

# **Hushed Up: Confidentiality Clauses in Organic Milk Contracts**

**By Jill Krueger**

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# Hushed Up:

## Confidentiality Clauses in Organic Milk Contracts

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Many organic dairy producers sign contracts to sell milk to a processor. These contracts have some common features. While producers tend to focus upon the price offered when deciding whether or not to sign a contract with a processor, organic milk contracts contain other important terms.

This article focuses upon confidentiality clauses which are included in some contracts. In preparation to write this article, unsigned contracts for sale of milk with Dairy Marketing Services (DMS), Horizon Organic, and HP Hood were reviewed. The fact that a processor uses a confidentiality clause does not necessarily mean that its contract terms are worse or better overall than those offered by other processors. **It is important to read and understand all of the clauses in a contract before signing it.** Future newsletters will address other common contract clauses.

### What do confidentiality clauses say?

Some contracts reviewed did not contain clauses requiring dairy producers to maintain confidentiality. But most contracts offered by HP Hood with the assistance of Dairy Marketing Services, contained something like the following clause:

Producer agrees that for the duration of this Agreement, Hood will be the exclusive customer of Producer with respect to Milk, provided however, that if Hood is unable or unwilling to purchase all of the milk produced by Producer hereunder, Producer shall be free to sell any such excess to third parties. The parties each agree not to disclose the specific terms of this Agreement to any other party other than Dairy Marketing Services without the prior approval of the other party.

This clause establishes an exclusive agreement between the parties in the first sentence, and requires confidentiality in the second sentence. Other contracts may use different wording to create a confidentiality clause.

### What do confidentiality clauses mean?

By signing a contract which contains the confidentiality clause above, the producer agrees not to disclose the specific terms of the Agreement to any other party other than Dairy Marketing Services without approval from the processor. This means that the producer agrees not to share the specific contract terms with parties such as family members, lawyers, accountants, lenders, other producers, another processor, or farmer

organizations without first seeking approval from the processor. The clause does not explain what factors the processor will consider when it decides whether to grant or deny approval for the producer to disclose the specific terms of the contract to another party.

The restriction on the producer is not limited to sharing the written version of the contract with another party. The producer agrees not to “disclose the specific terms.” This means that a producer who orally discusses the terms of the contract, or part of the contract such as the pay price or premiums offered, is likely violating the contract by disclosing its specific terms.

### **Why might a processor want to enforce a confidentiality clause?**

The main reason put forward by a processor for a confidentiality provision would likely be protection of trade secrets and other confidential business information. The processor might state that it is concerned that disclosures regarding pay price or other terms might be made to its competitors.

Processors may have a variety of other reasons to seek to enforce confidentiality clauses in their contracts. For example, the processor may want to prevent producers from comparing the terms they were offered with their fellow producers, or from discussing the terms with a bargaining association. The processor may also wish to prevent the producer from discussing the terms offered with consumers or the media.

### **Why might producers object to a confidentiality clause?**

Producers might wish to disclose the specific terms of their contracts with other farmers or members of their associations for a variety of reasons—to find out whether they have been offered a fair price, to seek advice and mentoring on how to negotiate the terms of the contract and minimize their risks, or to participate in collective bargaining.

### **Possible consequences of violating a confidentiality clause**

Most contracts reviewed for this article include clauses that allow for early termination of the contract in certain circumstances. (In fact, the processor in the contract clause quoted near the beginning of this article already has the right to terminate the contract, in effect, since it is not required to buy all of the producer’s milk whenever it is *unable* or *unwilling* to do so.)

The contract which contains the confidentiality clause quoted near the beginning of this article states that either party may deliver written notice of its intention to terminate the contract in 30 days to the other party, if the other party has breached the contract and failed to correct that breach. A breach of confidentiality would be a breach of contract, and it is hard to imagine how a producer could correct a breach of confidentiality. Thus, the processor would have the right to terminate the contract and stop buying the producer’s milk if the producer violated a confidentiality clause. A processor could also seek money damages from the producer, particularly if it believed it had been harmed by the violation of the confidentiality clause.

### **Can't producers just deal with all of that later, if a problem comes up?**

By signing a contract that contains a confidentiality clause, the producer agrees to be bound by the clause. However, if the processor later denies approval to disclose contract terms to another party, or if the processor alleges the producer has violated the contract by disclosing contract terms, then the producer may have few alternatives but to face the processor in court. Going to court is costly, time-consuming, and tends to damage relationships. It is often hard to predict the chance of success in court. Producers will be better served by preventing problems and addressing any potential difficulties before the contract is signed.

### **Are confidentiality clauses legal?**

There is no federal law that specifically states that confidentiality clauses in contracts for the sale of agricultural goods such as milk are illegal. Nor are there any such laws in any northeastern states (though some Midwestern states have laws prohibiting confidentiality clauses in contracts for the production or sale of some agricultural commodities.)

### *What about freedom of speech?*

In general, the United States Constitution prevents the federal government from placing limits upon freedom of speech. The contract clause is an agreement between two private parties. There is likely no violation of freedom of speech, because the restriction is not imposed by the government.

### *Packers and Stockyards Act*

The federal Packers and Stockyards Act was passed by Congress in 1921 to protect farmers against the concentrated market power of the meatpackers. In general, the Packers and Stockyards Act regulates unfair and deceptive practices.<sup>1</sup> Its protections have been expanded to include production contracts for poultry and hogs. However, it has not been amended to address contracts for the sale of milk or to protect dairy farmers.

### *Law barring confidentiality clauses in production contracts*

As part of the 2002 Farm Bill, Congress passed a new federal law that directly addressed confidentiality clauses in livestock production contracts.<sup>2</sup> Technically, this law is not part of the Packers and Stockyards Act, but like the Packers and Stockyards Act, its protections do not extend to dairy producers. This is because the law defines a “producer” as any person engaged in the raising and caring for livestock or poultry for slaughter. And the law defines a “processor” as any person engaged in the business of obtaining livestock or poultry for the purpose of slaughtering the livestock or poultry.

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<sup>1</sup> 7 U.S.C. § 192.

<sup>2</sup> 7 U.S.C. § 229b.

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The law states that in spite of such a contract clause, a producer may not be prohibited from discussing any terms or details of the contract with a federal or state government agency, an attorney, a lender, an accountant, a farm manager, a landlord, or an immediate family-member. The confidentiality law applies even if a contract between a “producer” and a “processor” states that information contained in the contract is confidential.

Though the law does not currently protect dairy producers, dairy producers should be aware of it for two reasons. First, they may find it helpful in negotiations with processors. Second, they may wish to contact their Congressmembers about providing similar protection to dairy producers.

### *Agricultural Fair Practices Act*

The federal Agricultural Fair Practices Act, known as AFPA, protects the right of farmers to join together in associations for the purpose of bargaining with handlers who acquire agricultural products for the purpose of processing or sale.<sup>3</sup> Under AFPA, a “producer” means a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower. Thus, dairy producers are specifically included under AFPA. AFPA defines an “association of producers” as any association of producers of agricultural products engaged in marketing, bargaining, shipping, or processing their products.

In general, it is a violation of AFPA for a handler, including a milk processor, to attempt to coerce a producer not to join and belong to an association, or to discriminate against a producer because he or she belongs to an association of producers.

This law could apply to contracts for the sale of organic milk, if a producer were a member, or interested in becoming a member, of a producer association that engaged in marketing and bargaining on behalf of its members. It seems clear that such an association would expect its members to disclose the terms of contracts offered to them, so that the association could negotiate more effectively. If a processor denied approval to a producer to disclose specific terms of the contract to its association, one could argue that the processor was attempting to coerce the producer not to join the association or to breach his or her membership agreement with the association, in violation of AFPA. But it is very difficult to predict whether this argument would prevail in court.

The version of the Farm Bill passed by the Senate and currently awaiting action by a Congressional conference committee contains a Livestock Title that would strengthen the provisions of AFPA.<sup>4</sup> The Livestock Title would broaden the definition of “association of producers” to include an organization of agricultural producers dedicated to promoting the common interest and general welfare of producers of agricultural products. Thus, the

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<sup>3</sup> 7 U.S.C. §§ 2301-2306.

<sup>4</sup> The bill number in the Senate was S.2302. It is also referred to as an engrossed amendment to the House bill, H.R. 2419. The Livestock Title is Title X.

association would not have to be directly engaged in negotiations on behalf of its members in order for members to be protected under AFPA if this change were adopted.

### ***State laws barring confidentiality clauses in specified agricultural contracts***

A number of midwestern states have state laws that make confidentiality clauses in some agricultural contracts unenforceable. These states include:

- Arkansas<sup>5</sup>
- Illinois<sup>6</sup>
- Iowa<sup>7</sup>
- Minnesota<sup>8</sup>

Organic dairy producers in these states should seek legal advice to determine which types of contracts and agricultural commodities are addressed. Research for this article did not reveal any similar laws in northeastern states.

### ***State laws against restraint of trade***

Most states have court decisions addressing “restraints on trade” imposed by contracts. It is possible that an organic dairy producer could argue that a confidentiality clause was too broad and restricted the producer’s actions unreasonably. Again, it is very difficult to predict whether this argument would prevail in court.

### **Options for producers when offered a contract containing a confidentiality clause**

Producers have a variety of options when offered a contract for the sale of organic milk which contains a confidentiality clause. Producers may want to consider one or more of the following strategies:

- Consult an attorney in the producer’s state. The producer is not bound by the contract until he or she has signed it. Producers should keep in mind that even though they are not bound by the contract until they sign it, processors may be displeased if they learn a producer has disclosed contract terms before signing the contract. Disclosure to an attorney with whom the producer has an attorney-client relationship should not present a problem, because attorneys owe a duty of confidentiality to their clients.

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<sup>5</sup> Ark. Code Ann. § 2-32-201(b) (applies to contract production of livestock and poultry, but milk not specifically included).

<sup>6</sup> 505 Ill. Comp. Stat. § 17/30 (applies to production of commodities including milk, if the company has or exercises some control or direction over the production process).

<sup>7</sup> Iowa Code § 202.3 (applies to contract production of commodities including milk, but application to sales contracts unclear).

<sup>8</sup> Minn. Stat. § 17.710 (application to production of milk unclear).

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- Negotiate with the processor for the removal of the clause. Research on whether the processor's competitors require confidentiality might help in the negotiations.
- Cross out the clause (the producer should initial and date the change) and sign the contract. The processor may accept the cancellation of the clause, or reject the change proposed by the producer.
- Negotiate with the processor for limits on the clause. The contract could set forth factors the processor will consider when granting or denying approval to disclose contract terms. Or the contract could list parties to whom the processor approves disclosures in advance. Or the contract could list specific parties to whom disclosure is forbidden.
- Decline to sign the contract. Search for another processor.
- Sign the contract with the intention of complying with the confidentiality clause. Complying with the clause might include seeking approval from the processor for disclosure of contract terms to certain parties.

A producer might be tempted to sign the contract with the intention of freely disclosing its specific terms. Such a plan is risky, because disclosing the terms would violate the contract, and is not recommended.