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The Legal Environment Facing Economic Agents in Production

Janie S. Hipp and Harriet F. Francis

Agriculture has seen a steady movement toward the increased use of contracts. Agricultural contracts now guide the interrelationships of parties throughout the modern production system, extending well beyond the livestock sector. With this predominance come new issues that require us to reexamine contract theory and the roles of the parties. This review examines legislation, regulations, and recent court rulings in seemingly unrelated areas that have specific relationships to the development of contracts in production agriculture: environmental law and labor law.

Key Words: contracting, environment, labor, law, liability, relationships, risk

JEL Classifications: D23, D86, K12, K31, K32

Contracts have a long history of use in the world of agriculture, with early beginnings in sharecropping, a contract agreement to farm a parcel of land owned by another for a percentage of the produce. Currently, contracts are likewise a part of everything done in agriculture from acquisition of land, seed, and equipment to marketing agreements for products, crops, and livestock. In 1969, only 6% (156,000 farms) of all farms used contracts to raise 12% of the total value of agricultural production. By 1998, 11% of all farms used contracts to raise 35% of the total value of agricultural production (Census Bureau). By 2001, contracting accounted for one third of the total value of production on U.S. farms (USDA ERS). Most observers hold the opinion that this trend will continue. The poultry and livestock industries are among those segments of agriculture that have embraced and

have pioneered the use of comprehensive contracts to define and guide relationships between components and participants in the agricultural marketplace.

Agricultural contracts now guide the interrelationships of parties throughout the modern production system, extending well beyond the livestock sector. With this predominance come new issues that require us to reexamine contract theory and the roles of the parties. In preparing this review, we limited ourselves to an examination of legislation, regulations, and recent court rulings in seemingly unrelated areas that have specific relationships to the development of contracts in production agriculture: environmental law and labor law. Many other areas of the law that affect and are affected by contract use in agriculture are outside the limitations of this article.

Contract Basics

A contract (whether oral or written) is a legally binding agreement between two or more parties involving an enforceable promise to do something or to refrain from doing something.

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In their simplest form, contracts embody social customs and rules and depend on each person's connection to one another and to third parties. Contracts, in general, usually relate to supply of goods or services and most often contain a prearranged or fixed price. They are used to reduce risks and stabilize quality and price fluctuations.

Two general types of contracts are in widespread use in U.S. agriculture: marketing contracts and production contracts. Marketing contracts establish a pricing mechanism, usually a set price for established quality grades, and identify delivery procedures. The producer makes most, if not all, management decisions and owns the commodity until marketing, thus bearing all the risk.

Production contracts involve a shift in management authority from the grower to the purchaser, usually a processing company. A production contract usually specifies in detail the production inputs to be supplied by the contractor, the quality and quantity of the particular commodity involved, the production practices to be used, and the manner in which compensation is to be paid to the producer (Kunkel and Larison). The buyer/contractor may also provide technical guidance for production or be given other forms of support. Production contracts can include formulas that base contract payments on a comparison of the performance of the livestock that are the subject of the contract to other similar livestock. These contracts usually specifically identify the risks of production or management that will be borne by the producer.¹

Legislative Efforts to Address Agricultural Contract Issues

Federal laws dealing with agricultural contract relationships are few. The federal Packers and Stockyards Act (PASA) and Perishable Agricultural Commodities Act (PACA) provide some protection for producers involved in

contract relationships that experience problems. PACA, in particular, provides significant protection for unpaid producers.

Few states have enacted provisions providing forms of protections for producers involved in these types of contracts. In the absence of statutory law, problems arising from a contractual relationship will be governed by traditional contract law theories. Although state legislative bodies have been urged to address issues of contract fairness, inequities in bargaining power, concentration in the marketplace, and other related issues, few legislative bodies have moved forward in this area. One of the proposed methods of dealing with concerns over agricultural contract fairness issues was first proposed by members of the National Association of Attorneys General and is called the Model Producer Protection Act.

The Model Producer Protection Act (Model Act) began with and grew out of the Iowa Attorney General's work on production contracts.² The Model Act combined portions of proposed federal and state legislation into a model law for potential adoption at the state level. It was later endorsed by 16 Attorneys General. Producer protection acts have been proposed in the legislatures of farm and ranch states to protect contract growers and producers. Minnesota, Iowa, Kansas, and Mississippi introduced and passed provisions similar to component parts of the Model Act. Kentucky and Minnesota went so far as to attach liability for environmental problems occurring on production farms of the corporate contracting party. Iowa and South Dakota introduced measures that would have addressed environmental liability contract provisions. Missouri also addressed issues related to agriculture producer protection during the 2003 legislation session (Matthews).³ Georgia saw two pieces of legislation addressing producer protection is-

¹ These include risk of crop loss, disease, loss of herd, effect that weather conditions will have on the performance requirements, and risk of loss for non-payment under the contract.

² See <http://www.state.ia.us/government/ag/99lvsk.htm> (June 30, 2002). See also, <http://www.newrules.org/agri/ppa.html> (June 30, 2002).

³ See also 2004 Missouri HB1375. This bill died without action in the 2004 Legislative Session.

sues during the 2003 legislative sessions.⁴ The Arkansas General Assembly has revisited portions of the Model Producer Protection Act as recently as the 2005 legislative session.

Critics of the Model Act argue that extending special protections to farmers entering into this type of contractual relationship is unnecessary and that existing laws provide adequate protection. Critics also charge that the Act could have certain unintended consequences. For example, unnecessary regulation might prompt processors to own their own production facilities rather than forming contracts with individual producers. Additionally, opponents are concerned that increased regulation might encourage processors to take their business to other states or other countries.

Proponents of the Model Act believe that its protections are necessary because of the market dominance of processors and the inherent disadvantage this causes producers when negotiating contracts.⁵ Laws currently exist that provide similar protections in other contexts without such unintended consequences. Franchise laws provide protections similar to those offered by the Model Act.⁶ Similar to

production contracts, franchise agreements almost always are drawn up by the franchisor and presented to dealers without negotiation over terms. Recognizing the potential for abuse by franchisors, state and federal legislation has been enacted to protect franchisees.

Production Contracts and Environmental Liability

One specific area of risk allocation in production contracts is that related to liability for activities occurring on the farming operation, particularly environmental or pollution liability. It is common for such liability to be placed on the producer (Abdalla; Miller), including the responsibility to obtain all necessary permits for the facility (Moeller). Animal feeding operations, including poultry operations, are regulated concerning their potential for and actual environmental impact. The Federal Clean Water Act regulatory requirements incorporate the need to obtain a permit to conduct operations should the livestock farming operation meet certain standards concerning size and capacity (such operations are designated "confined animal feeding operations" [CAFOs]) to discharge pollutants that would affect water sources. This permitting scheme is known as the National Pollutant Discharge Elimination System program, and has been in place with regard to large livestock confinement operations for several years. Amendments to existing regulations pertaining to CAFOs became effective in April 2003, creating tiered permit requirements for certain sizes of operations and specifically addressing issues of land application of animal wastes attendant to these production operations (Centner).

Although not included in the final amendments, measures were proposed that would have extended liability for environmental problems on the farm to the corporate entity involved in the production relationship (Centner). This proposed creation of joint liability incorporated ideas of "copermitting" as the means by which sharing of environmental liability could occur. A few state animal feeding operation regulators have chosen similar

⁴ HB 644 (Sims) and HB648 (Ray). HB648 passed out of the House Agriculture Committee with one nay vote, but didn't make it out of the House Rules Committee to be voted on by the entire House of Representatives.

⁵ Remarks of IFB President Ron Warfield, Agricultural Contract Legislation, May 12, 2003. In his remarks, Warfield discussed the support that Farm Bureau had given over the years to creation of new markets for agricultural products through "value added" production and "partnering" with firms up and down the food chain. He reflected that what has accompanied these efforts are a "blizzard of new contracts and legal documents that now impact farming." He expressed support for Illinois HB264, the Agricultural Production Contract Code that was taken up in the Illinois legislature during the 2003 session. President Warfield cited numerous attempts on behalf of Farm Bureau to seek voluntary changes within the agribusiness firms to address contracting problems, to no avail. HB264 was focused on contract readability, confidentiality, and protection from arbitrary contract cancellation.

⁶ Franchising typically involves an agreement between a large company and an individual or small business. The franchisee pays the franchisor (the company) an initial fee and conducts business according to franchisor requirements.

routes. In Kentucky, for example, the Division of Water passed a regulation requiring that environmental liability of the operation be shared between the producer and the corporate partner. This idea of copermitting has not been adopted widely and was ultimately dropped by the U.S. Environmental Protection Agency (EPA) in its regulatory amendment activity.

A similar environmental law, the Federal Clean Air Act, does not specifically address air emissions from CAFOs, even though livestock facilities do generate particulate matter and gas emissions, most notably methane. A study was funded by the EPA and USDA on such emissions, with the final report published in 2003. The EPA is currently developing a consent agreement with the livestock industry working toward a 2-year, nationwide monitoring program for emissions (Endres and Grossman).

Under tort theory, the liability for potential environmental problems caused by CAFO operations is the person or persons responsible for the harm. Responsible persons might include the contracting company, which typically own the animals and tell the producers how to manage the entire operation, including how to build the manure handling facilities and maybe even how to treat the manure. Typical contract provisions require producers to assume all environmental liability and to further agree to indemnify the contracting company should it be liable for any environmental violations. These two separate clauses are called the "disclaimer" and "indemnity" (hold-harmless) clauses. It is these provisions within existing contracts that cause environmental regulators and the community at large (including some producers) concern because of the rising levels of attention to the effects of water quality in some areas caused in part by livestock operations. This shift of risk and liability in many cases is beyond what a party to the transaction would normally expect (Miller). In the poultry industry, for example, growers could be responsible for removal of litter and disposal of dead birds in conformity with state, federal, and local laws (Hamilton).

The Oklahoma Example

The poultry industry, as a virtually completely integrated contract user, has as one of its central growing regions the Ozark Plateau. This region is home to many of the United States' leading poultry processing companies and is among the top three poultry growing and processing regions of the country. The Ozark Plateau encompasses western Arkansas, northeast Oklahoma, and southwest Missouri. Each state plays a critical role in development within the region, not only in terms of poultry production development, but also overall economic development within the region and creation and preservation of a regional identity.

The State of Oklahoma has been under tremendous pressure since the mid-1990s to enhance its capacity to regulate CAFO operations. Historically, it had been one of only nine states that had in place anti-corporate farming statutes since the mid 1970s. Anti-corporate farming statutes control the capacity of many types of agricultural production associations to conduct agricultural production in a state. All 50 states also have what are known as right-to-farm statutes. Right-to-farm statutes provide protections to agricultural operations that are conducted in conformance with the law from nuisance lawsuits.⁷

In 1991, the Oklahoma legislature amended these statutes to encourage economic development in the state. These amendments loosened the anti-corporate farming statutes and strengthened the nuisance shield offered by right-to-farm statutes. One of the immediate reactions was a dramatic increase in the number of hogs raised in confinement in primarily the western part of the state. The eastern part of the state had long been home to numerous confined poultry operations. With the meteoric rise in number of hogs in the state in a short period of time, the citizenry and then the Oklahoma legislature began a multiyear focus

⁷ See also Haroldson. The nine states that enacted anticorporate farming statutes were: Iowa, North Dakota, South Dakota, Minnesota, Wisconsin, Nebraska, Kansas, Oklahoma, and Missouri.

and public debate on how best to regulate the growing number of CAFOs in the state.

Although begun by a concern over hogs, the scrutiny did not stop there. As a result, the Oklahoma legislature passed House Bill 1480 in 2001 requiring that all poultry growers: (1) be registered by the state; (2) engage in mandatory waste management training; and (3) participate in lowering the negative water quality impact that they might have on the State's water sources. The bill was the first of its type to regulate poultry growers in the United States. Although not directly requiring copermitting for producers, Oklahoma's regulatory framework does require registration, tightening of soil phosphorous load limitations, increased setback requirements, and greater degrees of training in proper litter management by contract growers.

Lawsuits have been filed in various courts, putting at issue the quality of water in the state of Oklahoma and the effect the poultry industry has had on water quality. Each of these suits, including the City of Tulsa suit discussed next, is in various stages of discovery, pretrial motions, and other settlement/mediation activities.⁸

The City of Tulsa, after years of discussion with many involved in the poultry industry, filed suit in state court in 2001 (*City of Tulsa v. Tyson*). The suit sought to require that all poultry processing companies doing business in the region be held responsible for the diminishing quality of the city's drinking water supply in the Eucha-Spavinaw basin. A Settlement Agreement was reached in the case in 2003 and is still in its operational phases.

The Agreement recognized the importance of clean lakes, safe drinking water, and a viable poultry industry to the economies of Nebraska, Oklahoma, and northwest Arkansas. It recognized the right of the poultry companies and their growers to continue to conduct poultry operations in the watershed within estab-

lished protocols and included measures to ensure that nutrient management protocols are used in the Eucha-Spavinaw Watershed to reduce the risk of harm to the city of Tulsa's water supply. To assure compliance, a Special Master was appointed to coordinate all the parties and others in meeting the terms of the agreement.

Selected Court Decisions

Recent court cases continue to address the issue of integrator (or contractor) liability for violations of environmental laws. In *Sierra Club v. Seaboard Farms*, the Sierra Club sued Seaboard Farms, the owner/operator of a hog farm, for violations of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) reporting requirement for ammonia emissions. At issue was whether an individual hog house, lagoon, or land application is a "facility" under CERCLA §103 for purposes of mandatory emissions reporting. The Court of Appeals held that while an individual hog house may be considered a facility under §103(A), the entire site is considered a facility under §103(B). The Court noted that the liberal interpretation of the definition of facility furthered the remedial purpose of CERCLA to facilitate remedial goals, including immediate notification to provide citizens with accurate information [regarding] *all releases* of toxic chemicals at a site. The holding is important for two reasons: first, for the determination that emissions from the entire farm (i.e., all the houses, lagoons, etc.) must be aggregated for purposes of reporting, which is consistent with the holding in *Sierra Club v. Tyson*, and second, because the Court attached CERCLA liability to the emissions in question. This movement into CERCLA liability was also a part of the order entered by the court in *City of Tulsa v. Tyson*, but which was later vacated when the parties entered into Settlement.

In the case of *Sierra Club v. Tyson*, owners of land located near chicken production farms and an environmental group brought suit against farm owners and operators. Two of the three farms were under contract to Tyson to

⁸ Jones, et al. v. Simmons Foods, Inc., filed in the United States District Court for the Northern District of Oklahoma on September 23, 1999; Thompson, et al. v. Tyson Foods, Inc., filed in the District Court for Mayes County, OK, on October 23, 2001.

grow poultry, and the third farm was leased by a Tyson subsidiary and operated as a grower facility. The action was filed as a CERLCA/Emergency Planning and Community Right to Know Act of 1986 (EPCRA) violation, and the plaintiffs alleged a failure on the part of the defendants to report releases of ammonia from poultry droppings.

The plaintiffs argued that ammonia released from the droppings should come under the requirements of CERLCA and EPCRA and that the farms were not exempt from the reporting requirements under the provision for agricultural exemption. The Court agreed with the plaintiffs, holding that the venting of gaseous ammonia from chicken houses does not qualify for the "routine agricultural exemption." The Court went on to determine that each whole farm site, rather than individual houses, was a "facility" for purposes of CERLCA and EPCRA reporting requirements. This determination that emissions from all the poultry houses on a site must be aggregated to determine level is significant. It will require more operations to test and report ammonia levels. This will be of concern for producers because the costs to monitor these emissions will affect the expected profit related to production of the animals (Centner)

The Court also determined that under CERLCA the wholly owned subsidiary of the food production company was a "person in charge" of facilities under contract with growers. The Court reasoned that Tyson Chicken was clearly in a position of responsibility and power with respect to each facility, in a position to make a timely discovery of release, and had the capacity to prevent and abate. Clearly, this portion of the holding speaks to the relationship between the contractor and the grower, establishing an agency relationship and responsibility for certain environmental issues to the company/contractor.

The responsibility of the company/contractor was also at issue in the case of *Tyson v. Stevens*. In this Alabama case, adjoining landowners sued Tyson Foods and the hog farmer over odor from a hog farm. Compared with the previously discussed cases, this suit was filed as a nuisance, negligence, and trespass

action, which are common law tort causes of action.

The facts showed that Tyson contracted with Burnett to finish hogs as an independent contractor. Burnett's contract with Tyson was a "typical" production contract agreement, whereby Tyson supplied hogs, feed, supplies, building specifications, etc. Tyson representatives inspected the farm weekly. Burnett was required to use the waste system designed by Tyson, which was not adequate to handle the production waste effectively. The jury found an agency relationship between Tyson and Burnett, and therefore liability for damages suffered by plaintiffs. The Supreme Court of Alabama upheld the jury's determination of an agency relationship even in the face of an independent contract agreement:

... whether an agency exists is determined from the facts, not by how the parties choose to characterize their relationship.

This sort of ruling has been standard in nonagricultural contract cases (i.e., unemployment and workers compensation) for at least two decades. The Tyson and Stephens cases (*Tyson v. Stephens*) indicate a willingness on the part of courts to find an agency relationship, and therefore responsibility on the part of the company/contractor for environmental problems that occur on the farm, even though the parties allocated the risk (and therefore responsibility) to the grower/contractee by contract, under both statutory and common law causes of action.

The Oklahoma Attorney General's Opinion

A critical move incorporating the question of employment/contractor status and the liability that would flow from that determination was taken by Oklahoma policymakers in a 2001 formal opinion⁹ issued by the Oklahoma Attorney General that included the determination

⁹ The Opinion was issued on April 11, 2001, in response to questions posed by Representative Kenneth Corn. The opinion is found at OK. Att. Gen. 01-017 (2001).

that under certain circumstances, contract poultry growers are “employees” of the poultry processing companies despite contract provisions to the contrary. Opinions of the Attorney General are released in response to questions by members of the legislature, generally concerning points of law, and must be followed by Oklahoma regulatory bodies as pronouncements with the force and effect of law until overturned or adopted by a court of law. This 2001 Opinion addressed the following questions:

- Are contract growing arrangements “contracts of adhesion” under Oklahoma law?
- Which state’s law governs the contract—the state in which the integrator has its legal place of business or corporate headquarters or the state in which the contract is initiated or performed?
- Under these contracts, are the contract growers considered independent contractors or employees of the integrator?¹⁰

The Attorney General reached three conclusions:

- The poultry growing contractual relationship analyzed was one of adhesion.¹¹
- The contracts were to be interpreted under the laws of the state in which the contract is to be performed (Oklahoma), unless the Oklahoma party contracts this right away. But, even if contracted away, where a con-

tract of adhesion exists, the state’s laws in which the weakest party in the relationship resides (Oklahoma) will govern.

- Where the integrator directs in detail the manner in which the crop is to be raised, the contract grower is the employee of the integrator. The Opinion clearly stated that each contract growing relationship would have to be interpreted on its own facts.

The Opinion relied on a number of court cases involving a variety of industries, including: (1) *Commonwealth Life Insurance Company v. Gay*, an action against an insurance company to recover damages for injuries resulting from an auto accident; (2) *Cook Construction Co. v. Longcrier*, an action involving injuries potentially covered by workers compensation in which the issue again was whether someone was an independent contractor or employee; (3) *Tulsa County v. Braswell*, an action involving injury to an election inspector and the question of whose employee/contractor she was when the injuries were caused; and (4) *Texaco v. Layton*, an action for damages for the wrongful death of a customer of a gas station operated by an individual under lease from Texaco.

In each of these cases, the courts looked at the nature of the relationship between the parties, particularly the right to control the actions of the independent contractor. Factors considered in a majority of the cases included, but were not limited to:

- the right to control and/or degree of control exercised by the employer, or the independence enjoyed by the contractor or agent;
- whether the party is to be paid by the job or is to receive a certain salary by the day, week, or month;
- whether his employment consists solely in working for his employer;
- the control that is exercised over him in the method and manner of performing the work;
- whether the agent uses his own equipment or whether the equipment, if any so used, is owned and controlled by the owner; and
- the nature of the contract, whether written or oral.

¹⁰ The opinion did not frame the discussion or reach conclusions in the context of only poultry contract growing relationships. It cited *Holly Farms Corp. v. NLRB* (517 U.S. 392, 395 [1996]) in describing this contract relationship in the larger livestock context and cited *Delta & Pine Land Co. v. Sinkers Corp.* (177 F3rd 1343, 1346 [Fed. Cir. 1999]) in describing the relationship in the seed context.

¹¹ Adhesion contracts in Oklahoma generally involve standardized contracts prepared entirely by one party that, because of the disparity in bargaining power between the draftsman and the other party, must be either accepted or rejected on a “take it or leave it” basis, without opportunity for bargaining. *Rodgers v. Tecumseh Bank* (756 P2d 1223, 1226 [Okla. 1988], footnote omitted). Whether a contract is one of adhesion is a question of fact and each contract must be analyzed separately to make that determination.

The most recent case cited was *Bouziden v. Alfalfa Electric Cooperative, Inc.*, an action to recover damages for real and personal property loss caused by a wildfire. The court was called on to examine the nature of the relationship between the parties in determining fault for the damages caused by the wildfire. The court recognized that the general law of Oklahoma requires an analysis of the facts and circumstances of each particular case in determining whether a person is considered an employee or an independent contractor and that the primary test for determining this answer is the right to control the physical details of the work.

Many courts employ a similar analysis to that employed by the Oklahoma courts in determining whether a relationship indicates employment or independent contractor status in the context of tax and benefit laws. There are recognized factors central to the issue of whether the business has a right to direct and control how the worker does the task for which he or she is hired. The following criteria are used by the U.S. Internal Revenue Service and by state and federal courts throughout the United States in examining the nature of the relationship:

- What instructions are given to the workers by the business?
- What training is given the workers by the business?
- Is the worker integrated into the business?
- Are services rendered personally?
- Hiring, supervising, and paying assistants—Is this the worker's or the employer's responsibility?
- Is there a continuing relationship?
- Hours of work—Who sets the hours of work?
- Full time—Is the worker expected to devote his attention full time?
- Is the work done on premises?
- Who determines the order of completion of services to be performed?
- Reports and reporting—What are the requirements?
- Is the pay hourly, weekly, or monthly?

- Expenses—Who pays the worker's business and travel expenses?
- Tools and materials—Who provides these?
- Does the business have the right to fire?
- What is the worker's right to terminate?
- Investment—Does the worker invest in the facilities?
- Profit or loss—Does the worker incur profit or loss associated with his activities?
- Can the worker have more than one job?
- Are the worker's services available to the general public?¹²

The 20 factors generally represent the pronouncements of courts in the United States employing a common law analysis to determine the nature of the working relationship. Generally, if a person has the right to control and direct the individual who performs services in the ultimate result of the work and the details and methods, the courts and the IRS will, in employing a 20-factor test, find that an employer-employee relationship exists. Actually employing the control is unnecessary; the right to control is key. Clearly, these factors can be instructive of the issue of control, as the Oklahoma Attorney General stated in his 2001 Opinion. The control issue is, however, the determining factor:

While the person hiring an independent contractor is limited to specifying what he or she wants accomplished, an employer may specify and control the manner in which an employee performs the actual work itself. This is "the decisive test for determining whether one is an employee or an independent contractor. *Bouziden v. Alfalfa Elec. Coop., Inc.*¹³

¹² Internal Revenue Service, Rev. Ruling 8741; see also <http://www.cses.com/rental/contractor.htm>; (May 13, 2003); Employee vs. Independent Contractor IRS' Determining 20 Factors, Internet site: <http://www.cbmcpc.com/news/EmployeevsIndependentContractors-20factors.asp>; (May 13, 2003); Guide to the Twenty Questions, Internet site: <http://www.pro-unlimited.com/20guide.html>.

¹³ 6 P.3d 340, 349 (Okla. 2000). The tension between two lines of cases in Oklahoma—one line describing the control of the work done as "the decisive test" and the other line listing several relevant factors and announcing "that no one factor is controlling"—

The IRS 20-Factor test, and the "element of control" determination are not the only methods used to determine whether a person's status is that of an employee or independent contractor. The Migrant and Seasonal Agricultural Workers Protection Act and the Fair Labor Standards Act use the economic realities test, which focuses on the worker's economic dependence on the business to which the services are provided. Courts have also used a hybrid approach, including both the "right to control" and "economic realities" test to statutes such as the Civil Rights Act and the Age Discrimination in Employment Act (Hegar).

Many view the Oklahoma Attorney General's opinion as a panacea for addressing a myriad of grower issues, not the least of which are environmental liability concerns. However, the opinion and subsequent developments may forever change the face of agriculture. There are advantages for each party, contractor and grower, in the independent contractor relationship. Company/contractors reduce record keeping and tax liability by paying growers as independent contractors. Such an arrangement also reduces the company's vicarious liability for acts of the independent contractor, eliminates the need for benefit programs, and in the case of livestock growers, reduces or eliminates capital expenditures for land and facilities. Grower/contractees are afforded certain tax benefits as independent businesses. Growers have substantial capital investments in their operations, as well as large expenses, which benefit from business tax deductions (Hegar). They may also qualify for certain government farm programs. If the social and business communities are to be adequately prepared for these changes, a clear analysis of the pathways necessary for and resulting from the opinion's implementation is paramount. This opinion, should it be upheld by the courts, enforced against the parties and adopted industry-wide, has far-reaching implica-

tions. These implications cut across many areas, including tax liability, entitlement to farm program payment benefits, entitlement to workers compensation and unemployment compensation benefits, coverage under FLSA requirements, and tort liability, among others.

The Oklahoma Attorney General's opinion has been made the central issue in *Been et al. v. OK Foods* (Been). This case was filed in the United States District Court for the Eastern District of Oklahoma in early 2002 and is currently in the discovery and pretrial motion stages of litigation. The case is filed as a class action on behalf of poultry contract growers against their integrator, O.K. Industries and its related entities, O.K. Feed Mills, Inc.; O.K. Foods, Inc.; O.K. Processors, Inc.; O.K. Farms Inc.; O.K. Broiler Farms Limited Partnership; and the officers and principals of these entities. At issue is the essence of the relationship analyzed in the Oklahoma Attorney General's Opinion.

However, the Been case seeks not only to have the contractual relationships construed by the courts in line with the Attorney General's opinion but to declare the form of vertical integration and alliances practiced by the companies and prevalent throughout the poultry industry, and moving rapidly throughout other sectors of agriculture, in violation of state and federal laws. Early decisions of the trial court in the Been case have generally been against the growers' position on contracting issues; however, appeals from those early rulings will undoubtedly be taken.

Where Will Been Take Us—Unintended Consequences?

Should the Been case result in a verdict that upholds the Oklahoma Attorney General's Opinion, it is conceivable that all poultry contract grower relationships *in the state of Oklahoma* could be deemed ones of employer/employee as opposed to ones centered around the principles of independence in contracting. Although the following list of potential implications is not exhaustive or fully reported in the context of this presentation, the list raises issues worthy of examination by legal scholars, certified public accountants, public policy

is resolved in the case of *Page v. Hardy* (334 P.2d 782 [Okla. 1958]). The Page court held that "control . . . in all matters connected with the performance of the service" is the determinative issue, with the various factors offered as means of determining whether such control exists. (334 P.2d 784 [Okla. 1958]).

experts, financial experts, insurance providers, and labor experts. Should all producers/growers be deemed employees of their corporate contracting counterpart, the following areas will be implicated.

- *Tax liability.* Will the grower lose all expenses and other tax deductions relating to his or her small business or farming enterprise? Will the off-farm employment income receive a different tax treatment?
- *Benefits.* Will the grower be entitled to unemployment, workers compensation, and retirement benefits from the company employer? Will the company be able to offer different benefit packages to those on the farm compared with those in the home office or benefits at different levels of coverage state-to-state? Are workers compensation and unemployment compensation coverage retroactive or prospective only?
- *Labor.* Which fair labor acts cover the poultry growers' type of work? How will fair labor standards affect the minimum wage to which the grower is entitled? Will the growers be salaried employees or will the companies be required to pay overtime to the growers? How will the growers' hours of employment be affected, and how will the employer enforce those hours? Will a grower's compensation be correlated to the number of houses or birds? How will compensation for growers that are full time compare with that for growers with off-farm income?
- *Tort liability.* Will federal and state antidiscrimination laws cover the firing of growers? Can the grower be terminated at will or must it be for cause? If the contracting company refuses to hire a grower for future work, will the company be subject to federal and state antidiscrimination laws? If the growers are employees of the company, are employees hired by the grower to work for him in the operation also company employees?

How will employment status interface with the grower's ownership of property? Is the company liable for injuries caused to third persons that are on the grower's property? Is the company liable for all potential activities on

the grower's property that might lead to environmental liability exposure? Will the company then be held liable for improperly supervising its employee on the property in question? What if the grower leases out a portion of his property for other activities and there are environmental problems associated with those activities?

- *Financial implications and participation in federal farm programs.* Will financial institutions have collateral for future loans on operations that involve contract relationships that are now deemed employment relationships or for existing loans in which the bank took a lien on the operation but the operation has changed to one grounded in an employment relationship?

Farming loans guaranteed by the federal government require that the borrower be "actively engaged" in farming. Is this requirement met if the person is the company's employee? Are farmers entitled to counter-cyclical payments or disaster payments if they are employees? How will these farmers qualify for government support such as EQIP or guaranteed loans?

- *Bankruptcy implications.* If the grower is now an employee with regard to the operation, is he entitled to seek protection under Chapter 12 of the Bankruptcy Code? If he cannot, will he then be entitled to seek protection under Chapters 7 or 11?
- *Technical assistance.* Will the growers who are deemed employees of the company no longer be entitled to technical assistance from the Natural Resources Conservation Service? Will producers be entitled to assistance from other federal and state agencies?
- *Insurance coverage.* Will companies be able to get insurance coverage for activities that occur on remote, unsupervised growing sites?
- *Management input.* How will the change to employee status affect the grower's capacity to manage the portion of the overall farming operation attributable to the contracting relationship as well as all aspects of his entire farming operation? Will the grower lose the capacity to manage the operation to such a

degree that it implicates the ability to be considered creditworthy for future financial obligations?

Discussing the Policy Implications

It is clear even to the most casual observer that, in the attempt to address one problem, such as environmental concerns, a myriad of additional issues relating to the nature of the relationship between contract growers and their contracting corporations are implicated. This discussion is not neatly confined to the phenomenon of poultry contracting because the trend throughout all agriculture is toward contracting relationships in other sectors—row crops, specialty grains, and other livestock. Further study of these issues is warranted and might best be undertaken by a partnership of members of the academic, economic, and legal communities.

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