The Uniform Commercial Code (UCC) has, with a few exceptions, been adopted by all of the states. First published in 1952, the UCC is one of a number of acts created to harmonize laws among U.S. states. The UCC relates to the law of sales and other commercial transactions. Section 2-207 provides that—between merchants—additional terms in the acceptance or confirmation (such as in an invoice) of sales are considered proposals to the contract unless the buyer objects to these additional terms within a reasonable time.

Numerous suppliers include "additional terms" on their invoices, such as interest charges and attorney fee language. Specifically, UCC § 2-207 (often referred to as the "battle of the forms"—purchase order versus invoice) states:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Consequently, if a buyer receives an invoice which contains terms to which it does not agree, it must, within a reasonable time, object to the additional terms. Otherwise, they become part of the contract between the parties.

Many produce supplier invoices contain language that interest will be charged on late payments, even though the parties may never have discussed interest. For example, an invoice could and should state: “A FINANCE CHARGE calculated at the rate of 1½% PER MONTH (18% ANNUALLY), or at the highest rate permitted by law, will be applied to all PAST DUE ACCOUNTS.”

Frequently, invoices also include verbiage concerning attorney fees, such as: “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 of this contract, the prevailing
party in such action shall be entitled to, in addition to such other relief as may be granted, an award as and for the actual attorneys’ fees and costs in bringing such action and/or enforcing any judgment granted therein.”

Of course, the downside to this language is that it refers to the “prevailing party,” although the language can be changed to “the grower” or “the supplier.” The words “prevailing party” mean that should a supplier bring a legal action against a buyer and lose, the supplier may be responsible for the buyer’s attorneys’ fees. In addition, in some states, including California, the winner in a legal action will collect attorneys’ fees if there is contractual language providing for an award of these fees to either party, because the obligation is made reciprocal by statute.

SPECIFIC CASES

In reparation proceedings, the U.S. Department of Agriculture (USDA) has finally followed the lead of federal courts and has begun routinely awarding pre-judgment interest at the rates stated on invoices. This is quite significant as it often makes a HUGE difference in the amount awarded to the Complainant in reparation damages.

In cases in which there is no interest rate specified in the sales documentation, the default interest rate is substantially less than 1% based upon the applicable federal interest rate. Thus, if a complainant waited two years to obtain a reparation award finding that it was entitled to $50,000 in damages, the complainant would be awarded another $18,000 in late fees in addition to the $50,000 damages found due, assuming its invoices provided for a monthly late charge of 18% per year on all delinquent balances due.

In *United Greenhouse LLC v. Premium Valley Produce, Inc.* (2013), for example, United Greenhouse sought to recover $14,340 for cucumbers sold to Premium Valley. The USDA awarded 18% interest based on the Complainant’s invoices through the date of the decision, but set a meager 0.12% per annum as the applicable interest rate after the issuance, which was presumably based upon the federal judgment interest rate at the time. In *United Greenhouse*, the USDA stated:

“Complainant seeks pre-judgment interest on the unpaid amount due for the mini cucumbers at a rate of 1.5% per month (18% per annum). Complainant’s claim is based on its invoice to Respondent which bears the statement: ‘Interest shall accrue on any past-due account balance at the rate of 1.5% per month on any past-due balance at the rate of 1.5% per month (18% per annum).’ There is nothing to indicate that Respondent objected to the interest charge provision state on Complainant’s invoice. In the absence of a timely objection by Respondent, the interest charge provision stated on Complainant’s invoice becomes incorporated into the sales contract. See UCC § 2-207. The 1.5 percent per month, 18 percent per annum, rate of pre-judgment interest set by Complainant’s invoice to Respondent is not unreasonable. Numerous courts have awarded pre-judgment interest at a rate of 18% based on similar contract provisions.”
In another PACA reparation decision, *Johnston Farms v. AG Grower Sales LLC* (2010) the Secretary awarded 18% interest when the language appeared on the invoice. In deciding to award interest at the rate specified on the invoice, the USDA relied heavily upon case law in which courts awarded attorneys’ fees based on the supplier’s invoices:

“[W]e find that the payment and interest charge provisions in Complainant’s invoices were incorporated into the parties’ sales contracts. Our decision is consistent with the application of Section 2-207(2) by federal courts that have been confronted with similar provisions on produce invoices. See, e.g., *Coosemans Specialties, Inc. v. Garguilo*, 2007 (invoice clauses providing for attorneys’ fees were incorporated into the parties’ contracts pursuant to 2-207); *Ruby Robinson Co., Inc. v. Kalil Fresh Marketing, Inc.* (S.D. Tex 2009) (attorneys’ fees provisions in invoices were incorporated into the parties’ contracts pursuant to 2-207); *Senn Bros., Inc. v. Foothills Meat and Produce, Inc.* (W.D. N.C. 2008) (terms included on seller’s invoices became binding on the parties pursuant to 2-207); *Dayoub Marketing, Inc. v. S.K. Produce Corp.* (S.D. N.Y. 2005) (interest and collection costs provisions in seller’s invoices were incorporated into the parties’ contracts, subject to a limitation of reasonableness, pursuant to 2-207); *Fleming Companies* (D. Del. 2004) (attorneys’ fees provisions on invoices enforceable pursuant to 2-207). Service charge and attorneys’ fee clauses have become commonplace on produce invoices because many federal courts have determined that these fees are recoverable in PACA trust actions pursuant to 7 U.S.C. § 499e(c)(2). See, e.g., *Middle Mountain Land and Produce Inc. v. Sound Commodities Inc.* (9th Cir. 2002); *Consumers Produce, Inc. v. R. Family Market* (N.D. Ohio 2009); *JC Produce, Inc. v. Paragon Steakhouse Restaurants*, (E.D. Ca. 1999).

**PARADOXICAL FINDINGS**

While it is not entirely clear why the USDA refuses to follow judicial precedent in awarding a prevailing party in a reparation proceeding its attorneys’ fees, when a supplier’s invoices include language specifying that a prevailing party should recover such fees, its propensity to award contractual interest has made a big difference to complainants who may have to wait many months or even years to obtain a decision. Without the verbiage on the invoices regarding late fees or interest, the Complainant would have been relegated to the federal interest rate, which was 0.29% at the time of the *Johnston Farms* decision.

Similarly, in *Skolnick, Inc. dba Imperial Frozen Foods v. California Fruit Markets* (2008), the USDA awarded 18% interest based on the Complainant’s invoices. Interestingly, the 18% interest rate was held to apply until such time as the award was paid, so the federal judgment rate never came into play. Likewise, in *Underwood & Wong Produce v. Rueden, Inc.* (2013), a default order, the USDA adopted the interest rate shown on the complainant’s invoices (18%), but it also determined that the 0.12% federal interest rate would apply after the date of the Order.
until paid. Again, the Secretary noted, “in the absence of a timely objection by Respondent the interest charge provisions on Complainant’s invoices were incorporated into each sales contract."

The USDA’s own rationale (based upon the invoice language) applied in the Johnston Farms case reveals an incongruous and illogical distinction between invoice language pertaining to interest on one hand and attorneys’ fees on the other. There is simply no plausible legal basis for ignoring the language on an invoice pertaining to the recovery of attorneys’ fees expended by a party to obtain a recovery, especially when the Secretary does not hesitate to award interest based upon precisely the same platform relied upon by complainants seeking to recoup their attorneys’ fees—the invoice.

As it stands now, the USDA refuses to award attorneys’ fees, without explanation, even when the invoices state that a prevailing party should be reimbursed for such fees and costs. This practice seems to fly in the face of Section 5 of the PACA statute which states that “[i]f any commission merchant, dealer, or broker violates any provision of Section 2 he shall be liable to the person or persons injured thereby for the full amount of damages…” Certainly, when the contract relied upon by the parties specifies that attorneys’ fees shall be awarded to the prevailing party, that is a portion of a prevailing party’s damages to which it is entitled under the Act.

As the court reasoned in the Coosemans Specialties, Inc. v. Garguilo decision (cited by the Secretary in the Johnston Farms decision) “…the district court properly noted additional terms are to be construed as proposals for addition to the contract (N.Y. UCC § 2-207(2)). When the parties are two merchants, the additional terms become part of the contract unless the party opposing those terms can establish [an exception under § 2-207]… plaintiffs’ invoices created an enforceable contract providing for attorneys’ fees.” Inexplicably, the USDA wholly abandons the invoice language pertaining to the recovery of legal fees but embraces and enforces language on an invoice in connection with the rate of interest which should apply to late payments. Perhaps this is because the PACA statute also provides for an award of attorneys’ fees incurred in connection with an oral hearing [7 U.S.C. § 499g], but this provision should be relied upon only in those cases in which there is no invoice-based contractual right to recover such fees.

CONCLUSION

The USDA’s refusal to award attorneys’ fees based on section 2-207 ignores the bargained-for terms of the contract between two parties (as reflected upon the invoices), and fails to award to the injured party “the full amount of damages . . . sustained as a consequence” of a PACA violation, as mandated by PACA, 7 U.S.C. § 499e(a).

As long as the Secretary selectively enforces certain terms on the invoices relied upon by produce merchants but turns a blind eye toward attorney fee verbiage reflected upon such invoices, a prevailing complainant will be denied the full amount of its damages. 

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