Fall 2003

Rynn & Janowsky, LLP
AGRICULTURAL LAW
NEWSLETTER

INCLUDING ATTORNEYFEESAND FINANCE CHARGE PROVISIONS ON YOUR INVOICES ISAN ABSOLUTE MUST

I. Ninth Circuit Decision Should Benefit a Trust Claimant's Recovery

While it was always a good idea to include language on your invoices that would allow you to recover attorney's fees in the event litigation is filed, now there is a Ninth Circuit appellate decision that expressly adds these fees to a claimant's PACA trust claim. Although the Ninth Circuit covers only theWestern states of California, Oregon, Washington, Arizona, Idaho, Montana, Nevada, Alaska, Hawaii, and Guam, the Court of Appeals decision is persuasive authority throughout the entire United States.

The case is entitled *Middle Mountain Land and Produce, Inc. v. Sound Commodities, Inc.*, and it was decided in September of last year. This published decision will act to increase the PACA trust recoveries of PACA trust creditors; that is, provided your company's invoices contain certain necessary verbiage. In the decision, the Court of Appeals specifically stated that, "[i]f one particular supplier [that included attorney fee language on its invoices] gained a contractual right greater than that negotiated by others,then it is not unfair for such a supplier to gain the benefit of its superior foresight or industry."

The Court relied on the PACA statute that states that the buyer of produce must hold in trust for the supplier the produce received, the receivables, and all proceeds from the sale of the produce until "full payment of ***the sums owing in connection with such transactions*** has been received by such unpaid suppliers…." The Court reasoned that the words "in connection with" should be interpreted to mean that the additional sums protected under the PACA trust should include contractual rights to attorney's fees and interest.

II. Attorney Fees and Finance Charge Language Must be on Invoice

As long as the produce buyer receives your invoice with the attorney fees and interest language on it and does not object, under the Uniform Commercial Code, that merchant will becomeboundby the provision. And under the *Middle Mountain* decision, now there is no doubt that these additional costs become apart of the produce shipper's PACAtrustclaim.

III. Sample Language to Include on Invoices

The exact wording of the provisions to include on your invoices and where to place such language should be decided after consultation with Rynn & Janowsky or your attorney. The following,however,is an example of language that, if included on your invoices that the buyer receives, should entitle you to add fees and finance charges to your PACA trust claim against that buyer in the event the buyer fails to pay you:

"Should any action be commenced between the parties to this contract concerning the sums due hereunder or the rights and duties of any party hereto or the interpretation ofthis contract, the prevailing party in such action shall beentitled to, in addition to such other relief as may be granted, an award as and for the actual attorney's fees and costs in bringing such action and/or enforcing any judgment granted therein."

Sample language that can be pre-

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printed on your company's invoices for the recovery of finance charges (note that with this sample language, the charge is neither referred to as a "late charge" or a "finance charge" or "interest") is as follows:

"1.5% per month will be charged on past due accounts (18% annual percentage rate)."

We recommend actually referring to the interest as either as "finance charges" or "late charges" or not categorizing it as any specific charge, as opposed to calling it an "interest charge," or else you run the risk of a court reducing the "interest" amount to statutory rates, which are lower.

SIXTH CIRCUIT *OVERTON* DECISION DENIES PACA TRUST RIGHTS TO SELLERS WITH LENGTHY AND INCONSISTENT PAYMENT TERMS

I. Sellers Must Scrutinize Their Payment Terms

In a case decided last month entitled *Overton Distributors, Inc. v. Heritage Bank*, 240 F.3d 361 (6th Cir. 2003), a three judge appellate panel reversed a Tennessee district judge's ruling awarding an unpaid produce seller over $220,000 under the PACA trust. The Sixth Circuit ruled that Overton had forfeited its PACA trust rights when it set forth payment terms on its invoices which specified a payment due date of 10 days after the end of each month in which the produce was delivered.

The PACA statute imposes a 30-day maximum allowable payment term between sellers and buyers of produce to qualify for PACA trust protection. Because Overton's invoice terms allowed for payments to be made as late as 40 days after the buyer received the produce, the appellate court found that the transactions were outside of PACA coverage. As the Court noted, ". . .The statute is intended to protect only those produce sellers making short-term credit arrangements."

Overton's failure to ensure that the terms of its invoices were consistent with the payment terms agreed to in writing by the parties several years prior to the sales in issue was cited as another reason Overton lost priority PACA rights it would otherwise have been entitled to enforce. To Overton, the higher Court's ruling effectively nullified its judgment against its bankrupt customer's bank for over $220,000 won under a PACA trust theory in the trial court. Overton is now left only with an unsecured claim against its insolvent customer.

II. The "Safest" Approach For PACA Trust Protection is 10-Day Terms

The lesson for produce dealers is to exercise extreme care in the extension of written payment terms to customers. If sellers agree to extend customer payment terms for any duration other than "PACA prompt" or 10-day terms, a written agreement memorializing such terms between seller and the customer(s) is required to be executed before the produce is shipped. The payment terms agreement and the payment terms on the invoices must be identical. Written payment terms which exceed 30-days from the buyers' receipt of produce are fatal to a seller's PACA trust eligibility.

Produce sellers utilizing 10-day terms on invoices have a much easier time of staying within the confines of the PACA statute. Sellers whose invoices set forth "PACA prompt" or 10-day terms need not obtain separate signed agreements from their customers setting forth payment terms, nor do they have to be concerned about any inconsistencies between terms contained on written agreements and their sales invoices.

THE COUNTRY OF ORIGIN LABELING CONTROVERSY

I. General Background on "COOL"

The new Country of Origin Labeling ("COOL") requirements scheduled to go into effect September 30, 2004 have sparked controversy between produce suppliers and some retailers. Essentially, COOL requirements are designed to inform consumers, at the final point of sale, of the country of origin of the covered commodity. In the case of perishable agricultural commodities, this simply means that consumers must be told where the commodity was grown.

II. Retailers Attempt to "Pass The Buck" to Produce Suppliers

Because the notice must be provided to consumers at the final point of sale, the obligation (and, therefore, most of the cost) of providing that notice falls squarely on the retailer. Likewise, retailers (not shippers) are directly subject to enforcement penalties for violations of COOL notice requirements, which in a worst case scenario could result in fines of up to $10,000 per violation.

Recently, some retailers have undertaken an aggressive letter writing campaign "advising" produce suppliers of numerous new COOL-related demands that retailers intend to impose upon suppliers before the new law goes into effect. Typically, the retailer demands go far beyond statutory requirements and include the following: (a) that suppliers provide, at the supplier's cost, COOL stickers, stamps, labels, signs, or placards for each customer-ready retail unit or display unit; (b) that suppliers maintain COOL records and a verifiable audit trail; (c) that suppliers provide full indemnification to the retailer for fines assessed in connection with a retailer violation of COOL notice requirements; (d) segregation of all commodities by country of origin throughout the production chain; and (e) that suppliers submit to voluntary independent audits to verify the accuracy of the country of origin information provided by the supplier to the retailer. In some cases, the letters have gone so far as to state that if the demands are not met, the retailer will not provide shelf-space for the supplier's product.

Many produce shippers and trade associations view these demands as a blatant attempt by retailers to pass the retailer's obligations and additional costs associated with COOL notice requirements onto produce suppliers. Therein lies the controversy.

III. What Specific Obligations Does the COOL Statute Impose Upon Produce Suppliers?

COOL imposes essentially two obligations on suppliers of covered commodities: (1) to provide accurate country of origin information to the retailer; and, (2) to maintain an audit trail sufficient to verify the accuracy of that information. These records must be readily accessible and made available to the retailer for inspection upon request.

Generally, these obligations should be easily fulfilled, if not already satisfied by a produce vender's regular shipping and record keeping practices. Many shipping documents and commercial shipping cartons already identify the country of origin. If not, country of origin information must be added to those documents and shipping cartons. Alternatively, some other method of providing written country of origin information to the retailer must be implemented. With respect to required documents, as long as the shipping documents reflect the country of origin, the obligation to maintain a verifiable audit trail should also be satisfied. Currently, PACA outlaws any misleading or false information set forth on labels or sales documentation. This includes information with regard to country of origin. And, because PACA already requires that you maintain records for 2 years, COOL requirements should not impose any further record keeping burdens on produce shippers.

IV. How Should You Respond to Additional Obligations Demanded by Retailers?

As mentioned above, the demands currently being made by some retailers go far beyond the mandate of §1638a and seek to impose obligations upon growers and produce shippers that may be burdensome, costly and unnecessary. However, retailers are legitimately concerned about potential exposure for employees' errors with respect to thousands of labeling tasks which must be undertaken in each store. In responding to retailers' demands, we suggest that you consider following:

1. *Wait for the Regulation to be Adopted Before Allocating Compliance Burdens*. The COOL regulations are expected out this month. Any demands placed upon shippers at this juncture by retailers are premature.

2. *Providing stickers, stamps or placards for retail units*. Whether it is economically feasible for shippers to provide stickers, signs or placards for each customer-ready unit or retail display fixture depends upon a variety of factors, including the type of commodity sold and your current labeling or bagging practices. For example, many commodities (such as apples and other tree fruit or bagged potatoes) are typically shipped in retail bags or with individual labels affixed to each piece of fruit, which may already identify the country of origin, or which may be modified to do so at minimal cost.

3. *Maintenance of records and a verifiable audit trail*. More likely than not, shippers already maintain shipping and sales records for a period of two years identifying the country of origin. Thus, there should be no problem complying with this request.

4. *Indemnification*. We do not recommend agreeing to indemnifying retailers for violating COOL requirements. Before fines could ever be assessed against a retailer, there must be a finding by the USDA (after a 30-day opportunity to cure the violation and an oral hearing) that the retailer's violation was willful. If the retailer reasonably relied on information provided by the shipper, there could be no finding of a willful violation and hence no basis for indemnification. Moreover, if there was a willful violation, a grower/shipper should not be required to indemnify a retailer for that retailer's willful violation of the statute.

5. *Segregation of all covered commodities throughout the marketing chain*. So long as shipping or sales records and commercial shipping units identify the country of origin, the shipper should be able to trace the product to its country of origin (by number lot or other identification), throughout the production and shipping chain.

6. *Providing an independent audit*. Nowhere does §1638 require an audit to ensure the accuracy of country of origin information provided by a produce supplier. Nevertheless, should an audit be conducted by the USDA or if the internal audits are a regular part of a shipper's internal procedures, such audit, to the extent that addresses country of origin issues, might be shared with concerned retailers. When the final regulations are issued, more specific arrangements with retailers can be reached to minimize compliance burdens for all concerned.

If you have any specific questions concerning the above information or other COOL requirements, please contact our office, or consult your attorney.

There may still be time to register...

PACA LAW ~ Produce Sales Seminar and Workshops

Tuesday, October 14, 2003
9:30 a.m. to 2:30 p.m.

Rio Rico Resort & Country Club
1069 Camino Caralampi
Rio Rico, Arizona

For more information on availability for this seminar or for information on other upcoming seminars, please contact June Monroe at (949) 752-2911 extension 235 or june@rjlaw.com.

Within the Firm

Marion I. Quesenbery recently became an arbitrator on the Arbitration Panel of the Fruit and Vegetable Dispute Resolution Corporation, a private, non-profit organization, whose membership consists of firms involved in the marketing of fruits and vegetables within the NAFTA countries. Marion joins the panel with her Rynn & Janowsky partners, **Patricia J. Rynn** and **R. Jason Read**.

Congratulations!

***Wedding Bells* - Bart M. Botta** recently wed Kristin Carlson on July 19, 2003 and **Mindy L. James** is due to marry Abdi Nili on October 18, 2003.

***Baby Announcement* - Michelle Aguilar**, the firm's office manager, gave birth on September 13, 2003, at 5:21 p.m., to her second child, Haven Josephine Aguilar, 6 lbs., 11 oz., and 18".

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