



Recovery of Collection Costs Gain Steam:

Another U.S. Appellate Court Wraps Attorneys' Fees and Interest into the PACA Trust.

By David A. Adelman

Attorneys' fees and collection costs incurred in the pursuit of a lawsuit under the Perishable Agricultural Commodities ("PACA"), 7 U.S.C. §§ 499a - 499t are recoverable as part of the PACA trust, according to the United States Court of Appeals for the Eleventh Circuit in the case Country Best, et al. v. Christopher Ranch, LLC, et al., 03-11119, March 1, 2004, which gave unpaid produce sellers yet another club with which to whack delinquent buyers.

PACA, which regulates the sale of perishable agricultural commodities ("Produce") to protect Produce sellers from unscrupulous or insolvent buyers who are dealers, brokers and commission merchants, also requires licensing of all such entities. PACA further provides for various remedies which can be enforced either through a complaint to the Secretary of Agriculture or through the courts.

Among its protections, PACA provides that produce, or its proceeds, "shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums *owing in connection with such transactions* has been received by such unpaid suppliers, sellers or agents" 7 U.S.C. §499e(c)(2) (emphasis added). This creates a non-segregated floating trust thereby giving produce sellers priority over banks and other creditors with security interests in the receivables and inventory of a produce debtor. All PACA trust beneficiaries share the same priority.

In explaining its ruling, the Eleventh Circuit purposely followed the U.S. Court of Appeals for the Ninth Circuit's opinion in Middle Mountain v. Sound Commodities Inc., 307 F.3d 1220 (9th Cir. 2002), the only other Circuit level opinion on the issue. Quoting the Ninth Circuit, the Eleventh Circuit stated "it cannot be contended seriously that interpreting PACA claims to include contract rights to attorneys' fees and interest under the '*in connection with*' language of this statute is contrary to the statute's purpose, absurd or 'demonstrably at odds with the intention of the drafters'" Id. at 1224. The Eleventh Circuit noted that had Congress intended to limit PACA claims solely to the price of the produce it could have said so. Instead, Congress allowed "full payment of the sums *owing in connection with*" the produce transaction. The Court clearly recognized that credit costs are one of the many things that go into a produce transaction, such as pallets, temperature recorders, etc..

The Christopher Ranch and Sound Commodities rulings provide big sticks for unpaid produce sellers to use in the collection of their PACA receivables. If the parties have contracted

for the payment of interest and collection costs, including attorneys' fees, on past-due amounts, the costs of recovery can be shifted to the delinquent buyer. Put another way, the buyer is forced to pay for two sets of attorneys: his and the sellers'. This can provide ample incentive to delinquent buyers to pay up. The longer the buyer delays payment or prolongs a lawsuit, the more the buyer will ultimately owe where attorneys' fees and interest are allowed. The simplest way for a produce seller to shift the recovery costs is to state as a sales term on the seller's invoices or credit application that the buyer is responsible for interest and collection costs, including attorneys' fees on all unpaid amounts.

It should be noted that this approach to PACA law, and contract law, is not uniform across the nation. The Christopher Ranch and Sound Commodities rulings are only binding on the Southern and Western states within the Eleventh and Ninth Circuits until the United States Supreme Court weighs in on the issue, or other Circuits rule on the matter. Unfortunately, this leaves the door open to inconsistent rulings by individual District Court Judges, which recently happened in the District of Missouri in the matter of Grimmway Enterprises, Inc. d/b/a Grimmway Farms v. Gallo Produce & Food Products, Inc. d/b/a Gallo Fresh Produce, et al. 03-CV-311 (DCMO, January 12, 2004). In Gallo, the Court disagreed with the Sound Commodities analysis stating that had Congress intended PACA to allow interest and attorneys' fees it would have provided for it in the statute.

Produce sellers should take heart. Many feel this approach ignores the plain language of the PACA statute. The Gallo ruling is not controlling in any other jurisdiction and was issued before the Eleventh Circuit came out with the Christopher Ranch ruling. Additionally, the Eleventh and Ninth Circuit rulings, the only two appellate level rulings on the subject, provide very persuasive authority for other jurisdictions to rely upon. Moreover, the rulings follow a long line of often-cited District Court cases such as E. Armata, Inc. v. Platinum Funding, 887 F. Supp. 590, 594-95 (S.D. N.Y. 1995) and Morris Okun, Inc. v. Harry Zimmerman, Inc., 814 F. Supp. 346, 351 (S.D.N.Y. 1993). Clearly, while there is no uniform standard, the national trend is to include contracted for interest and attorneys' fees in PACA trust claims.

As the Eleventh Circuit noted, Congress signaled that it had not contemplated PACA would impact "the ability of the [seller]...to set contract terms." H.R. Rep. No. 98-543 (1983)(*reprinted in* 1984 U.S.C.C.A.N. 405). The Eleventh Circuit felt this indicated that buyers and sellers remain free to negotiate and enforce contract terms within the context of the PACA trust. As it said in Christopher Ranch, "Such is the reasonable and equitable result. In a free market, the price of goods is influenced by a variety of factors, including credit risks, litigation costs, late fees, and other incidents of the collection process. Commodity sellers [will] likely offer lower prices if they know that the financial burdens of their collection efforts will be lightened by the recovery of attorney fees and prejudgment interest."

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