United States Department of Agriculture

Agricultural Marketing Service

Fruit and Vegetable Programs-PACA Branch

"Perishable Agricultural Commodities Act (PACA) - Facilitating fair trade practices in the fruit and vegetable industry through education, mediation, arbitration, licensing and enforcement"

PACA Administrative Newsletter

Volume 3, Issue 3

Summer 2007

FDA Advisory Warnings' Impact on Contract Obligations

Last fall, the U. S. Food and Drug Administration's (FDA) advisory warning about the *E. coli* outbreak in spinach dominated the news. While the outbreak has ended, buyers and sellers have raised many questions about who should bear the cost for uncontaminated produce that was destroyed due to the FDA advisory.

If FDA issues another advisory in the future, understanding the following contract principles can help you decide what course of action to take.

The first, "**warranty of merchantability**," is implied in every produce contract, unless it is waived by the parties. This warranty means that the seller implicitly guarantees to the buyer that the produce sold will be of commercially acceptable quality and fit for human consumption.

The second, "**allocation of the risk of loss**," determines whether the buyer or seller will bear the financial loss if any damage or loss occurs to the produce before the buyer accepts it. This depends on the terms of sale. As most produce is shipped under an F.O.B. contract, the risk of loss passes from the seller to the buyer once the seller delivers the produce to the carrier. Any damage or loss to the produce during transit that is not caused by the seller is borne by the buyer.

The other common term is a "delivered" contract. In this case, the risk of loss is not transferred from the seller to the

Continued on page 2

Inside this issue:

Changes to PACA Trust Regulations Now Final

The changes to the PACA regulations clarify that PACA licensees are required to allow their produce suppliers to preserve their trust rights. If they do not comply with this responsibility, it will be considered a violation of PACA.

The final rule for the amendments to the PACA trust regulations were published in the *Federal Register* on May 30, 2007.

PACA trust beneficiaries have recovered hundreds of millions of dollars under the trust provisions since it was enacted in 1984. As a result of this latest amendment that clarifies how produce sellers are protected when using electronic invoicing, trust benefits under PACA are more likely to be secured. The changes to the regulations will ensure that produce sellers can protect their trust rights as trust creditors when electronic invoicing is used to bill buyers.

The final rule became effective on June 29.

The changes can be found in the *Federal Register* at 72 FR 29837. For more information, call 202-720-6873.

. . . . PACA Customer Service Line: 800-495-PACA . . . .

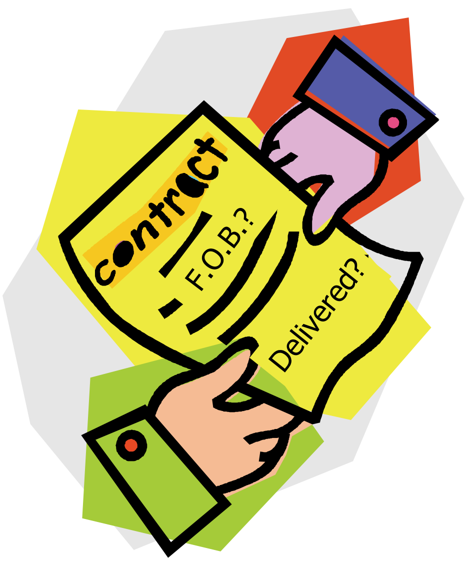
See related article on page 3

FDA Advisory Warnings' Impact on Contract Obligations

Continued from page 1

buyer until the produce is delivered to the contract destination. Any damage or loss to the produce during transit that is not caused by the buyer is borne by the seller.

The effect that an FDA advisory warning has on contract obligations is illustrated in the following scenarios. Let's assume that the advisory warns U.S. consumers not to eat the affected produce and that there is nothing else wrong with the produce.



Scenario 1

A seller contracts to sell produce to a buyer. Prior to shipment of the produce, the FDA issues an advisory warning that the produce is the subject of an E. coli outbreak.

The effect of the advisory warning here is to make the produce unmerchantable at shipment. Since the advisory was issued *prior* to shipment, the risk of loss remains with the seller. If the seller ships the produce, the seller may voluntarily recall the produce subject to the outbreak. If the seller decides not to recall the produce, the buyer would have a claim against the seller for a breach of the warranty of merchantability and could reject the produce.

"...understanding contract principles and terms can help you decide what course of action to take..."

Scenario 2

A seller contracts *to sell produce to a buyer. After the buyer has received and accepted the produce, the FDA issues an advisory warning that the produce is the subject of an E. coli outbreak.*

In this example, the advisory warning made the produce unmerchantable after it was received and accepted by the buyer. Since the advisory was issued *after* the buyer received and accepted the produce, the risk of loss shifted to the buyer who must pay for the produce. This result is supported by a legal decision involving Chilean grapes where the presiding officer held that a buyer must pay for the grapes although a "Stop Sale" directive had made all Chilean grapes unmerchantable. The presiding officer stated that the seller should not suffer this loss because the "Stop Sale" directive was issued two weeks after receipt and acceptance of the grapes.

Scenario 3

A seller contracts to sell produce to a buyer. While the produce is in transit from the seller to the buyer, the FDA issues an advisory warning that the produce is subject to an E. coli outbreak.

In this scenario, the advisory warning makes the produce unmerchantable *while* in transit from the seller to the buyer. It establishes a breach of the warranty of merchantability. However, resolution of this scenario depends on which party bears the risk of loss which as discussed earlier is also dependent on the contract terms.

If the terms are F.O.B. and the produce is in transit, the buyer bears the risk of loss in transit and must pay for the produce. If the shipment terms are "delivered" or "delivered sale," the seller bears the risk of loss in transit. Since the buyer in this situation has yet to receive the produce, the buyer would likely be able to reject the produce because the risk of loss rests with the seller.

These scenarios discuss possible effects of an FDA advisory on produce contracts, but outcomes may vary depending on specific terms entered into by the parties. For more information or clarification, consult with your attorney or contact the PACA Branch at 800-495-PACA.

PACA Customer Service Line Up and Running

The PACA Customer Service Line is up and running. This toll-free number is an easy way to gain instant access to an expert that can assist you in finding answers to many PACA-related questions.

Many in the produce industry have already taken advantage of this service, which went into effect in January. Since then, our experts have answered more than 3,000 inquiries involving produce shipments valued in the millions of dollars. Calls covered a variety of topics including understanding good delivery guidelines, interpreting USDA inspections, resolving disputes involving a contract, and obtaining license information.

Answers to your own questions are as quick and easy as a free phone call away. Call the PACA Customer Service Line today at **800-495-PACA**. When you call, you will be prompted as follows, depending on the nature of your call:

Press 1 for the National License Center, license inquiries, applying for a license, or to check on the status of a firm's license.

Press 2 for good delivery inquiries or contract-related issues.

To connect to a specific regional office, check on the status of a complaint, or ask a general PACA question,

- Press 3 for Manassas, Va.
- Press 4 for Ft. Worth, Tx.
- Press 5 for Tucson, Ariz.

The line is manned 11 hours, Monday through Friday from 8:00 a.m. EST to 4:00 p.m. PST.

Did You Know?

Past issues of the *PACA Administrative Newsletter* or electronic copies are available on the PACA Web site shown on page 4.

In addition to the copy of the newsletter you receive in the mail, you can also receive an electronic copy that you can forward to your valued colleagues or customers. To receive an electronic copy of coming issues of the *PACA Administrative Newsletter* in PDF format, e-mail your request to: Michiko.Shaw@usda.gov.

Final Chance to Sign Up for PACA and Inspection Training Classes for 2007

The final classes for the 2007 training schedule will be held on:

- Sept. 24-25 Introductory Class
- Sept. 26-28 Advanced Class

The classes are held at the USDA Fresh Products Branch's Training and Development Center in Fredericksburg, Va. Two-day introductory classes cover PACA background, trade terminology and dispute resolution. This class also covers basic inspection terms, standards and tolerances, equipment overview, reading a certificate and appeal procedures.

Take a three-day advanced class independently or together with the introductory class. The advanced class covers topics such as hands-on inspection of specific commodities, types of inspections, sampling requirements and import requirements.

For more information or to register, call the United Fresh Produce Association at 202-303-3400, or visit its Web site: www.unitedfresh.org.

. . . . PACA Customer Service Line: 800-495-PACA . . . .

USDA-Agricultural Marketing Service
Fruit and Vegetable Programs, PACA Branch
1400 Independence Avenue, SW, Stop 0242
Washington DC 20250-0242

PRESORTED STANDARD
POSTAGE & FEES PAID
USDA-AMS
PERMIT NO. G-297

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE $300

Our Web Address: www.ams.usda.gov/fv/paca.htm

PACA On-Line Features

- PDF Fillable License Application
- PACA License Search Engine—Search for licensees by business name(s), principal(s), or branch/trade name
- F.O.B. Good Delivery Guidelines
- Interactive Training Course
- Protecting Your Trust Rights
- Damage Claims
- Most Commonly Used Trade Terms and Definitions
- Perishable Agricultural Commodities Act and Regulations
- Frequently Asked Questions
- Office Directory

Send any PACA questions, comments or feedback to:
Bruce.Summers@usda.gov

PACA Branch Office Directory

PACA Customer Service Line:
800-495-PACA

Washington, DC

USDA-Agricultural Marketing Service
Fruit and Vegetable Programs, PACA Branch
1400 Independence Avenue, SW, Stop 0242
Washington, DC 20250-0242

Bruce W. Summers, Chief	202-720-2272
Lorenzo A. Tribbett, Asst. Chief	202-720-2272
Dispute Resolution Section	202-720-2890
Trade Practices Section	202-720-6873
Toll Free:	877-622-4716

Tucson, Arizona

Jerry W. Taylor, Regional Director	520-879-4361
Fax:	520-670-4798

Fort Worth, Texas

Robert Parker, Regional Director	817-978-0777
Fax:	817-978-0786

Manassas, Virginia

Basil W. Coale, Regional Director	703-331-4550
Fax:	703-330-4856
National License Center	703-331-4570
Fax:	703-330-4555

Past issues of the "PACA Administrative Newsletter" may be found at: www.ams.usda.gov/fv/paca .htm