

# MOVING THE FAMILY FARM INTO THE FUTURE: THE ROLE OF DAIRY CONTRACTS IN SUSTAINING THE FAMILY FARM

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## ABSTRACT

*In light of the most recent dairy market crisis, this article explores how dairy contracts serve as the foundational document of the dairy industry and how these agreements can be leveraged to save small-scale farming. After laying the groundwork by discussing farming generally, the relationship between producers and buyers, and the dairy contract, this article ultimately argues that contract*

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*negotiation is an important, and possibly overlooked, tool for sustaining family farms. The article focuses particularly on confidentiality, termination, and forum selection clauses and the implications of these terms. Additionally, it looks to organic milk contracts to discuss issues of contract enforcement.*

## I. INTRODUCTION

Wisconsin's most beloved industry is facing yet another crisis. In November 2019, Dean Foods, America's largest milk processor, announced it was filing for Chapter 11 bankruptcy.<sup>1</sup> Dean Foods cited a significant drop in the consumption of liquid milk as the reason for the company's struggles.<sup>2</sup> All sectors of the dairy industry are feeling the effects of the changing milk market, no more so than America's dairy farmers.<sup>3</sup> Wisconsin alone lost 818 dairy farms in 2019, 638 dairy farms in 2018, and 465 dairy farms in 2017.<sup>4</sup> Dairy farmers are facing declining milk prices, rising suicide rates, and a fight for a spot in the dairy market alongside factory farms with herds in the hundreds.<sup>5</sup> During his visit to the 2019 World Dairy Expo in Madison, Wisconsin, United States Agriculture Secretary Sonny Perdue stated that dairy farms will need to get bigger in order to survive.<sup>6</sup> Perdue's statements were met with anger, discouragement, and concern for the changing face of America's dairy industry.<sup>7</sup>

The United States Department of Agriculture (USDA) provides a number of different programs to regulate dairy farming and protect farmers.<sup>8</sup> This includes milk marketing orders to regulate pricing and the milk market as well as insurance for dairy farmers through programs such as the Dairy Margin Coverage program, Livestock Gross Margin for Dairy Cattle program, and the Dairy Revenue Protection program.<sup>9</sup> However, aside from price regulation and other standards,

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1. Amelia Lucas, *Dean Foods, America's biggest milk producer files for bankruptcy*, NBC NEWS (Nov. 12, 2019), <https://perma.cc/U73A-LB4H>.

2. *Id.*

3. *Id.*

4. John Hart, *Trump farm secretary: No guarantee small dairy farms will survive*, WIS. ST. J. (Oct. 2, 2019), <https://perma.cc/5ZQN-YDMP>; Jim Dickrell, *Wisconsin Loses 818 Dairies in 2019, Largest Decline in State History*, DAIRYHERD MGMT. (Jan. 9, 2020), <https://perma.cc/YDK2-DTBX> (according to data from the state Department of Agriculture, Trade and Consumer Protection).

5. Hart, *supra* note 4.

6. *Id.*

7. *Id.*

8. *Policy*, USDA, <https://perma.cc/A6FX-7Q86> (archived July 13, 2020).

9. *Id.*

dairy contracts, in and of themselves, are minimally regulated.

Moreover, little research has been done on the dairy contract, and even less on how dairy contracts affect the industry.<sup>10</sup> The lack of contract regulation and reliable and accessible legal research regarding dairy contracts is a factor that has gone unaddressed in the attempt to understand the crisis that is jeopardizing the future of the family farm. It is interesting that this factor has gone largely unnoticed considering it is the contract between the producer and the buyer that forms the very basis of the dairy industry.<sup>11</sup> More so, these contracts are often unilateral.<sup>12</sup> In general, these purchasing contracts are written by the buyer with little or no input from the producer.<sup>13</sup> Despite this fact, changes to the milk market and the decreased consumption of liquid milk is the most cited reason for the imminent demise of the family farm.<sup>14</sup> By acknowledging contracts between producers and buyers as the foundation of the dairy industry, the question then arises, can properly negotiated and enforced dairy contracts increase the longevity of the family farm?

Due to the limited availability of literature and case law on dairy contracts, as well as limited access to actual contracts, this note will also explore organic milk contracts. The USDA has certain standards and requirements for milk to be certified organic.<sup>15</sup> Thus, these standards are a necessary component of any organic milk contract. Organic milk contracts are also relevant because, with the advent of large-scale farming, or factory farming, the move to organic farming has been one way in which the family farms have survived.<sup>16</sup> Recently, however, some factory farms have started to infringe on this corner of the dairy market despite concerns voiced by consumers that these farms are not meeting USDA organic standards.<sup>17</sup> To clarify, this note will not discuss whether organic milk is good or bad, but will use organic milk contracts to illustrate some issues around milk contract enforcement and the ramification it has on dairy farming.

To understand the implications of dairy contracts and how they function, it

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10. Philip Gruber, *Milk Contract Forms Basis for Dairy's Business*, LANCASTER FARMING (Mar. 2, 2018), <https://perma.cc/JY69-QRDC>.

11. *Id.*

12. Todd J. Janzen, *The New Deal: Understanding and Negotiating Dairy Supply Contracts*, NAT'L AGRIC. L. CTR. (Jan. 16, 2018), <https://perma.cc/AK6K-ZBD9>.

13. Jan Shepel, *Dairy farmers need to look over milk contracts carefully*, WIS. ST. FARMER (Mar. 21, 2018), <https://perma.cc/QP49-839U>.

14. Lucas, *supra* note 1.

15. *See generally* 7 C.F.R. § 205 (2020).

16. Peter Whoriskey, *Why your 'organic' milk may not be organic*, WASH. POST (May 1, 2017), <https://perma.cc/736R-8R7R>.

17. *Id.*

is important to understand how the dairy industry works, including farming models and purchasing models. Section II will explain three models of dairy farming: small-scale farming, large-scale farming, and organic farming. Section II will also discuss direct purchasing agreements and cooperatives.

In section III, this essay will outline the different forms of dairy contracts and contract provisions, including output and requirements contracts. In addition, this analysis will review specific contract terms, including confidentiality provisions, forum selection clauses, and termination clauses. Also, section III will briefly look at organic milk contracts.

Finally, in section IV, this note will provide potential alternatives for the contract provisions outlined in section III and how those alternatives could benefit farmers. Furthermore, section IV will argue that, with proper negotiation and enforcement, such contractual changes have the potential to move the family farm into the future.

## II. MODELS OF DAIRY FARMING AND BUY-SELL AGREEMENTS

To properly understand dairy contracts, it is helpful to first understand the logistics of dairy farming. The modern dairy farm has seen developments not just in technology, but in the structure of the farms themselves. Large-scale farming—commonly known as factory farming—commenced in the United States in 1966.<sup>18</sup> This model of farming has grown over the decades, and the family farm model has struggled to compete.<sup>19</sup> With the dawn of organic dairy farming, the family farm lived to see another day.<sup>20</sup> In recent years, however, some factory farms have made the move to organic despite USDA regulations for pasture hours that are incompatible with the factory farm model.<sup>21</sup> Subsection A will describe three models of dairy farming relevant to this note: small-scale farming, large-scale farming, and organic farming.

After establishing the requisite background knowledge regarding dairy farming, subsection B will outline the two typical forms of buy-sell agreements in the dairy industry: (1) direct purchasing agreements, in which the buyer purchases milk directly from the farmer, and (2) cooperatives, in which farmers buy shares in the cooperative and the buyer works with cooperative representatives to purchase milk, or, alternatively, in which the cooperative also owns a milk processing facility.

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18. Danielle Nierenburg, *Happier Meals: Rethinking the Global Meat Industry*, WORLDWATCH PAPER 171, 5 (2005).

19. See generally *id.* at 7.

20. Whoriskey, *supra* note 16.

21. *Id.*

*A. How Many Ways can you Milk a Cow?*

To understand how dairy contracts function and the implications of dairy contracts on the success of the family farm, it is important to first understand the basic models of dairy farming: small-scale farming, intensive animal farming, and organic farming. Small-scale farming, referred to in this essay as the family farm, is what one may think of when picturing a typical dairy farm. These farms have smaller herds and cows are kept in feed lots, out to pasture, or a combination of both.<sup>22</sup> Typically, cows are only milked twice a day.<sup>23</sup> Furthermore, many of these farms are not strictly dairy farms and include various other livestock as well as croplands.<sup>24</sup>

Intensive animal farming, or large-scale farming, is known colloquially as factory farming. Unlike many small-scale farms, these dairy farms exclusively produce milk.<sup>25</sup> Factory farming has been the subject of many critiques by environmentalists, animal welfare activists, and public health professionals.<sup>26</sup> Others view factory farming as a success because more milk can be produced at a lower cost.<sup>27</sup> Proponents believe it to be a cost effective means of meeting the demands of the global market.<sup>28</sup> The factory farming model involves keeping large herds on feed lots, rather than out to pasture.<sup>29</sup> This is in part because cows that are grain-fed produce more milk than those that are grass-fed, and maintaining adequate pasture lands is expensive.<sup>30</sup> Due to the tremendous number of cows, production on these farms is around-the-clock with cows being milked in shifts throughout the day.<sup>31</sup>

In recent years, some dairy farms have made the switch to organic.<sup>32</sup> Many small dairy farms have made the change in hopes of increasing profitability and

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22. See GIANACLIS CALDWELL, *THE SMALL-SCALE DAIRY: THE COMPLETE GUIDE TO MILK PRODUCTION FOR THE HOME AND MARKET* 21 (2014).

23. *Id.*

24. *Id.* at 17.

25. Jonathan Anomaly, *What's Wrong with Factory Farming?*, 8 *PUB. HEALTH ETHICS* 246, 246 (2015).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Whoriskey, *supra* note 16.

32. WILLIAM MCBRIDE & CATHERINE GREENE, *A COMPARISON OF CONVENTIONAL AND ORGANIC MILK PRODUCTION SYSTEMS IN THE U.S.* 1 (2007).

their ability to compete.<sup>33</sup> By producing organic milk, farmers can earn approximately double the price of what they otherwise would for their milk.<sup>34</sup> However, meeting USDA certified organic standards can be a costly endeavor.<sup>35</sup> Organic milk cows must be grass-fed and any supplemental feed must be organic.<sup>36</sup> Croplands and pastures must be managed organically as well.<sup>37</sup> It can take three or more years for a farm to transition to being certified organic.<sup>38</sup>

*B. How to Make a Sale: The Choice Between Direct Purchasing Agreements and Cooperatives*

Farmers can sell their milk in one of two ways: directly to the milk processing plant, known as a direct purchasing agreement, or through cooperatives that pool members' milk together and sell it to the milk processing plant.<sup>39</sup> In a direct purchasing arrangement, the buyer makes a contract with the farmer.<sup>40</sup> For example, a buyer like Dean Foods would approach a farmer and offer to buy their milk, creating a single, two-party contract. On the other hand, cooperatives are member owned.<sup>41</sup> Farmers buy shares in the cooperative and the cooperative makes a contract with the buyer.<sup>42</sup> Here, members have a contract with the cooperative. In turn, the cooperative has a contract with the ultimate buyer to purchase their members milk.<sup>43</sup> However, some cooperatives also have their own milk processing plants.<sup>44</sup>

In theory, cooperative members all have a seat at the table, and the contracts should be more fair for the farmers than in a direct purchasing arrangement.<sup>45</sup> Under the direct purchasing model, the buyer has much more leverage over the farmer once they contract.<sup>46</sup> On the other hand, direct purchasing agreements "can reduce the farm's exposure to milk market volatility and may increase [his or her]

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33. *Id.*

34. Whoriskey, *supra* note 16.

35. MCBRIDE & GREENE, *supra* note 32, at 2.

36. *Id.* at 1.

37. *Id.* at 2.

38. *Id.*

39. Janzen, *supra* note 12.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

profitability.”<sup>47</sup>

### III. DAIRY CONTRACTS

The contract between producers and buyers of raw milk forms the very foundation of the dairy industry. Historically, there was a tradition amongst America’s dairy farmers of making informal contracts.<sup>48</sup> These traditional contracts were oral, handshake contracts or perhaps just a simple, single page agreement.<sup>49</sup> In the past, both farmers and buyers liked the flexibility of the handshake contract.<sup>50</sup> However, with the extreme changes in the dairy market and the lower demand for milk,<sup>51</sup> it is crucial for farmers to understand how their contracts function. This includes knowledge and implications of the provisions contained therein.<sup>52</sup>

Today, most milk contracts between producers and buyers are in writing.<sup>53</sup> When considering these contracts, it is important to understand that the buyer is the one writing the contract, not the producer.<sup>54</sup> With this in mind, milk contracts, for the most part, are unilateral and farmers are coming to the bargaining table in a much weaker position.<sup>55</sup> Such contracts can be vague, with provisions skewed in the buyer’s favor.<sup>56</sup> To understand the issues with dairy contracts and the way such contracts have harmed the family farm, subsection A will first explore the two typical forms of dairy contracts: output contracts and requirements contracts. The type of contract determines how the farmer will be paid. Next, subsection B will identify three key provisions present in most of these contracts: confidentiality clauses, termination clauses, and forum selection clauses. Finally, relevant to recent attempts by factory farms to move into the organic milk market, subsection C will identify some USDA requirements for organic milk contracts and possible issues around enforcement.

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47. Gruber, *supra* note 10.

48. Shepel, *supra* note 13.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Janzen, *supra* note 12.

56. *Id.*

*A. How the Farmer gets Paid: The Choice Between Output and Requirements Contracts*

Dairy contracts between producers and buyers are typically in the form of output contracts or requirements contracts. Such contracts are governed by the Uniform Commercial Code (UCC) section 2-306 which states in relevant part:

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.<sup>57</sup>

In an output contract, the farmer “agrees to sell his or her entire production to the buyer.”<sup>58</sup> In a requirements contract, however, the farmer “agrees to sell as much as the buyer would require, not as much as the [farmer] would produce.”<sup>59</sup> For example, Farmer A has an output contract with Buyer A and Farmer B has a requirements contract with Buyer B. In October, both Farmer A and Farmer B yielded 50,000 pounds of milk. Buyer A will pay Farmer A for all 50,000 pounds of milk produced and delivered to Buyer A’s facility. Buyer B only needed 40,000 pounds of milk. Buyer B will pay Farmer B for only 40,000 pounds of the 50,000 pounds of milk that was produced and delivered to Buyer B’s facility.

Under the UCC, a contract for the sale of goods requires price and quantity.<sup>60</sup> However, output and requirements contracts are unique and still enforceable despite lacking price in terms of quantity.<sup>61</sup> Although no specific quantity is mentioned in either an output or requirements contract, these contracts are enforceable under the “good faith” provision of UCC section 2-306.<sup>62</sup> Moreover, if an estimate of output or requirements is included, then the amount of milk supplied or demanded must not be unreasonably disproportionate in regards to that estimate, and any maximum or minimum amounts are intended to be the limits of such contracts.<sup>63</sup>

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57. U.C.C. § 2-306(1) (AM. LAW INST. & UNIF. LAW COMM’N 2019).

58. Troy Schneider, *Take time to understand milk supply-purchase contract*, FARMPROGRESS (May 12, 2017), <https://perma.cc/RDA8-RPHD>.

59. *Id.*

60. *Id.*; see U.C.C. §§ 2-105, 2-106, 2-201, 2-204 (AM. LAW INST. & UNIF. LAW COMM’N 2019).

61. Schneider, *supra* note 58.

62. *Id.*

63. U.C.C. § 2-306 cmt. 3 (AM. LAW INST. & UNIF. LAW COMM’N 2019).



The distinction between output and requirements contract mostly governs how the farmer will be paid. However, such contracts may include slightly different provisions. As explored later in this note, a requirements contract should include an adequate notice provision requiring the buyer to give notice of any change to the amount of milk required.<sup>64</sup> While a requirements contract may appear to be more beneficial to the buyer than the seller, there are a number of factors at work in such contracts. For instance, the buyer may offer a higher price or more favorable terms in a requirements contract than an output contract. Generally, the amount of milk contracted for would not be disproportionate to the amount of milk the farm typically produces.<sup>65</sup> Moreover, with a requirements contract the farmer knows how much they will be paid, even in some cases if they under produce.<sup>66</sup> Furthermore, requirements contracts can help reduce milk market volatility, benefiting both buyers and farmers.<sup>67</sup>

### *B. The Good, the Bad, and the Ugly of Dairy Contract Provisions*

#### *1. Making the Dairy Contract Confidential*

Many dairy contracts include a confidentiality provision, also known as a nondisclosure agreement. Nondisclosure agreements are defined as a “contractual provision containing a person’s promise not to disclose any information shared by or discovered from a holder of confidential information, including all information about trade secrets, procedures, or other internal or proprietary matters.”<sup>68</sup> Such provisions may encompass the entire contract or portions thereof. For instance, in a milk supply agreement between the Dairy Farmers of America, Inc. and Eagle Family Foods, Inc., clause 19 of the contract includes a confidentiality provision that is intended to encompass the entirety of the contract.<sup>69</sup>

Although confidentiality clauses generally serve an important function for business relationships, the inclusion of these clauses in dairy contracts can become concerning in some situations. Confidentiality clauses raise a red flag when it is learned that some buyers have gone so far as to advise farmers not to show their contracts to a lawyer because it is confidential.<sup>70</sup> Additionally, confidentiality

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64. See Schneider, *supra* note 58.

65. *Id.*

66. Gruber, *supra* note 10.

67. See Schneider, *supra* note 58.

68. *Nondisclosure Agreement*, BLACK’S LAW DICTIONARY (11th ed. 2019).

69. *Milk Supply Agreement*, SEC (archived on July 13, 2020), <https://perma.cc/S9KE-TXVY>.

70. Gruber, *supra* note 10.

clauses can infringe on farmers' ability to compete.<sup>71</sup>

## 2. *The Contract Ends when the Buyer says it Ends*

Like many other contracts for the sale of goods, dairy contracts often include a termination clause. The UCC defines a termination as “occur[ing] when either party pursuant to a power created by agreement . . . puts an end to the contract otherwise than for its breach.”<sup>72</sup> In other words, a termination clause outlines the specific set of conditions under which a contract may be terminated, as well as providing guidance on how the contract will be terminated if such conditions are met.<sup>73</sup> UCC section 2-309(3) governs the termination of contracts for a sale of goods and states that “[t]ermination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.”<sup>74</sup> Official comment eight of UCC section 2-309 expands on subsection (3), stating that “[a]n agreement dispensing with notification or limiting the time for the seeking of a substitute arrangement is, of course, valid under this subsection unless the results of putting it into operation would be the creation of an unconscionable state of affairs.”<sup>75</sup> If a contract or clause is determined to be unconscionable, a court may refuse to enforce the contract in whole or in part.<sup>76</sup> Unconscionability is defined as extreme unfairness.<sup>77</sup> Generally, unconscionability is assessed by an objective standard: 1) one party's lack of meaningful choice, and (2) contractual terms that unreasonably favor the other party.<sup>78</sup>

Despite UCC section 2-309(3) reasonable notice requirement, some farmers are given as few as thirty days to find a new buyer for their milk.<sup>79</sup> In a saturated market that has left both producers and buyers struggling, this is simply not enough time for the farmer to find another buyer.<sup>80</sup> Not only can buyers terminate the contracts on short notice, they can often terminate without cause.<sup>81</sup> Some buyers

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71. *See id.*

72. U.C.C. § 2-106(3) (AM. L. INST. & UNIF. L. COMM'N 2019).

73. *Id.*

74. U.C.C. § 2-309(3) (AM. L. INST. & UNIF. L. COMM'N 2019).

75. U.C.C. § 2-309 cmt. 8 (AM. L. INST. & UNIF. L. COMM'N 2019).

76. U.C.C. § 2-302(1) (AM. L. INST. & UNIF. L. COMM'N 2019).

77. *Unconscionability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

78. *Id.*

79. Gruber, *supra* note 10.

80. Janzen, *supra* note 12.

81. *Id.*

even attempt to add clauses that would allow them to terminate contracts immediately for a single bad load of milk.<sup>82</sup> Therefore, in some cases, these termination clauses may very well be unconscionable. First, these contracts are drafted by the buyer.<sup>83</sup> Second, minimal notice termination provisions are written in the buyer's favor.<sup>84</sup>

Moreover, requirements contracts allow a buyer to reduce the amount of milk purchased.<sup>85</sup> Although this does not speak directly to termination, it does speak to the issue of adequate notice.<sup>86</sup> For farmers with requirements contracts, a dramatic decrease in the amount of milk a buyer is willing to purchase may well be a termination of the contract.<sup>87</sup>

### *3. You can go to Court, just not Here*

Milk contracts will often also include a forum selection clause. A forum selection clause functions as a contractual waiver.<sup>88</sup> The purpose of this provision in a contract is to provide the chosen venue with personal jurisdiction over the parties.<sup>89</sup> Through the forum selection clause, “a contract[ing] party waives its rights to raise jurisdictional or venue objections if a lawsuit” is brought in the chosen venue.<sup>90</sup> Moreover, if such a clause is exclusive, then the contracting party also promises not to initiate litigation in any other forum.<sup>91</sup> In 1972, the Supreme Court of the United States held that forum selection clauses are presumed to be enforceable.<sup>92</sup>

Direct purchase contracts often include a forum selection clause that are, generally, in a state other than the one in which the farmer resides.<sup>93</sup> Such clauses raise numerous concerns in regards to public policy, as well as a long list of legal

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82. Gruber, *supra* note 10.

83. *See Nondisclosure Agreement*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Shepel, *supra* note 13.

84. *See id.*

85. Schneider, *supra* note 58.

86. *See generally id.*

87. *See id.*

88. Hannah Buxbaum, *The Interpretation and Effect of Permissive Forum Selection Clauses Under U.S. Law*, 66 AM. J. COMP. L. 127, 127 (2018).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 129.

93. Gruber, *supra* note 10.

queries in regards to jurisdiction and applicable law.<sup>94</sup> Additionally, such forum selection clauses in dairy contracts may include mediation and arbitration as alternatives to litigation.<sup>95</sup>

### *C. Organic Milk Contract Requirements and Questions of Enforcement*

Organic milk contracts, while composed of traditional milk contract provisions, also must include USDA standards for certified organic.<sup>96</sup> For instance, organic milk cows are grass-fed.<sup>97</sup> The USDA has a required number of pasture hours during the growing season, as well as organic feed requirements during the winter.<sup>98</sup> The question with organic milk contracts is not so much the provisions themselves, but rather the enforcement of USDA standards.

All dairy farms, as producers of food products, must be inspected. Organic farms are inspected not just for quality control, but to guarantee the farm is meeting USDA requirements for certified organic.<sup>99</sup> Interestingly, however, organic farmers can hire and pay “their own inspectors from lists of private companies and other organizations licensed by the USDA.”<sup>100</sup> The USDA, itself, typically does not inspect the farms.<sup>101</sup> Organic milk inspectors make an annual visit to the farms, arranged days or weeks in advance.<sup>102</sup> Only approximately 5% of inspections are done unannounced.<sup>103</sup> These unorthodox inspection rules call into question the integrity of organic milk contracts and raise concerns about enforcement. For instance, one large-scale organic farm arranged for inspections to take place outside of the growing season, despite USDA requirements that inspections take place during a time of year in which cows would be out to pasture.<sup>104</sup>

## IV. PROPERLY NEGOTIATED CONTRACTS CAN SUSTAIN THE FAMILY FARM

With the sharp decline in demand for liquid milk and the alarming decline in dairy farms, the content of the contract between producers and buyers becomes critical. Although the USDA provides programs like the USDA Dairy Revenue

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94. Buxbaum, *supra* note 88, at 128.

95. Gruber, *supra* note 10.

96. Whoriskey, *supra* note 16.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

Protection Program, which allows dairy farmers to buy insurance to protect against declines in revenue, and milk marketing orders to stabilize milk prices in regards to contract management, USDA regulations fall short.<sup>105</sup> These programs address only revenue and not the core of the problem: lack of protection for poorly drafted, unilateral contracts.

While contracts may currently be part of the family farm's problem, contracts may also be part of the solution. Thus, through proper negotiation of contract terms and enforcement of those terms, the family farm can stay competitive in today's declining market.<sup>106</sup> However, it is important to keep in mind with the current state of the market that farmers are negotiating contracts from a weak position.<sup>107</sup> Even weaker than it already was in the typical scenario with a sophisticated buyer.<sup>108</sup> Nevertheless, farmers cannot necessarily wait for the market to bounce back to begin negotiating their purchasing contracts. By using all tools at their disposal, such as the strength of a cooperative and knowledgeable advocates, farmers can be in a better position to negotiate their contracts.

This section will outline potential alternatives to current contract provisions and how the alternatives can prove to be beneficial for farmers. First, subsection A will further explore confidentiality provisions and the benefits of eliminating all-encompassing confidentiality clauses. Second, subsection B will discuss potential restrictions on termination clauses. Third, subsection C will look at alternatives for forum selection clauses and the pros and cons of each alternative. Finally, subsection D will discuss enforcement of organic milk contracts and the benefits that proper enforcement could have for family farms.

#### *A. When Confidential is too Confidential*

Confidentiality provisions become a problem when they begin to infringe on the farmer's ability to compete.<sup>109</sup> Although confidentiality provisions are a typical business practice when negotiating a contract, the inclusion of such a provision should be questioned.<sup>110</sup> What is it that the buyer wants to keep secret? For the farmers, the implications of confidentiality provisions go further than trade secrets. On the other hand, omission of a confidentiality clause may limit negotiations because buyers may become wary of the process. Therefore, the answer is not

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105. *See generally* Policy, *supra* note 8.

106. Shepel, *supra* note 13.

107. *Id.*

108. Gruber, *supra* note 10.

109. *Id.*

110. Janzen, *supra* note 12.

necessarily a complete exclusion of a confidentiality provision, rather a less expansive provision.

With all-encompassing confidentiality provisions, farmers cannot know the prices other farmers are being offered for their milk, clauses contained in others' contracts, and additional requirements (such as animal care standards that exceed USDA requirements) being imposed on farmers.<sup>111</sup> Essentially, the elimination of all-encompassing confidentiality clauses would make such information more accessible, and in today's market that information may be crucial. Moreover, if these contracts were less confidential, it would be easier to determine if they are lawful and meet USDA requirements.

### *B. Buyers cannot just Walk Away*

Oftentimes, buyer-written dairy contracts include a termination provision that lets the buyer terminate on short notice for any reason.<sup>112</sup> In today's market, it is difficult for farmers to simply find another buyer for their milk, a phenomenon that has been a major factor in the sharp decline of dairy farms.<sup>113</sup> Generally, termination clauses limiting time to seek a substitute arrangement are valid under UCC section 2-309, unless it would create an unconscionable state of affairs.<sup>114</sup> Therefore, in negotiating termination provisions, a better provision would have a longer notice requirement. For instance, some contracts have a twelve months' notice of termination of contract.<sup>115</sup> Moreover, a better alternative provision would make it more difficult for buyers to terminate without cause.<sup>116</sup> Although flexibility may have previously been beneficial to both producer and buyer, in today's market, the key is to make it so buyers cannot simply walk away.<sup>117</sup>

However, it is important to consider that today's market is also causing buyers to struggle.<sup>118</sup> Therefore, a provision that makes it more difficult for buyers to terminate may make buyers less willing to contract. On the other hand, longer notice requirements may be beneficial to buyers. Rather than all out termination of the contract, the notice period gives time for the buyer and producer to renegotiate more favorable terms, potentially keeping the buyer competitive and the producer

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111. *See generally* Gruber, *supra* note 10.

112. *Id.*

113. *See* Lucas, *supra* note 1.

114. U.C.C. §2-309 cmt. 8 (AM. L. INST. & UNIF. L. COMM'N 2019).

115. SEC, *supra* note 69.

116. *See* Gruber, *supra* note 10.

117. *See id.*

118. Lucas, *supra* note 1.

in business.

In addition to termination provisions, requirements contracts should include an adequate notice provision.<sup>119</sup> If, for instance, a buyer drastically drops the amount of milk it is willing to buy, farmers need enough time to find some other buyer or potentially renegotiate their contract.<sup>120</sup> Therefore, adequate notice provisions must provide sufficient time for farmers to mitigate and meet the “good faith” requirements of UCC section 2-306. Moreover, if a requirements contract includes an estimate, buyers cannot change the quantity required to an amount that is unreasonably disproportionate to the estimate.<sup>121</sup>

### *C. A Potpourri of Possible Forums*

Many dairy contracts include a forum selection clause with a choice of venue that is outside of the farmer’s home state.<sup>122</sup> This can make it difficult for farmers to dispute their contracts or defend against litigation.<sup>123</sup> Four possible alternative forum selection clauses include: (1) choice of venue where farmer resides, (2) arbitration, (3) mediation, or (4) some combination of the first three.<sup>124</sup>

A local forum is generally preferable for resolving disputes.<sup>125</sup> This can be true for a number of reasons, including logistically and strategically. For farmers who work 365 days out of the year, a home forum is desirable. Moreover, considering the fact that litigation is already costly, requiring a farmer to find a lawyer in another state and travel to bring or defend a suit can be impracticable. In consideration of the costs, litigation as the first option to resolve disputes may not be the best option. Litigation can be an exceptionally timely process, and when a farmer is at risk of losing their contract, time is of the essence. Furthermore, the buyer may be opposed to this option because they may not be willing to litigate outside of their preferred forum or the laws of the farmer’s home state may be disadvantageous to the buyer.

Alternative dispute resolutions, although often criticized, are rife with advantages.<sup>126</sup> Arbitration is an alternative dispute resolution process in which a neutral arbitrator, or panel of arbitrators, hear a dispute and makes a legally binding

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119. Schneider, *supra* note 58.

120. *Id.*

121. U.C.C. 2-306 cmt. 3 (AM. L. INST. & UNIF. L. COMM’N 2019).

122. Gruber, *supra* note 10.

123. *Id.*

124. *Id.*

125. *See id.*

126. *See generally id.*

decision.<sup>127</sup> In many respects, arbitration mirrors the litigation process, although it is less formal.<sup>128</sup> Many of the critiques of arbitration agreements stem from the way the clause is hidden in unilateral, unnegotiable contracts, like shrink wrap contracts.<sup>129</sup> In dairy contracts, however, arbitration agreements could be beneficial to farmers because they may create a more equal footing with buyers.<sup>130</sup> Moreover, arbitration is a less timely and more cost effective process.<sup>131</sup>

Mediation, like arbitration, is another form of alternative dispute resolution. Mediation can take many forms in order to meet the needs of the parties.<sup>132</sup> A mediator's decision, unlike an arbitrator's, is not legally binding.<sup>133</sup> The fact that the decision is not legally binding could be a good or a bad thing for farmers, depending on the outcome of the mediation. Generally, however, mediation has the potential to be a useful option for forum selection clauses in dairy contracts.<sup>134</sup> Mediation is practical in its time-efficiency and cost-effectiveness. More so, because mediation is a less restrictive resolution process, it can take the form necessary to meet the parties' needs in reaching a resolution.<sup>135</sup>

Finally, another possible forum selection clause, and possibly the best alternative, would be to outline a dispute resolution process. For instance, the clause may give parties the opportunity to reach an agreement on their own. If the parties are unable to reach an agreement, they move on to arbitration or pre-litigation mediation. If the dispute is not resolved in arbitration or mediation, the final step would be to litigate the matter. Although this proposed provision sounds antithetical to previous statements regarding timeliness and cost-effectiveness, the idea would be for most matters to be resolved long before reaching a courtroom.<sup>136</sup>

#### *D. Proper Enforcement of Organic Milk Contracts can Benefit Family Farms*

Finally, in regard to organic milk contracts, enforcement has seemingly become an issue. Factory farms have started to impede on a sector of the industry

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127. David B. Lipsky, *The New York Times' Attack on Arbitration*, DISP. RESOL. MAG., 2016, at 7.

128. *Id.*

129. *See generally id.*

130. *See generally* Gruber, *supra* note 10.

131. Lipsky, *supra* note 127, at 7.

132. *See generally* Lon Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971).

133. *Id.*

134. *See generally* Gruber, *supra* note 10.

135. Fuller, *supra* note 132, at 305-339.

136. Gruber, *supra* note 10.



that had been primarily made up of family farms.<sup>137</sup> Although this trend is concerning to family farmers and consumers alike, it is also concerning from a contract enforcement perspective. USDA requirements for certified organic are a natural and integral part of organic milk contracts.<sup>138</sup> Enforcement of these requirements is done through annual inspections.<sup>139</sup> However, the USDA currently allows farmers to choose and pay for their own inspector.<sup>140</sup> This unorthodox inspection rule calls into question whether some farms are meeting certified organic standards or simply buying the label.<sup>141</sup> Although this issue is broad in that it stems from an inadequate USDA policy, it can still be considered in the narrow context of milk-purchasing contracts. An organic milk buyer has contracted with the farmer to produce organic milk. If such milk is not meeting USDA organic standards, then the producer is breaching the contract. Therefore, proper enforcement of organic milk contracts could benefit the family farm if it proves to be true that these organic factory farms are not meeting USDA standards.

#### V. CONCLUSION

Can properly negotiated and enforced dairy contracts increase the longevity of the family farm? Potentially, yes. Contracts between producers and buyers are the foundation of the dairy industry. Without such contracts, farmers would not be able to sell their milk, and buyers would not be able to meet consumer needs, even if those needs are not as extensive as in the past.

This note has explored how the dairy industry works, how dairy contracts function, and it has reviewed specific, problematic contract provisions. Taking into consideration issues of enforcement, highlighted by the discussion of organic milk contracts, it is clear there is a problem with dairy contracts from the producer's perspective. Confidentiality clauses infringe on farmers' ability to compete. Termination clauses can leave farmers with no buyer and no alternatives. Forum selection clauses make it difficult for farmers to dispute their contracts or defend against litigation. And finally, the USDA's unorthodox organic inspection rules have potentially allowed factory farms to infringe on a sector of the market dominated by small-scale farms.

Although it is true that larger factors are at play, contracts still have a role in the problems affecting small-scale farms. The entire industry is being affected by

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137. Whoriskey, *supra* note 16.

138. *See id.*

139. *Id.*

140. *Id.*

141. *See id.*

less consumption of liquid milk, as proven by Dean Food's announcement that it will be filing for bankruptcy.<sup>142</sup> However, although the demand for milk has decreased, a demand for dairy products still exists and buyers will need to contract with producers to meet consumer demands. Therefore, even in the thick of a market decline, understanding how contracts have worked against farmers and how such contracts could be improved is important.

Moreover, USDA programs, such as milk marketing orders and the Dairy Revenue Protection program, are inadequate in addressing this specific issue.<sup>143</sup> In a declining market, stabilization of milk prices is important. Nevertheless, milk prices are just one piece of a dairy contract, although an important one. However, milk prices are only important if farmers are able to maintain their contracts and stay in the market. Therefore, it is the dairy contract in its entirety, and not simply milk prices, that need to be addressed.

Through proper negotiation of contract terms, family farms can be in a better position to stay in business despite the bleak outlook for the milk market. It is important for farmers to understand the implications of contract provisions. In the past, farmers have attempted to take contract negotiation into their own hands through cooperatives.<sup>144</sup> Cooperatives, theoretically, give farmers a seat at the bargaining table that they may not otherwise have.<sup>145</sup> Moreover, some cooperatives have their own milk processing plants.<sup>146</sup> Therefore, not only is the farmer the producer, but, because the farmer owns shares in the cooperative, the farmer is also the buyer in some respects. Even with the strength of a cooperative behind them, farmers need advocates who are willing to help them understand their contracts, the ramifications of the provisions contained therein, and the negotiation or dispute process.

Overall, contract negotiation and enforcement are some ways family farms can move into the future. Many factors are at play in today's dairy industry and all areas of the industry are being affected; however, it is clear from the numbers that small farms are taking the brunt.<sup>147</sup> Proper contract negotiation and enforcement may not resolve the problems that have resulted due to the decline in the milk market, but it may provide a stepping stone in the right direction. Contracts between buyers and producers are the foundation of the dairy industry. Therefore,

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142. Lucas, *supra* note 1.

143. *See generally* Policy, *supra* note 8.

144. Janzen, *supra* note 12.

145. *Id.*

146. *Id.*

147. Hart, *supra* note 4 (according to data from the state Department of Agriculture, Trade and Consumer Protection).

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it is essential that these contracts are given the attention they deserve.

*In loving memory of my father, Tim “Farmer” McCarthy.*