etc.), it is a smart practice to send the appropriate communication to the buyer (even if it is just a letter memorializing a phone conversation). If you are uncomfortable with the level of detail in the contract language describing how communication between you and the buyer must occur, consider negotiating a less complex communication provision. For example, instead of requiring a written communication in a particular manner (such as by certified mail), you might negotiate for a simple writing requirement that allows any type of written communication method (including email, regular mail, fax, etc.).

Example: Communication Requirements

Producer agrees to make reasonable efforts to receive communications from Buyer. All communication between the parties related to this agreement shall be in written form, either transmitted by fax or email, sent by reputable overnight delivery courier (FedEx, DHL, or similar), or by certified U.S. mail to the appropriate email address, fax number, or physical address for Buyer contained herein. With the exception of routine operational communications, communication conducted via any other method shall be deemed ineffective.

Put Everything In Writing!

Even if the contract does not require communication with the buyer to be in writing, you should still be sure to communicate important contract-related information to the buyer in writing and keep a written record of what you provided to the buyer and when.

It is best to make sure that you keep written records of at least the following:

(1) Important information provided to the buyer;

(2) Important information received from the buyer; and

(3) Any agreements reached with the buyer that change or clarify any contract provisions.

It is also a smart practice to write a short letter or email to the buyer restating any important information the buyer communicates to you in a meeting or over the phone that asks the buyer to respond within a certain time period (for example, 10 days) if it does not agree with your restatement of the information.

CHAPTER 4 — ENDNOTES

[1] See 7 C.F.R. §§ 205.202(b), 205.671 (2012); but see 7 C.F.R. § 205.672 (2012). See also Jim Riddle, Flooding and Organic Certification Webinar (eOrganic eXtension 2011), available at http://www.extension.org/pages/60874/flooding-and-organic-certification-webinar.

[2] See 7 C.F.R. § 205.290 (2012).

[3] See 7 C.F.R. § 205.290(a) (2012).

[4] See 7 C.F.R. § 205.290(e) (2012).

[5] See U.S. Department of Agriculture, Agricultural Marketing Service, *Current Temporary Variances List* (2012), available at http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5091045.

[6] Minn. Stat. § 17.710 (2011).

[7] See Midwest Organic & Sustainable Education Service (MOSES), Crop Insurance for the Organic Farmer web page, available at http://www.mosesorganic.org/cropinsurance.html (provides information and links to resources related to federal crop insurance, including the limits of federal crop insurance for organic farmers).

[8] See National Sustainable Agriculture Coalition, *Organic Crop Insurance Senate 2012 Farm Bill Floor Debate, Making the farm safety net work for organic farmers* (June 2012), available at http://sustainableagriculture.net/wp-content/uploads/2012/06/Organic-Crop-Insurance-Amendment-Senate-Floor-6-14-12.pdf.