

Rynn & Janowsky, LLP

AGRICULTURAL LAW

NEWSLETTER

EDI AND THE PACA TRUST: ARE YOU PROTECTED?

Paperless Invoices May Jeopardize Seller's Trust Rights

As more and more food service, retail and club store customers are requiring their vendors, including produce vendors, to shift from paper invoices to electronically transmitted invoices, produce merchants are more concerned than ever about their PACA trust rights. They should be concerned. The increasing prevalence of Electronic Data Interchange or "EDI" invoices in lieu of paper billing statements, coupled with the very real prospect that behemoth retail chains or distributors may suddenly file for bankruptcy protection brings a newsense of urgency to the issue.

In 1995, the Perishable Agricultural Commodities Act of 1930 ("PACA") was amended to allow PACA licensee stop reserve their super priority PACA trust

rights by including the prescribed "PACA Trust" language on the face of their "ordinary and usual billing or invoice statements." The required language is as follows:

"The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received."

This change in the statute made a produce merchant's task of perfecting its PACA trust rights on paper invoices virtually fool proof. But in the paperless world of EDI

billing, PACA trust questions become a little murkier.

If two trading partners have adopted EDI as the agreed method of transmitting sales and invoice data between one another, it would be difficult to characterize the EDI transmissions as anything other than *ordinary and usual* billing or invoice statements. Consequently, if the vendor includes the PACA trust statement on each EDI transmission, the transaction should be covered by the PACA trust.

As a practical reality, however, many buyers simply choose not to receive, view or download all standard form disclaimer, PACA trust language, and attorney fees and finance charge verbiage, which produce vendors often squeeze on to their paper invoices. In fact, some EDI customers go so far as to expressly admonish their vendors that they will not receive, read or download any "surplus"

Rynn & Janowsky, LLP is a limited liability partnership engaged in the practice of labor management, agricultural, and commercial law. The purpose of the Rynn & Janowsky, LLP Agricultural Law Newsletter is to provide large and small business concerns with agricultural law developments and their practical application. The contents of the Agricultural Law Newsletter should not be construed as legal advice or legal opinion; you are urged to consult your own attorney or Rynn & Janowsky, LLP concerning your particular situation and any specific legal questions you may have.

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Truck Broker Or Trucker: Who's Fault Is It Anyway?

You just shipped a load of squash across the country where it arrived with 40% decay due to temperature problems during transit. Your first instinct is to contact the truck broker to demand payment on the claim. While you are correct to call the truck broker, he or she may not be the person you can look to if a lawsuit is initiated.

While a broker in most cases will assist you with your claim since they usually maintain a relationship with the trucker, they are in many cases not legally responsible for the damage sustained to the goods. Many shippers unsuccessfully negotiate claims for months with brokers without ever contacting, or for that matter, making a claim directly to the trucker. Under California law as well as the law in other jurisdictions, a truck broker may not be held legally responsible for damages incurred during the transit unless it "held itself out" as the actual carrier. For example, perhaps the broker took some action to make you or the general public believe that it was acting as a common carrier. In a recent California decision, *Chubb v. H.A. Transportation System, Inc.*, 243 F.Supp.2d 1064 (C.D. Cal. 2002), the court indicated that a broker could be held liable for damage to goods if it did not disclose its status as a broker, listed itself as the carrier on the bill of lading or freight contract or otherwise represented itself as the actual carrier. Without these facts, the broker's liability will otherwise be

limited to its independent negligence or breach if its contractual duties (i.e., misdirecting the truck or negligently arranging for the transportation).

To avoid this pitfall, make your written claims directly to the trucking company as well as to the broker. While your brokers should be able to assist you with the claims procedure, it is best not to rely on the broker to make and negotiate the claim for you. You may also want to request certain documents from the broker that may assist you in the event that you encounter a freight claim. Ask the broker to sign an agreement warranting that he or she will select only carriers with adequate insurance to cover the value of your cargo. A breach of this agreement may give you a valid claim against the broker for the value of the load. You should also require that the broker fill out a carrier tax identification or social security number, ICC number, insurance carrier and policy number. In the event that you do need to make a freight claim, you will be armed with all the information you need.

Extended Payment Terms And Reimbursement Of Attorneys' Fees: The Saga Continues

In a recent decision issued by the District Court in Kansas City, Missouri, PACA trust claims cumulatively exceeding \$850,000.00 were ruled to be valid even though the invoices reflected payment terms beyond 10 days but the seller failed to enter into a separate written agreement with the

buyer confirming those extended payment terms. In this decision, however, the Court also rejected the PACA trust creditors' claims for reimbursement of attorneys' fees incurred in the litigation, despite the seller's contractual right to receive those fees.

Extended Payment Terms

PACA Regulations require parties who elect to extend their payment terms beyond 'PACA Prompt' (10 days from acceptance) to reduce their agreement to writing before entering into the sales transaction. 7 C.F.R. §46.46(d)(1). Thus, if an invoice reflects a payment term of, for example, 21 days, but there is no written agreement between the seller and buyer confirming that 21-day payment term, an argument exists that the seller failed to comply with one of the clear requirements of PACA and therefore the seller's PACA trust claims are invalid.

Although a few courts have accepted this argument, the trend throughout the country seems to be a movement away from such a harsh consequence for a seller's failure to reduce an extended payment terms agreement to writing. The recent decision in Missouri furthers this trend by rejecting the argument that strict compliance with the written agreement requirement is a prerequisite to receiving PACA trust benefits. In reaching its decision, the 8th Circuit adopts the reasoning of *Advantage Produce v. Idahoan Fresh*, a 3rd Circuit decision, which held that the failure

to reduce extended payment terms to writing only negated the prompt payment term and did not void the seller's PACA trust rights. According to both Courts: "The writing requirement relates to an enforceability of an agreement to extend a payment term, but does not disqualify an unpaid seller from receiving trust benefits."

As encouraging as the 8th Circuit decision is, many Circuits (including the 9th Circuit) have yet to resolve this issue one way or the other. Therefore, the most cautious approach to take is to simply use the standard PACA Prompt payment term of 10 days from acceptance. Doing so will eliminate any potential argument that failing to comply with the written agreement requirement regarding extended payment terms somehow voids your PACA trust rights. However, if your company currently utilizes extended payment terms, you should consult with your attorney before making any changes, especially if you have issued a payment term agreement to your buyer.

Reimbursement of Attorneys' Fees and/or Finance Charges

In our Fall 2003 Newsletter, we reported on *Middle Mountain Land & Produce, Inc. v. Sound Commodities, Inc.*, a 9th Circuit

decision that allowed PACA trust creditors to recover finance charges and attorneys' fees incurred in connection with litigation filed to collect sums due for produce sales if the invoices contained clauses providing for the recovery of those fees and charges. The basis for this decision was that because PACA trust claims include all costs incurred 'in connection with' the produce sale, attorneys' fees and/or finance charges that are part of the contract of sale should be included within the definition of such costs.

Armed with the *Middle Mountain* decision, the PACA trust creditors in the Missouri case whose invoices contained such clauses requested that the court include finance charges and attorneys' fees as part of their trust claims. Unfortunately, the request was flatly denied.

Not only did the Missouri Court adamantly refuse to adopt the *Middle Mountain* decision, but it did so by harshly criticizing the 9th Circuit's reasoning, which was characterized as "circular" and "not very persuasive." According to the Missouri Court, the 9th Circuit's decision to expand the definition of costs incurred "in connection with" a produce transaction to include attorneys' fees ignores both common sense and the plain meaning of the statute. To the contrary, the Missouri Court concluded that in order to

further the purpose of PACA (that being, to protect all unpaid produce sellers) the phrase 'in connection with,' must be limited to include only those costs necessary to complete the produce transaction itself, such as palletization, pre-cooling and handling, for example. As stated by the Missouri Court, "The plain language of the PACA statute does not require expanding the definition of 'in connection with' the produce transaction to include attorneys' fees. Neither would such a broad definition serve the purposes of the PACA statutes."

Despite the ruling in Missouri, a majority of courts are allowing recovery of attorneys' fees and finance charges as part of the PACA trust claim if the seller's invoices contain clauses that provide for the recovery of those fees and charges. For example, as recently as March 1, 2004, the 11th Circuit adopted the *Middle Mountain* reasoning and allowed recovery of contractual attorneys' fees and finance charges over strong objections that doing so will result in a disproportionate distribution of trust assets. Therefore, it is strongly recommended that your invoices contain such clauses. For sample language, please refer to our Fall 2003 Newsletter, which is available on our website at www.rjlaw.com. □

There may still be time to register....

PACA Law ~ Produce Sales Seminar and Workshops

**Monday, April 5, 2004
9:30 a.m. to 3:00 p.m.**

Radisson Hotel ~ Seattle Airport
17001 Pacific Highway South
Seattle, Washington

For more information, please contact Michelle Aguilar at (949) 752-2911 extension 236 or shelly@rjlaw.com.

Within the Firm

Patricia Rynn was appointed to a year term on the Advisory Board of the California Department of Food and Agriculture, Market Enforcement Branch. Ms. Rynn's partner, **Bart Botta**, was appointed as an alternate.

Firm partners, **Marion Quesenbery**, **Jason Read** and **Patricia Rynn** just completed three-day Mediation and Arbitration training, along with other Fruit & Vegetable Dispute Resolution Corporation ("DRC") arbitrators in Calgary, Canada earlier this month.

Partner **Patricia Rynn** will be giving a presentation entitled "I Never Thought I Was First Anyway: PACA, Secured Lenders and Bankruptcy" concerning the PACA trust and bankruptcies before the American Bar Association, Business Law Section Spring Meeting in Seattle, Washington on April 2, 2004. More information may be obtained by contacting Trista Dunn.

Jason Read was a featured speaker at the 2004 Washington State Potato Conference in February 2004. The Conference, which drew a record number of 1,800 participants, was held in Moses Lake, Washington. Mr. Read's presentation included a summary of recent developments in PACA law and tips for minimizing credit risks associated with produce sales.

**R&J Agricultural Law Newsletter is available on the Internet at
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INSIDE THIS EDITION:

- **Paperless Invoices and Preserving PACA Trust Rights**
- **Breaded Produce: Covered Under PACA or Not?**
- **Are Truck Brokers Liable?**
- **Extended Payment Terms: The Saga Continues**