

# Uncommon Issues with Industrial Hemp Production Contracts

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## INTRODUCTION

The legalization of industrial hemp production has created some unique and novel issues for attorneys, producers, and processors. This crop, facing both logistical and legal challenges, has created problems and opportunities for all involved in the emerging industry. At the heart of industrial hemp production—as with any other business endeavor—is the contract, which helps parties mitigate loss and ensure efficient and effective production.

This Article examines the foundational features of production contracts as they relate to the hemp industry and the concerns facing growers and attorneys. It explores common clauses found in contracts, benefits and challenges contracts provide, and other novel issues such as crop insurance arising during the infant stage of industrial hemp production.

## I. WHY ARE CONTRACTS SO CRITICAL IN INDUSTRIAL HEMP PRODUCTION?

From 2014 through 2018, many in the hemp industry did not consider contracts a necessity.<sup>1</sup> Growers did not typically

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consider market volatility as a problem, and processors saw prices for CBD and the floral material used to make it increase.<sup>2</sup> Limited pricing information was available during the early years because there was little publicly reported information.<sup>3</sup> From what information could be gathered through talking with growers during this time, it was exceptionally rare to hear about a grower with a contract.<sup>4</sup> Some growers in 2016 and 2017 discussed prices of hundreds of dollars per pound for dried hemp biomass.<sup>5</sup> Reliable CBD percentages are not available from this time; however, assuming a price of \$200 per pound with an average yield of 1000 pounds of biomass per acre, a grower could expect to gross around \$200 thousand per acre.

How does this compare to a more common commodity crop such as soybeans? Looking at Illinois using 2018 data, farms averaged a yield of seventy-four bushels per acre, with the price per bushel for soybeans at \$8.85; there was an expected gross revenue of roughly \$655 per acre (excluding federal farm program payments).<sup>6</sup> With a gross revenue difference so extreme, why didn't more farmers convert to industrial hemp? The high cost of growing hemp was a major factor.<sup>7</sup> In the 2019 interim final rule, the Agricultural Marketing Service ("AMS"), using estimates from a

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<sup>1</sup> Tyler Mark et al., *Economic Viability of Industrial Hemp in the U.S.: A review of State Pilot Programs*, U.S. DEPT OF AGRIC., 23 (Feb. 2020), <https://www.ers.usda.gov/webdocs/publications/95930/eib-217.pdf?v=1768.4>. [<https://perma.cc/97X8-9PUZ>].

<sup>2</sup> *See id.* at 29.

<sup>3</sup> *See id.* at 19.

<sup>4</sup> *See id.* at 29.

<sup>5</sup> beaverpeeler, *Farmers...will you grow hemp?*, MINN. TRAPLINE PRODCUTS, INC. (Aug. 6, 2018), [https://trapperman.com/forum/ubbthreads.php/topics/6295925/Re:\\_OT:\\_Farmers...will\\_you\\_gro](https://trapperman.com/forum/ubbthreads.php/topics/6295925/Re:_OT:_Farmers...will_you_gro) [<https://perma.cc/Q974-F36K>].

<sup>6</sup> Gary Schnitkey et al., *Projected Net Incomes on Illinois Grain Farms in 2019 and 2020*, FARMDAILY (Nov. 19, 2019), <https://farmdaily.illinois.edu/2019/11/projected-net-incomes-on-illinois-grain-farms-in-2019-and-2020.html>. [<https://perma.cc/79MK-GMCQ>].

<sup>7</sup> *See* U.S. DEPT OF AGRIC., POTENTIAL U.S. PRODUCTION AND PROCESSING, [https://www.ers.usda.gov/webdocs/publications/41740/15859\\_ages001ei\\_1\\_.pdf?v=0](https://www.ers.usda.gov/webdocs/publications/41740/15859_ages001ei_1_.pdf?v=0) (last viewed Mar. 22, 2020) [<https://perma.cc/3P3J-6UKF>].

University of Kentucky study, cited a projected budget for producing hemp to be \$19,421 per acre.<sup>8</sup>

Fast-forward to January of 2020, and the price has fallen to around \$1.30 per percentage point of CBD found in the biomass.<sup>9</sup> Assuming an average CBD percentage of 8 percent, a price of \$1.30 per percentage point of CBD, and a yield of one thousand pounds of biomass per acre means the same grower would now gross about \$10,400—if the grower could find a buyer willing to pay for the product. While this drop in price evidences the need for contracts, it does not mean a contract will provide perfect protection. Even the largest and most sophisticated players in this new industry are not exempt from wild price fluctuations. When GenCanna Global declared bankruptcy in early 2020, many of the growers contacting with them were left with no place to market their crop.<sup>10</sup> It is important to remember no matter how artfully a contract is drafted, there always remains a risk of breach or bankruptcy when market conditions change rapidly and unexpectedly.

## II. LIMITATIONS ON INDUSTRIAL HEMP PRODUCTION CONTRACTS

### A. *Hemp is Not Your Typical Commodity Crop*

Industrial hemp is a regulated crop and therefore different from any other row crop in common production.<sup>11</sup> These differences require contracts to consider the unique challenges industrial hemp creates.<sup>12</sup> Hemp, also known as *Cannabis sativa L.*, is mainly cultivated for its fibers, seeds, and oils.<sup>13</sup> Easily confused with

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<sup>8</sup> Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58,522, 58,541—542 (Oct. 31, 2019) (to be codified at 7 C.F.R. Pt. 990) <https://www.govinfo.gov/content/pkg/FR-2019-10-31/pdf/2019-23749.pdf> [<https://perma.cc/QCQ6-56DK>].

<sup>9</sup> Elena Schmidt, *Hemp & CBD Market Value: January 2020 Price Trends for Crude, Flower Biomass, Isolate*, ACS LAB. (Jan. 14, 2020), <https://acslabcannabis.com/blog/education/hemp-cbd-market-value-price-trends-for-crude-flower-biomass-isolate/#:~:text=According%20to%20Hemp%20Benchmarks%20the,%24175%20to%20%24325%20pound%20overall> [<https://perma.cc/7HRF-M774>].

<sup>10</sup> Grace Schneider, *Kentucky Hemp, CBD Giant's Bankruptcy is a 'Black Eye' for Industry, Congressman Says*, COURIER J. (Feb. 6, 2020), <https://www.courier-journal.com/story/news/2020/02/06/kentucky-hemp-gencann-files-chapter-11-bankruptcy/4677730002/> [<https://perma.cc/MGC9-ANVZ>].

<sup>11</sup> See generally 7 C.F.R. § 990 (2021) (prescribing the regulatory requirements that states and tribes must follow in order to allow for the cultivation of industrial hemp).

<sup>12</sup> See C.F.R. § 990.3.

<sup>13</sup> RENEE JOHNSON, CONG. RSCH. SERV., R44742, DEFINING HEMP: A FACT SHEET (2019).

marijuana, the plants are different varieties of the same species.<sup>14</sup> According to federal law, the only distinction between the two plant varieties is in their THC concentrations.<sup>15</sup> 7 U.S.C.A. § 1639o(1) specifically defines industrial hemp as containing a THC concentration with a maximum of 0.3 percent on a dry weight basis, whereas marijuana typically contains greater than a 5 percent THC concentration.<sup>16</sup>

While United States production has been non-existent for decades, hemp was like any other commodity until 1937, when Congress passed one of the first restrictions on hemp—the Marihuana Tax Act of 1937.<sup>17</sup> After this, hemp production began to dwindle; however, there was a brief resurgence during World War II when the United States Department of Agriculture (“USDA”) urged farmers to cultivate hemp by suspending the Marihuana Tax Act of 1937 in hopes of creating rope for the Navy.<sup>18</sup> Once World War II ended, the Federal Government reimposed the tax on hemp, again lowering production.<sup>19</sup> However, the fatal blow to hemp came in 1970 when Congress passed the Controlled Substances Act of 1970.<sup>20</sup> This act outlawed all cannabis plants, not distinguishing between those with high or low THC levels.<sup>21</sup>

In 2014, the federal government began easing hemp laws and regulations,<sup>22</sup> which eventually led to the legalization of hemp and later its exclusion from the definition of “marihuana” under the Controlled Substances Act.<sup>23</sup> Since then states have taken action on a wide range of hemp related issues having both positive

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<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 2–3.

<sup>16</sup> *Id.* at 3, 7; 7 U.S.C.A. § 1639o(1) (Westlaw 2021).

<sup>17</sup> Marihuana Tax Act of 1937, Pub. L. No. 75-238 (repealed 1970).

<sup>18</sup> Kit O’Connell, *Why Did ‘Hemp for Victory’ Disappear? The US Hid this Film After WWII*, MINISTRY OF HEMP, <https://ministryofhemp.com/blog/hemp-for-victory-disappear/> (last viewed May 31, 2021) [<https://perma.cc/D4LY-SM9T>].

<sup>19</sup> U.S. DEP’T OF AGRIC. ECON. RSCH. SERV., INDUSTRIAL HEMP IN THE UNITED STATES: STATUS AND MARKET POTENTIAL, (Jan. 2000), [https://www.ers.usda.gov/webdocs/publications/41740/15867\\_ages001e\\_1\\_.pdf?v=9477.8](https://www.ers.usda.gov/webdocs/publications/41740/15867_ages001e_1_.pdf?v=9477.8). [<https://perma.cc/YDX5-8L74>].

<sup>20</sup> *1970 / Controlled Substances Act Bans U.S. hemp production*, KY. HEMPSTERS (Dec. 5, 2019), <https://www.kyhempsters.com/post/1970-controlled-substances-act> [<https://perma.cc/84ZA-TGSZ>].

<sup>21</sup> *Id.*

<sup>22</sup> 7 U.S.C.A. § 5940 (West 2021); 21 U.S.C.A. § 802 (West 2021).

<sup>23</sup> 21 U.S.C.A. § 802 (2018).

and negative effects on the fast-growing industry.<sup>24</sup> While not every state has enacted hemp laws reflective of the new change in federal policy, forty-nine states have taken actions to establish hemp research programs and regulate their statewide hemp industries.<sup>25</sup> As more and more states welcomed the return of hemp as a crop, their laws and regulations have focused on two main aspects at the forefront of the industry: licensing requirements and possession of raw hemp.<sup>26</sup> This complicated framework increased the need for competent attorneys capable of providing legal advice on issues such as licensing and contracting; however, confusion surrounding the legality of representing industrial hemp clients has slowed efforts down.<sup>27</sup>

### *B. Early Limitations on Attorneys*

New industries create new challenges for attorneys across the country. Often these challenges revolve around new regulations, evolving business environments, and more mundane tasks such as drafting contracts, creating business entities, and litigating disputes. Both new and experienced attorneys should foresee potential challenges. In fact, the very first rule in the American Bar Association's Model Rules of Professional Conduct addresses this issue: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>28</sup>

Attorneys are expected to provide competent legal counsel to clients. The comments to Rule 1.1 explain that attorneys are not expected to know everything at the outset, but they have the obligation to adequately prepare sufficient to competently represent their clients.<sup>29</sup> This is nothing new. However, one rule of professional conduct has proved challenging for attorneys involved in the industrial hemp and marijuana industries:

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<sup>24</sup> See *Industrial Hemp Laws: State-by-State*, NAT'L AGRIC. L. CTR., <https://nationalaglawcenter.org/state-compilations/hempprovisions/> (last viewed Mar. 22, 2021) [<https://perma.cc/MX7R-WSRT>].

<sup>25</sup> *Id.*

<sup>26</sup> Mitchel Denham, *Compliance with State and Federal Laws is Key After Hemp Legalization*, DBL L. (Feb. 11, 2019), <https://www.dblaw.com/compliance-with-state-and-federal-laws-is-key-after-hemp-legalization/> [<https://perma.cc/8GFQ-4SKB>].

<sup>27</sup> Nathalie Bougenies, *Patchwork of Judicial Decisions Exacerbates Confusion on Legality of CBD Products*, ABOVE THE LAW (June 30, 2020, 4:46 PM), <https://abovethelaw.com/2020/06/patchwork-of-judicial-decisions-exacerbates-confusion-on-legality-of-cbd-products/?rf=1> [<https://perma.cc/DX9D-7CTT>].

<sup>28</sup> MODEL RULES OF PROF'L. CONDUCT r. 1.1 (AM. BAR ASS'N 2019).

<sup>29</sup> MODEL RULES OF PROF'L. CONDUCT r. 1.1 cmt. 5 (AM. BAR ASS'N 2019).

*A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.*<sup>30</sup>

A cursory reading of this provision informs attorneys they may counsel clients about the law, but they may not assist the client in breaking the law. How does this relate to industrial hemp? For example, North Dakota legalized industrial hemp production in 1999;<sup>31</sup> however, the Federal Government did not move towards legalization until the 2014 Farm Bill.<sup>32</sup> During those fifteen years, hemp businesses (like any other business) engaged in creating new business entities, buying, selling, and leasing land and equipment, purchasing starter plants, hiring labor, and contracting for sale of the product—actions for which legal advice is both relevant and advised.<sup>33</sup> States and state bar associations, such as North Dakota, continued to wrestle with the concept that although a state might legalize a particular industry, such as industrial hemp, the Federal Government may deem the same activity illegal.<sup>34</sup>

While no attorneys faced discipline for actions facilitating a hemp producer while cannabis was still illegal on the federal level, it still created a realistic fear for attorneys that they may be in danger of losing something of great value to them: their license to practice law.<sup>35</sup> To address the concerns of attorneys working in the cannabis arena, many states legalizing some form of cannabis (hemp and a growing number with recreational or medical marijuana) have had state bar associations issue ethics opinions

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<sup>30</sup> MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2019) (emphasis added).

<sup>31</sup> N.D. CENT. CODE § 4-41-01-03 (repealed 2017).

<sup>32</sup> See *generally* 7 U.S.C.A. § 5940 (West 2018).

<sup>33</sup> RENÉE JOHNSON, CONG. RSCH. SERV., HEMP AS AN AGRICULTURAL COMMODITY 1, 5–6, 16–17 (2012).

<sup>34</sup> See Renee Cooper, *2018 Farm Bill Hugely Impacts North Dakota Hemp Industry*, VOTE HEMP (Jan. 2, 2019), <https://www.votehemp.com/hemp-news/2018-farm-bill-hugely-impacts-north-dakota-hemp-industry/> [<https://perma.cc/72ZJ-3U7C>].

<sup>35</sup> Ian Wagemaker, *Professional Ethics – The High Risk of Going Green: Problems Facing Transactional Attorneys and the Growth of the State-Level Legal Marijuana Industries*, 37 W. NEW ENG. L. REV. 371, 391 (2015).

regarding legal assistance in this area.<sup>36</sup> States have addressed this ethical issue in different ways ranging from permitting attorneys to work on cannabis business related issues, so long as they are legal under the applicable state law, to some states strictly interpreting Rule 1.2.<sup>37</sup>

While ethical issues are not the focus of this Article, it is important to point out how ethical considerations have played a factor in limiting the involvement of attorneys to handle routine legal issues such as the drafting of contracts.

### III. EXISTING CONTRACTS: WHAT TO EXPECT

Contract disputes related to hemp production stretch back to America's earliest decades.<sup>38</sup> As in typical production contracts, general principles of contract law apply to hemp production contracts when one of the parties breaches.<sup>39</sup> However, this may include specific rights, duties, and consequences the parties bargained for unique to the contract.<sup>40</sup> Unique factors such as differences from traditional row crops and, for the early part of the hemp boom, ethical issues on the most mundane of legal tasks created challenges for industrial hemp.<sup>41</sup>

Together, these two issues created a situation where there was a general lack of well-written industrial hemp contracts.<sup>42</sup> This section will delve into unique and semi-unique clauses typically found in industrial hemp contracts across the country. These conclusions are based on twenty contracts reviewed by staff at the National Agricultural Law Center. While this number seems low, the review was nearly exhaustive of all available contracts because of the frequent use of confidentiality clauses.<sup>43</sup>

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<sup>36</sup> Karen E. Boxx, *Tiptoeing Through the Landmines: The Evolution of States' Legal Ethics Authority Regarding Representing Cannabis Clients*, 43 SEATTLE U. L. REV. 935, 936—38 (2020).

<sup>37</sup> *Id.*

<sup>38</sup> *See, e.g.*, *Winters v. Jan. & Son*, 16 Ky. 13, 15 (1800).

<sup>39</sup> *See My Daily Choice, Inc. v. Hunter*, No. 2:20-CV-00809-APG-DJA, 2020 WL 4369447, at \*1 (D. Nev. July 30, 2020).

<sup>40</sup> RESTATEMENT (SECOND) OF CONTRACTS § 3–4 (1981).

<sup>41</sup> JOHNSON, *supra* note 33; Karen E. Boxx, *Tiptoeing Through the Landmines: The Evolution of States' Legal Ethics Authority Regarding Representing Cannabis Clients*, 43 SEATTLE U. L. REV. 935, 936—38 (2020).

<sup>42</sup> Rusty Rumley & Scout S. Snowden, *Industrial Hemp Production Contracts: Managing Expectations and Mitigating Loss*, NAT'L AGRIC. L. CTR. 1 (Oct. 27, 2020), <https://nationalaglawcenter.org/ww-content/uploads/assets/articles/HeHe-Contracts.pdf> [<https://perma.cc/FV22-8RLV>].

<sup>43</sup> *Id.*

*A. Licensing and Costs*

Hemp cultivation and production is heavily regulated by both federal and state governments.<sup>44</sup> Accordingly, growers and producers often need to be licensed primarily through a state or tribal agency (or through the USDA if neither asserts primary regulatory authority) before beginning operation.<sup>45</sup> Failure to secure the proper licensing before beginning an operation will invariably lead to delay or termination of production, or possibly civil or criminal penalties depending on the circumstances.<sup>46</sup>

To address this issue, many hemp production contracts explicitly require parties to secure and prove they have the proper licenses before beginning any production. This burden almost exclusively falls on the growers and handlers of the unprocessed material, not the buyers of the final product. This is due to the federal regulations addressing the *production* of hemp and not the *processing* of hemp.<sup>47</sup> It is important to note the reviewed contracts do not generally provide a cost-shifting or cost-sharing provision between the parties involved, leaving the grower with the responsibility of any fees or legal costs associated with securing the licenses. However, when licenses are needed for testing, delivery, or other post-cultivation activities, contracts are more likely to provide for split costs and responsibilities between the contracting parties.

Why does this matter? Licensing costs vary dramatically between states.<sup>48</sup> For example, Vermont currently charges an annual fee of one hundred dollars for commercial growers regardless of size (and only twenty-five dollars for personal use), while the state of Rhode Island charges a licensing fee of \$2,500 lasting two years.<sup>49</sup> This means two farms, separated by as few as

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<sup>44</sup> 7 C.F.R. § 990.3–4 (2020); *See generally Industrial Hemp Laws: State-by-State*, NAT'L AGRIC. L. CTR., <https://nationalaglawcenter.org/state-compilations/hempprovisions/> (last viewed Mar. 22, 2021) [<https://perma.cc/MX7R-WSRT>].

<sup>45</sup> 7 C.F.R. § 990.2 (2021).

<sup>46</sup> 7 C.F.R. § 990.6 (2021).

<sup>47</sup> C.F.R., *supra* note 45 (explaining that States or Indian Tribes desiring to have primary regulatory authority over the *production* of hemp in the State or territory of the Indian Tribe for which it has jurisdiction shall submit to the Secretary for approval, through the State department of agriculture (in consultation with the Governor and chief law enforcement officer of the State) or the Tribal government, as applicable, a plan under which the State or Indian Tribe monitors and regulates that *production*. (emphasis added)).

<sup>48</sup> *See generally* NAT'L AGRIC. L. CTR., *supra* note 24.

<sup>49</sup> Stephanie Smith, *Hemp Registration Fees for 2020*, VT. AGENCY OF AGRIC., FOOD AND MARKETS, <https://agriculture.vermont.gov/hemp-registration-fees-2020> (last viewed Mar. 22, 2021) [<https://perma.cc/H2UR-YESW>]; 2 R.I. GEN. LAWS ANN. § 2-26-5 (West 2019).



sixty miles, could end up paying over ten times the licensing fees based on what state they operate. When parties are contemplating entering into a contract to grow industrial hemp, it is important to define who bears the burden of paying and applying for licenses.

### *B. Confidentiality*

Ensuring confidentiality is a common practice in business contracts, but it is particularly common with hemp production. Because hemp cultivation is a relatively novel modern business, there are continuing innovations among growers and producers to set their products apart from the competition.<sup>50</sup> Consequently, intellectual property, such as the innovation of proprietary technology and genetic modification, is often the focus of these confidentiality provisions. Some contracts go as far as prohibiting parties from even disclosing the existence of the contract.

Prohibitions on disclosure of various facets of production or the agreement are not categorical. Absent express exceptions in the contract, some state and federal statutes require certain disclosures in spite of a contract's confidentiality requirements.<sup>51</sup> As a result, if a party is required to disclose certain facts by applicable law, it may do so without breaching the contract. For example, some states, like Pennsylvania, required signage at the grow sites.<sup>52</sup> However, most contracts require the other party receive notice before this information is disclosed. Furthermore, confidentiality clauses typically do not bar the disclosure of readily and publicly information available through no fault of the grower, nor does it bar the disclosure of information independently developed by employees or consultants of the buyer without reliance on such confidential information.

Another objective of the confidentiality clause is security. Hemp production contracts often address preservation of the secrecy of the location of the greenhouses or fields where the hemp

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<sup>50</sup> See generally Susan Gunelius, *10 Innovative Technologies in the Hemp Industry*, CANNABIZ MEDIA (Sept. 27, 2019), <https://www.cannabiz.media/blog/10-innovative-technologies-in-the-hemp-industry> [<https://perma.cc/AQ7E-JY7A>] (providing examples of innovations in the hemp industry).

<sup>51</sup> See generally *Hemp Contracts – Things to be Aware Of*, GROWSMARTER! BLOG <https://www.yankeefarmcredit.com/blog/may-2019/hemp-contracts-%E2%80%93-things-to-be-aware-of> (last viewed Mar. 22, 2021) [<https://perma.cc/KE54-SXUX>] (noting that the UCC most likely applies to hemp).

<sup>52</sup> But see *Industrial Hemp, PA. DEPT OF AGRIC.* [https://www.agriculture.pa.gov/Plants\\_Land\\_Water/industrial\\_hemp/Pages/default.aspx](https://www.agriculture.pa.gov/Plants_Land_Water/industrial_hemp/Pages/default.aspx), (last viewed Jan. 26, 2021) [<https://perma.cc/58JE-EHNC>] (noting that Pennsylvania has removed that requirement for the 2021 growing season).

is grown. Theft has been an issue facing growers, so choosing discretion is not an uncommon tactic.<sup>53</sup> Though hemp is different from marijuana, such distinction is not easily ascertained without laboratory testing.<sup>54</sup> Consequently, hemp production sites face enhanced security threats as individuals may think they host valuable narcotics.<sup>55</sup>

Even fields clearly labeled as industrial hemp have suffered losses due to theft when prices for CBD were higher.<sup>56</sup> One of the most efficient ways parties can protect against this risk is to include in their contract a confidentiality provision protecting against disclosure of the site where the crop is grown, along with the quantity grown. On the other hand, the clause also limits the ability of growers to compare contract terms, which can put less sophisticated growers at a disadvantage. By limiting the circulation of hemp contracts, it also creates a situation where attorneys are forced to create new contracts from whole cloth instead of modifying existing contracts to best fit their clients' needs.

### C. Cultivation

The portion of the contract dealing with cultivation is one of the more important sections in an industrial hemp contract. What are the responsibilities of the grower and what must the buyer do? Calling this section "cultivation" can be deceiving. Issues surrounding the actual growing of the crop are important, but it is critical to address other matters such as who supplies the inputs and in what form should the final product be delivered.

In contracts we reviewed, it is common for the grower to be required to use its best efforts in cultivating the agreed upon product. This standard is often defined as producing and

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<sup>53</sup> See generally Jason Nark, *People keep stealing hemp from US farms, thinking it's weed*, STUFF (Nov. 15, 2019), <https://www.stuff.co.nz/business/farming/117460269/people-keep-stealing-hemp-from-us-farms-thinking-its-weed> [https://perma.cc/KEG6-XK8K] (providing examples of theft from hemp farms).

<sup>54</sup> See generally Shannon Smith, *New TBI testing can tell the difference between marijuana and hemp*, 10NEWS (Oct. 30, 2019, 7:02 PM), <https://www.wbir.com/article/news/new-tbi-testing-can-tell-the-difference-between-marijuana-and-hemp/51-d682c4b5-3e53-49e4-81ee-c21112800990> [https://perma.cc/SZC5-ZDTU] (providing an example of how hemp and marijuana can be distinguished through laboratory testing).

<sup>55</sup> See Jessie Higgins, *Thieves across U.S. mistake hemp fields for marijuana*, UPI (Dec. 19, 2019, 2:00 AM), [https://www.upi.com/Top\\_News/US/2019/12/19/Thieves-across-US-mistake-hemp-fields-for-marijuana/9621576705193/](https://www.upi.com/Top_News/US/2019/12/19/Thieves-across-US-mistake-hemp-fields-for-marijuana/9621576705193/). [https://perma.cc/4H6P-ZP7L].

<sup>56</sup> Nark, *supra* note 53.

cultivating hemp in accordance with industry standards and to follow any legal requirements. The grower agrees to perform its services diligently to meet those standards. For example, a grower's typical obligations found in contracts are to:

- Cultivate and care for the product and take precautions to keep it free from disease and comply with the terms set by the buyer.
- Apply only the chemicals and treatments pre-approved by the buyer and legal under state or federal regulation.
- Provide access to the crop for the buyer from time to time to ensure that the growing conditions conform to the agreement.
- To limit access to the product and knowledge of the operation to only those parties involved in the contract or state or federal agencies with enforcement authority.

Certain contracts also explicitly prohibit the growth of marijuana on any land to be used to grow industrial hemp, whether legal under state law or not. In the event this type of cross-contamination (or confusion as to what crop is actually growing) occurs, the agreements provide the grower will have waived its right to any compensation for the product grown and will be declared in breach of the contract. This is to ensure quality as well as to avoid criminal liability for the grower or buyer.

Many contracts acknowledge the grower may not be successful in producing the estimated quantity or quality expected by the buyer. Accordingly, the agreements typically provide a grower is not obligated to do so if legitimately unable to; however, at this point, substantial differences are seen in the contracts. Some agreements allow the buyers to reject the nonconforming materials delivered, while other contracts allow the buyer to take over the plot to try to recover a usable product. These provisions concerning cultivation should be carefully reviewed to ensure both the grower and the buyer are comfortable with their obligations under the contract.

#### *D. Quality and Testing*

The quality of the delivered product is one of the most scrutinized and detailed provisions of hemp production contracts.

The buyer typically sets the standards for the quality of hemp it expects. Some examples of the standards set for hemp seed are as follows:

- Not greater than one percent green seeds after cleaning;
- Zero percent orange or brown “meats” after hulling;
- Not greater than two percent yellow “meats” after hulling;
- Not greater than 0.1 percent sclerotinia;
- Zero percent pesticides, fungicide or herbicide chemical residue, no glyphosates at all.

Often, the standards for quality are based on federal or state regulations for other crops.<sup>57</sup> For example, the standards from the contracts viewed typically required the hemp be relatively free of any contaminants such as mold or non-hemp biomass and shall have a moisture content consistent with long-term product stability. On a practical note, drying and storing hemp is not a simple or cheap process for growers; so care should be used in evaluating any contract.<sup>58</sup>

Buyers often further request the product be free of chemicals, pesticides, or herbicides and the grower prove such by providing the buyer with a copy of a state license and state-issued fitness certificate. To make matters more complex, one may see other requirements like additional testing and certification by a third-party laboratory. For example, growing hemp on land also used for cotton production has caused issues for growers in the southern United States. In this case, a buyer may also require the crop be tested for heavy metals, such as arsenic, which were active ingredients in some older pesticides and may show up in hemp crops decades after the last use.

To ensure the product is the quality the buyer expects, agreements generally require that the grower either deliver a sample for testing to the buyer or perform testing on the product itself to determine the quality of the product. For example, one agreement requires the grower provide a five-pound sample immediately after harvest that is representative of the grower’s

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<sup>57</sup> See generally 7 C.F.R. § 810.304 (2021) (stating that the maximum limit of sclerotinia for canola seed is 0.1%).

<sup>58</sup> See generally Laura Drotleff, *Insiders share harvest, storage tips to avoid costly mistakes in hemp farming*, HEMP INDUSTRY DAILY (Feb. 26, 2020), <https://hempindustrydaily.com/insiders-share-tips-on-harvesting-industrial-hemp-and-storage> [https://perma.cc/7LR7-Y3YD].

production. A separate sample is required for each grade grown. Buyers also often require growers to provide access to the crops as often as is deemed necessary to inspect the crops from time to time.

Certain agreements require testing be done by third-party labs in accordance with state or federal standards, where applicable. The quality of the product to be delivered to the buyer is almost always set by the buyer. However, detailed expectations set by the buyer are not necessarily a bad thing. A sophisticated buyer or processor will know exactly what it needs, and quality control language (sometimes found in another section depending on the specific contract) will reflect those needs. These provisions need to be carefully considered because some of the contracts reviewed provide an objective standard on rejecting crops such as requiring the crop to test under 0.3 percent THC threshold and be ninety-five percent free of foreign materials. While other contracts leave the right of rejection solely at the buyer's discretion, language permitting rejection at the sole discretion of the buyer may create a situation where, if there is another dramatic price decline, the buyer may reject all deliveries in order to avoid further financial losses by processing an unprofitable crop.

When disputes arise over the quality of the product, agreements vary as to the remedies available to each party. Typically, the buyer or processor has great discretion in dealing with these issues, which often means the ability to reject the product at the standards they set forth in the contract. Nevertheless, the buyer still must normally notify the grower of its decision to reject the product. When this happens, the grower is often allowed to keep the rejected product unless the contract requires otherwise.

One reviewed contract gave the buyer the right to accept or reject the material delivered at its sole discretion, with ownership of the hemp becoming property of the grower at that point. With the storage concerns facing hemp growers and processors, this is something that all parties to the agreement need to understand before the contract is executed, especially with the difficulty of selling hemp on the cash market since CBD prices have fallen in 2019.

Another reviewed contract further required the grower had five days to pick up the rejected crop and the grower agreed to pay a storage fee of \$0.25 per pound per week. If one assumes an average crop as producing one thousand pounds of hemp per acre, this would have resulted in a storage cost of \$250 per acre delivered per week. Assuming the grower provided hemp from a

five-acre plot meaning storage fees of \$1,250 per week, as the grower attempts to secure another buyer.

The reviewed contracts varied dramatically regarding quality standards and the buyer's right to reject the hemp. It is critical that a grower fully understand its obligations under the agreement and can meet the expectations of the buyer, barring unforeseen events, before it enters into the contract.

### *E. Delivery*

Strict time limits are often imposed regarding the time between harvest and delivery, ranging from forty-eight hours to five days. Usually these requirements are specifically addressed, but sometimes contracts just note time is of the essence. A farmer harvesting wheat can immediately take the crop from the field and take it to a buyer or to a grain elevator for storage. Industrial hemp is not as simple. As noted, industrial hemp is a highly regulated crop.<sup>59</sup>

In Arkansas, the unprocessed hemp materials such as the roots, viable seeds, fiber, and floral material must remain in a licensed growers and processors possession.<sup>60</sup> In order to transfer or sell the material, the transporter must be in possession of a bill of lading or a state Hemp Material Transfer Request form, copies of all hemp licenses for all parties involved in the transaction, and a valid lab analysis showing the crop is compliant with the 0.3 percent THC level.<sup>61</sup> That is a significant amount of paperwork just to move a crop from the location where it was grown or stored by the grower to the processor.

In reviewing contracts, liability for delays in delivery typically rests on the grower, absent gross negligence by the buyer. Another potential issue for growers is that some contracts require upon delivery of an excessive quantity or poor-quality product, the grower is responsible for paying the buyer for storage, which is typically determined by a set price per pound. As already noted, the storage cost for hemp can end up being extremely expensive.<sup>62</sup>

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<sup>59</sup> See generally Nat'l Agric. L. Ctr., *supra* note 24.

<sup>60</sup> ARK. STATE PLANT BD., *Arkansas Industrial Hemp Research Program Rules*, at 19 (May 23, 2019), <https://www.agriculture.arkansas.gov/wp-content/uploads/2020/06/Arkansas-Industrial-Hemp-Research-Program-Rules-AR-Hemp-Act.pdf>. [<https://perma.cc/S35H-XLUD>].

<sup>61</sup> *Restriction on Sale or Transfer*, ARK. DEP'T OF AGRIC. <https://www.agriculture.arkansas.gov/plant-industries/feed-and-fertilizer-section/hemp-home/restrictions-on-sale-or-transfer/> (last viewed Jan. 12, 2021) [<https://perma.cc/Z2ES-LZY7>].

<sup>62</sup> Drotleff, *supra* note 58.

Because of the expense associated with storing industrial hemp, it is critical the grower and its attorney carefully review the obligations for delivery and ensure the quantity and the timeframe are realistic for the grower to meet.

*F. Risk of Loss and THC Levels*

Issues concerning the failure to deliver a crop meeting the contractual minimum quality standards, or a crop failure caused by foreseen or unforeseen events, are ever-present risks with industrial hemp.<sup>63</sup> Common risks such as weather, disease, pests, and market volatility are regularly faced by industrial hemp growers as well as farmers in general; however, only industrial hemp growers have to be concerned with the THC content of their crops.<sup>64</sup>

7 U.S.C. § 1639o(1) specifically defines industrial hemp as only containing a THC concentration of 0.3 percent on a dry weight basis.<sup>65</sup> Anything above that amount of THC may be considered marijuana under the Controlled Substance Act.<sup>66</sup> This sets a very fine line between legal industrial hemp and federally illegal marijuana. This issue was further complicated by the fact that different laboratories could reach different results.<sup>67</sup>

Consequently, AMS incorporated a measurement of uncertainty in the hemp regulations by defining what constitutes an “[a]cceptable hemp THC level.”<sup>68</sup> Measurement of uncertainty is defined as “[t]he parameter, associated with the result of a measurement, that characterizes the dispersion of the values that could reasonably be attributed to the particular quantity subject to measurement.”<sup>69</sup> Essentially, this allows labs to have an established margin of error rate that must be estimated and reported along with the actual test results.<sup>70</sup>

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<sup>63</sup> Robert Tigner, *Risks in Hemp Production*, UNIV. OF NEB. AGRIC. FARM & RANCH MGMT. (Feb. 8, 2021), [https://farm.unl.edu/crops/risks-hemp-production/02082021-1249#:~:text=Hemp%20is%20another%20uncommon%20agricultural, reduces%20cash%20flow%20and%20profitability \[https://perma.cc/573Z-ARG3\]](https://farm.unl.edu/crops/risks-hemp-production/02082021-1249#:~:text=Hemp%20is%20another%20uncommon%20agricultural, reduces%20cash%20flow%20and%20profitability [https://perma.cc/573Z-ARG3]).

<sup>64</sup> *Id.*

<sup>65</sup> 7 U.S.C.A. § 1639o(1) (West 2021).

<sup>66</sup> 21 U.S.C.A. § 802(16) (West 2021).

<sup>67</sup> *See generally* 7 C.F.R. § 990.3 (2021) (providing the general requirement for laboratories when determining appropriate CBD levels for hemp but does not provide a strict set of standards for the laboratories.).

<sup>68</sup> 7 C.F.R. § 990.1 (2021).

<sup>69</sup> *Id.*

<sup>70</sup> 7 C.F.R. § 990.3(a)(3)(F) (2021).

In defining what an “[a]cceptable hemp THC level” is, AMS provided an illustrative example in its definition.<sup>71</sup> The example asked one to assume an industrial hemp sample tested with a reported THC level of 0.35 percent on a dry weight basis.<sup>72</sup> The same laboratory conducting the test has a measurement of uncertainty of  $\pm 0.06$  percent.<sup>73</sup> With the measurement of uncertainty for this laboratory at  $\pm 0.06$  percent, the actual test results could be between 0.29 percent and 0.41 percent because of the margin of error.<sup>74</sup> Since the possible test results could be at 0.3 percent, AMS has decided this will fall within the “[a]cceptable hemp THC level” and meet the purpose for plan compliance.<sup>75</sup> A literal reading of 7 U.S.C.A. § 1639o(1) would suggest this sample is above the 0.3 percent threshold, and therefore it would be considered marijuana.<sup>76</sup> AMS, however, recognizes the uncertainty when interpreting the results and it accordingly gives growers some leeway in determining acceptable levels of THC.<sup>77</sup>

What if the grower is still over the acceptable hemp THC level? In such case, the regulations require states or tribal governments (or the USDA in states allowing production of hemp but have not submitted a plan)<sup>78</sup> to establish procedures for the disposal or remediation of the crop.<sup>79</sup> AMS released a notice of enforcement discretion to the interim final rule on February 27, 2020 concerning disposal of non-compliant plants.<sup>80</sup> The disposal method must render the plants non-retrievable and in non-ingestible form.<sup>81</sup> This requirement can be met by disking; plowing; mulching or composting; mowing; burying the material at least 12 inches deep; or burning the crop.<sup>82</sup> The practical result for the grower and buyer is that the crop is no longer marketable.

How realistic is the possibility that the grower is over the acceptable hemp THC level? Numbers can vary significantly from

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<sup>71</sup> 7 C.F.R. § 990.1 (2021).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> 7 U.S.C.A. § 1639o(1) (West 2021).

<sup>77</sup> 7 C.F.R. § 990.1 (2021).

<sup>78</sup> 7 C.F.R. § 990.27 (2019).

<sup>79</sup> 7 C.F.R. § 990.3(a)(3)(iii)(E) (2019).

<sup>80</sup> USDA Agric. Mktg. Serv., *Enforcement Discretion – Interim Final Rule*, USDA, <https://www.ams.usda.gov/rules-regulations/hemp/enforcement> [https://perma.cc/AM6W-W6Q3] (last viewed Mar. 19, 2021).

<sup>81</sup> *Id.*

<sup>82</sup> USDA AGRIC. MKTG. SERV., *Hemp Disposal Activities*, USDA <https://www.ams.usda.gov/rules-regulations/hemp/disposal-activities> [https://perma.cc/YL8H-XXQF] (last viewed Mar. 19, 2021).



state to state. A study in North Carolina found around 10 percent of all industrial hemp is likely to test higher than 0.3 percent THC, despite control efforts.<sup>83</sup> The USDA estimates one in five hemp lots will have to be destroyed in 2020 because the plants exceed 0.3 percent.<sup>84</sup> One of the highest rates found occurred in Arizona for the 2019 growing season, where forty-one percent of the hemp plants tested were above the 0.3 percent THC threshold.<sup>85</sup>

Contractually, the grower generally assumes the responsibility for issues arising from the quality of the product grown, which typically include THC levels. An exception to this principle is that, on occasion, contracts permit liability to shift to the buyer upon transfer, provided the grower furnished all necessary and accurate information related to testing of the product. With the prevalence of high THC tests in parts of the country, it is critical for the grower to take steps to reduce its risk.<sup>86</sup> One common tactic discussed by growers with the National Agricultural Law Center staff is to send samples to private labs on a weekly basis in order to time their harvest before THC levels exceed the 0.3 percent threshold.<sup>87</sup> The grower typically has to pay for the additional testing; however, many are willing to pay the price if it means they do not suffer a complete financial loss caused by a high THC level.<sup>88</sup>

In terms of non-THC-related losses, growers may be liable, and accordingly suffer a loss, if they fail to take precautions to keep the crops free from disease and comply with directions from the buyer.<sup>89</sup> This includes only applying chemicals and treatments to the crops the buyer authorized. Agreeing to clear instructions on which party is responsible for various aspects of the growing and harvesting of the industrial hemp crop is essential in determining which party should bear the risk of loss.

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<sup>83</sup> George Place, *Hemp Production – Keeping THC Levels Low*, N.C. COOP. EXTENSION (Dec. 5, 2019), <https://catawba.ces.ncsu.edu/2018/11/hemp-production-keeping-thc-levels-low/> [<https://perma.cc/VA3N-3ERX>].

<sup>84</sup> Maggie Cowee, *Chart: 20% of Hemp Lot Will Exceed 0.3% THC Limit Next Year*, *USDA Estimates*, HEMP INDUSTRY DAILY (Dec. 12, 2019), <https://hempindustrydaily.com/chart-20-of-hemp-lots-will-exceed-0-3-thc-limit-next-year-usda-estimates/> [<https://perma.cc/JNR9-TK8S>].

<sup>85</sup> *Tests find some early Arizona hemp crops have too much THC*, ASSOCIATED PRESS (Jan. 19, 2020), <https://apnews.com/article/11bed04631137ca111d64cf518d3d2bf> [<https://perma.cc/6DHV-SS7B>].

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See* Paul Barbagallo, *3 Ways to Prevent Your Hemp Harvest from Growing Hot*, HEMP GROWER (July 10, 2020), <https://www.hempgrower.com/article/how-prevent-hemp-crop-going-hot-thc-threshold-percent/> [<https://perma.cc/4CMJ-HHVW>].

*G. Dispute Resolution Clauses and Breach of Contract*

In the event a breached contract leads to litigation, parties may choose to address this issue proactively through choice of law and venue provisions. It is common for contracts to include both venue and choice of law provisions governing future litigation potentially arising with regard to the transaction.<sup>90</sup> Generally, absent any indication by the parties they do not wish the local law to apply, it will.<sup>91</sup> In reviewing hemp contracts, the venue and choice of law clauses look virtually identical to those found in many other contracts lawyers review on a daily basis.

The importance of these clauses in hemp contracts hinges more on the current structure of the hemp industry and less on the novelty of the clauses. Though growing and production contracts may be between intrastate parties, the number of processors, and their locations, are not necessarily distributed equally throughout the country. For example, Kentucky had eighty-two licensed processors or handlers in 2019,<sup>92</sup> while Montana has twelve registered in 2021.<sup>93</sup> Entering into a contract may require a party to do business either miles away intrastate or even across state lines. If the two parties are not within the same state, the agreement typically provides the applicable law is that of the state where the buyer is located. Choice of venue clauses typically set venue in the jurisdiction—often the county—where the buyer is located.<sup>94</sup>

Breach of contract is a very real risk when dealing with industrial hemp contracts. It is not this Article's intent to summarize the Restatement of Contracts, but the economic realities of 2019 and 2020 have shown a breach of contract for industrial hemp is a strong possibility.<sup>95</sup> As of August 2020, however, hemp acreage has dropped by sixty-seven percent,

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<sup>90</sup> 141 AM. JUR. *Trials* § 377 (2015).

<sup>91</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(3) (AM. L. INST. 1971).

<sup>92</sup> KY DEPT. OF AGRIC. INDUS. HEMP RSCH. PILOT PROGRAM, *2019 Processor/Handler List*, KY DEPT. OF AGRIC. (2019) [https://www.kyagr.com/marketing/documents/HEMP\\_LH\\_2019\\_Processor\\_List\\_editable.pdf](https://www.kyagr.com/marketing/documents/HEMP_LH_2019_Processor_List_editable.pdf) [<https://perma.cc/N8TH-VF63>].

<sup>93</sup> *MT Hemp Processors*, MT DEPT. OF AGRIC., <https://agr.mt.gov/Portals/168/Documents/IndustrialHemp/Hemp%20Processor%20List%201152021.pdf?ver=2021-01-15-084714-380> (last viewed Mar. 19, 2021). [<https://perma.cc/CLN9-R4C5>].

<sup>94</sup> Rumley & Snowden, *supra* note 42, at 4.

<sup>95</sup> *Id.*

from 137 thousand acres in 2019 to 45 thousand acres.<sup>96</sup> This follows four consecutive years of producers doubling their hemp acreage annually.<sup>97</sup> This drastic change in demand for hemp caused many disruptions in the crop's production, which subsequently implicated many production contracts that were in effect.<sup>98</sup>

#### IV. FEDERAL CROP INSURANCE AND CONTRACTS

Profitability alone is not the only reason for good contracts. One often overlooked factor is a written contract is a prerequisite the United States Department of Agriculture's Risk Management Agency ("RMA") requires before a grower is eligible to purchase federally reinsured crop insurance.<sup>99</sup>

The federal crop insurance program began several years after the passage of the first farm bill with the Federal Crop Insurance Act ("FCIA") of 1938.<sup>100</sup> The FCIA intends to "promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance and providing the means for the research and experience helpful in devising and establishing such insurance."<sup>101</sup> Generally, private insurance companies sell and service multi-peril crop insurance ("MPCI") policies insured by the Federal Crop Insurance Corporation ("FCIC"), but the FCIC sometimes issues insurance directly.<sup>102</sup> The government directly subsidizes a portion of the farmer's premium cost of the crop insurance policy, with an average premium subsidy benefit to farmers of sixty-two percent of the premium cost.<sup>103</sup>

Because of the 2018 Farm Bill, the FCIC can now offer crop insurance for hemp.<sup>104</sup> In fact, beginning in the 2020 reinsurance

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<sup>96</sup> Jenni Avins, *The CBD-Fueled Hemp Boom Has Gone Bust*, QUARTZ (Aug. 12, 2020), [https://qz.com/1891432/the-cbd-fueled-hemp-boom-has-gone-bust/?utm\\_term=mucp](https://qz.com/1891432/the-cbd-fueled-hemp-boom-has-gone-bust/?utm_term=mucp) [<https://perma.cc/EQ9G-HAV9>].

<sup>97</sup> *Id.*

<sup>98</sup> *See, e.g.*, In re GenCanna Glob. USA, Inc., 619 B.R. 364 (Bankr. E.D. Ky. 2020).

<sup>99</sup> U.S. DEP'T OF AGRIC., RISK MANAGEMENT AGENCY, 2022 STANDARD REINSURANCE AGREEMENT (2021).

<sup>100</sup> Chad G. Marzen, *The 2018 Farm Bill: Legislative Compromise in the Trump Era*, 30 FORDHAM ENVTL. L. REV. 49, 52 (2019).

<sup>101</sup> *Id.*

<sup>102</sup> *Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Servs., Inc.*, 121 F.3d 630, 633 (11th Cir. 1997).

<sup>103</sup> *2018 Farm Bill Primer: The Farm Safety Net*, CONG. RESEARCH SERV. (Apr. 3, 2019), <https://fas.org/sgp/crs/misc/IF11111.pdf> [<https://perma.cc/ZV8C-9ABN>].

<sup>104</sup> Additional Supplemental Appropriations for Disaster Relief Act of 2019, Pub. L. No. 116-20, § 107, 133 Stat. 871 (2019).

year, the FCIC was required to offer coverage under the whole-farm revenue protection (“WFRP”) insurance policy for hemp.<sup>105</sup> To fully implement this mandate, the FCIC has the authority to promulgate regulations necessary to carry out its duties.<sup>106</sup> Accordingly, the FCIC released its first form of guidance in August 2019 to help transition crop insurance to cover hemp.<sup>107</sup>

The first guidance related to crop insurance for hemp concerned the first batch of coverage for the 2020 crop year, which will cover hemp grown for fiber, flower, or seeds.<sup>108</sup> This insurance is available for producers in areas covered by USDA-approved hemp plans or approved state or university research programs.<sup>109</sup> WFRP coverage is available for hemp producers who are part of a section 7606 state or university research pilot as authorized by the 2014 Farm Bill.<sup>110</sup> Other producers cannot obtain coverage until a USDA-approved plan is in place.<sup>111</sup> WFRP allows coverage of all revenue for farm-produced commodities up to a total insured revenue of \$8.5 million, but hemp producers must comply with applicable federal, state, or tribal regulations for hemp production and must have a contract for the purchase of the insured industrial hemp to be eligible.<sup>112</sup> Additionally, for hemp with a THC concentration above the compliance level,<sup>113</sup> WFRP provisions prevent this excessive concentration from constituting an insurable cause of loss and prevent it from qualifying for replant payments under WFRP.<sup>114</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> 7 U.S.C. § 1503, 1506(o) (2018).

<sup>107</sup> Press Release, U.S. Dep’t of Agric., Risk Mgmt. Agency, *Hemp Crop Insurance Coverage Available for 2020* (Aug. 27, 2019) (on file with Risk Mgmt. Agency).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> U.S. Dep’t of Agric., *Hemp Crop Insurance Coverage Available for 2020*, U.S. DEP’T OF AGRIC. RISK MGMT. AGENCY (Aug. 27, 2019), <https://www.rma.usda.gov/en/News-Room/Press/National-News-Archive/2019-News/2019-News/Hemp-Crop-Insurance-Coverage-Available-for-2020>, [https://perma.cc/Y3RT-759G].

<sup>113</sup> 7 U.S.C. § 1639o(1) (2018) (defining hemp as a plant with a THC concentration of not more than 0.3 percent); U.S. Dep’t of Agric., *Hemp Crop Insurance Coverage Available for 2020*, U.S. DEP’T OF AGRIC. RISK MGMT. AGENCY (Aug. 27, 2019), <https://www.rma.usda.gov/en/News-Room/Press/National-News-Archive/2019-News/2019-News/Hemp-Crop-Insurance-Coverage-Available-for-2020>, [https://perma.cc/Y3RT-759G].

<sup>114</sup> 7 U.S.C. § 1639o(1); U.S. DEP’T OF AGRIC., *HEMP CROP INSURANCE COVERAGE AVAILABLE FOR 2020*, U.S. DEP’T OF AGRIC. RISK MGMT. AGENCY (Aug. 27, 2019), <https://www.rma.usda.gov/en/News-Room/Press/National-News-Archive/2019-News/2019-News/Hemp-Crop-Insurance-Coverage-Available-for-2020> [https://perma.cc/Y3RT-759G].

The USDA’s Risk Management Agency, (“RMA”) released a second round of guidance in December 2019.<sup>115</sup> There, it announced a pilot insurance program providing Actual Production History (“APH”) coverage under 508(h) MPCCI for hemp grown for fiber, grain, or CBD oil for the 2020 crop year.<sup>116</sup> This coverage will be available in certain counties in Alabama, California, Colorado, Illinois, Indiana, Kansas, Kentucky, Maine, Michigan, Minnesota, Montana, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Tennessee, Virginia, and Wisconsin.<sup>117</sup>

Like WFRP, hemp producers are eligible to participate in the MPCCI pilot program if they have a contract for the sale of the insured hemp, but under MPCCI they must also have produced hemp for at least one year.<sup>118</sup> Similarly, producers also must be a part of a section 7606 state or university research pilot program or be licensed under a federal, state, or tribal program approved under the AMS interim final rule<sup>119</sup> issued in October 2019.<sup>120</sup> Like the WFRP, if the THC level in hemp exceeds the maximum federal statutory compliance level, it will not constitute an insurable cause of loss and the hemp will not qualify for replant payments or prevented plant payments under MPCCI.<sup>121</sup>

Beginning with the 2021 crop year, the Nursery crop insurance program and the Nursery Value Select pilot crop insurance program will allow hemp to be insurable if it is grown in containers and is in accordance with federal law, state law, tribal law, and the terms of the crop insurance policy.<sup>122</sup> In February 2020, the USDA released its third, and most recent, guidance on crop insurance coverage for hemp: the Noninsured Crop Disaster Assistance Program (“NAP”). The NAP fills in preexisting gaps in coverage by providing coverage for hemp grown for fiber, grain,

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<sup>115</sup> U.S. DEPT OF AGRIC., USDA ANNOUNCES PILOT INSURANCE COVERAGE FOR HEMP GROWERS, U.S. DEPT OF AGRIC. RISK MGMT. AGENCY (Dec. 23, 2019), <https://www.rma.usda.gov/en/News-Room/Press/National-News-Archive/2019-News/2019-News/USDA-Announces-Pilot-Insurance-Coverage-for-Hemp-Growers>, [https://perma.cc/9HMM-Y755] [hereinafter “USDA ANNOUNCES PILOT INSURANCE COVERAGE”].

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Establishment of a Domestic Hemp Production Program, 84 Fed. Reg. 58,522 (Oct. 31, 2019) (to be codified at 7 C.F.R. pt. 990); USDA ANNOUNCES PILOT INSURANCE COVERAGE, *supra* note 115.

<sup>120</sup> USDA ANNOUNCES PILOT INSURANCE COVERAGE, *supra* note 115.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

seed or CBD for the 2020 crop year where no permanent federal crop insurance program is available.<sup>123</sup>

With some states having a high percentage of growers testing “hot,”<sup>124</sup> coupled with the elevated cost of planting an industrial hemp crop,<sup>125</sup> there are major limitations for hemp producers wanting to use federally insured crop insurance policies to mitigate the risks of growing hemp. When these limitations are considered alongside the fact that growers are required to have a contract in place to sell their hemp crop,<sup>126</sup> the usefulness of crop insurance appears limited for the foreseeable future.

### CONCLUSION

Industrial hemp production continues to create challenges and opportunities for attorneys, producers, and processors. This new crop, facing both logistical and legal challenges, has created problems and opportunities for all involved in the emerging industry. One of the fundamental ways attorneys assist with new business endeavors is to help mitigate risk through properly drafting contracts. This can be challenging with a new crop and the potential confusion about ethical considerations in the early days of industrial hemp’s reemergence.

However, comparing existing contracts and examining common clauses can better prepare attorneys, growers and processors to handle the difficulties of this unique product. Contracts are an important tool; however, the economic reality the hemp industry faced during the 2019 and 2020 growing seasons has demonstrated even the most skillfully drafted contract cannot prevent one party from breaching an agreement or seeking relief from a federal bankruptcy court. Nevertheless, contracts remain an important tool for mitigating risk, whether by defining the agreement between the parties or through ancillary benefits such as eligibility for federally reinsured crop insurance.

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<sup>123</sup> U.S. DEPT OF AGRIC., USDA ANNOUNCES DETAILS OF RISK MANAGEMENT PROGRAMS FOR HEMP PRODUCERS, U.S. DEPT OF AGRIC. (Feb. 6, 2020), <https://www.usda.gov/media/press-releases/2020/02/06/usda-announces-details-risk-management-programs-hemp-producers>, [<https://perma.cc/4T5K-BZQH>].

<sup>124</sup> See, e.g., *Tests find some early Arizona hemp crops have too much THC*, *supra* note 85.

<sup>125</sup> See Establishment of a Domestic Hemp Production Program, *supra* note 8, at 58, 541–42.

<sup>126</sup> U.S. DEPT OF AGRIC., *supra* note 112.