

## **HOW THE PACA TRUST NOW HELPS YOU RECOVER INTEREST CHARGES AND COLLECTION FEES**

While the primary concern is to make sure your trust claims are properly preserved, another issue to consider is the amount which can be claimed under the PACA trust. Keaton & Associates has been leading the charge to make the defaulting buyer responsible for reimbursing the seller for any fees and costs of collection. While some courts and, amazingly enough, all other PACA lawyers, took the position the PACA trust only covers the “produce only”, this firm championed the seller’s rights to recover these fees and costs as part of the unpaid PACA claim. All that is required is a minor change to your invoices to specifically make these fees and costs, as well as interest charges, an additional term of your contract with the buyer.

1) What you need on all invoices: To recover these extra sums, please consider including the following provisions on the face of your all your new invoices:

- ***Interest shall accrue on any past-due account balance at the rate of 1.5% per month (18% per annum).***
- ***In the event collection action becomes necessary, Buyer agrees to pay all costs of collection, including attorneys’ fees.***
- Any claims for shortage, damage or condition will not be honored unless the problem is reported in writing to Seller within eight (8) hours of receipt of the product and a timely USDA inspection is performed on the product.

2) Why you need this language on all invoice: Under old English law, the loser always had to pay the winner’s attorneys’ fees. That worked very well and made sure any buyer thought twice before they forced a seller to hire a lawyer and go to court in order to get paid. When the American system of laws was set up, this “fault” provision was left out and we adopted a “no fault” rule where both sides had to pay their own lawyer, regardless of who was found to be at fault. Now, the only way courts will make the loser pay, it if there is a contract provision that requires it. In other words, the buyer agreed to reimburse you for attorneys’ fees if he ever failed to pay on time and you had to hire lawyer to collect.

3) How it works: By placing these terms for fees and interest on the face of each invoice, these additional terms become part of the contract unless the buyer objects within a “commercially reasonable” time.

Section § 2-207 of the Uniform Commercial Code (“UCC”), is the reason these additional terms as stated on the face of the seller’s invoices are binding on the buyer. As a preliminary matter, both the buyer and the seller qualify as “merchants” because they regularly deal in produce or “goods of the kind”. Under existing law, the seller’s placement of additional terms on the invoice creates what the law refers to as the “Battle of the Forms”. Essentially, the seller’s forms say one thing and the buyer’s forms say something else or are silent on the issue. There are two (2) views of what happens next.

Under the first view, the seller rejected the buyer’s offer to buy on his stated terms and the seller made a counter-offer to sell the same goods to the buyer, but on the seller’s standard credit terms as reflected on the face of its invoice. The buyer then accepted this counter-offer by receiving and either using or re-selling the goods sold and delivered under the seller’s invoice.

According to the second “majority” view, the “additional terms” stated on all the seller’s invoices become a term of the contract unless: (1) the offer to buy expressly limits any acceptance to the buyer’s stated terms (effectively, the “Mirror Image Rule” - the only valid acceptance must exactly match the terms of the offer to buy); (2) the new terms *materially alter* the offer, or; (3) buyer *objects* within a commercially reasonable time. In most cases, the buyer’s offer to purchase does not limit acceptance to its terms and the buyer also fails to object within a commercially reasonable time. Thus, the only issue is usually whether the “additional terms” materially altered the terms of the contract. This question is answered in the UCC itself where it states as follows:

Examples of clauses which involve no element of surprise and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: ... a clause providing for interest on overdue invoices or fixing the seller’s standard credit terms

See Official Comment 5 to UCC § 2-207 (emphasis added).

Under either view, the standard credit terms upon which the seller agrees to sell its products to any purchaser all become expressly stated and properly incorporated terms of the underlying contract. As such, the additional amounts due under these provisions become an indistinguishable part of the seller’s PACA trust claim by virtue of 7 U.S.C. § 499e(c)(2) (trust survives until debtor makes "full payment of the sums owing in connection with such transactions").

4) Where it works: Keaton & Associates is the only law firm in the country to have advanced this argument at the federal appellate level, and won. Not just once, but twice. In fact, it has only happened twice and both times, the firm's clients have become entitled to recover their fees and costs of collection as an indistinguishable part of their PACA trust claims. More importantly, by successfully navigating these PACA claims through two (2) federal appellate circuit courts, this position is now binding and controlling law on all federal and bankruptcy judges in twelve (12) states, including some of the most influential produce states in the Country:

Alabama  
Alaska  
Arizona  
California  
Georgia  
Hawaii

Florida  
Idaho  
Montana  
Nevada  
Oregon  
Washington

Because the lower courts in each of these States are obligated to follow the rulings of these two (2) higher courts, sellers can be assured their PACA claim will include their fees and interest charges in all future cases. This not only makes any future cases in these states much easier and less expensive for a PACA claimant, these rulings go a very long way toward convincing judges in other states to extend PACA trust coverage to a seller's fees and interest charges.