Understanding Farmers' Rights to Be Paid for Fruit and Vegetable Crops

September 29, 2007

Presented at a Workshop Hosted by

The Farmworker Association of Florida, Inc.

FLAG

FARMERS' LEGAL ACTION GROUP, INCORPORATED

Farmers' Legal Action Group, Inc.
360 North Robert Street,Suite 500
St. Paul, Minnesota 55101-1589

Phone: 651-223-5400
Fax: 651-223-5335
Email: lawyers@flaginc.org
Web site: www.flaginc.org

Understanding Farmers' Rights to Be Paid For Fruit and Vegetable Crops

I. INTRODUCTION

Farmers growing and selling fresh fruits and vegetables face unique challenges in receiving prompt and fair payment. These materials discuss practical and legal steps that farmers can take to protect their right to be paid when they sell fresh fruits and vegetables. Sometimes, taking practical steps will be enough to ensure that a farmer receives prompt and full payment. In any case, a farmer who gets agreements in writing and who keeps detailed records will be in a better position to enforce his or her rights under the law.

Farmers' rights to be paid for their fruit and vegetable crops have three primary sources: (a) the farmers' contracts with buyers, (b) state contract laws,[1] and (c) the Perishable Agricultural Commodities Act. The Perishable Agricultural Commodities Act ("the PACA") is a federal law designed to ensure fairness in the fruit and vegetable industry.[2] To help farmers better understand their rights to be paid for their fruit and vegetable crops, these materials will describe the legal protections farmers have under the PACA.

II. WRITTEN CONTRACTS MAXIMIZE FARMERS' RIGHTS TO GET PAID FOR FRUIT AND VEGETABLE CROPS

The most important source of a farmer's right to be paid for fruit and vegetable crops is the agreement, or contract, between the farmer and the buyer. Farmers will want to be sure that the agreement includes all of the required and desired details, or "terms," and that the agreement is enforceable in case there is a dispute. This section discusses contract terms and enforceability. In general, farmers are strongly urged to use written contracts with produce buyers in order to give themselves the most payment protection.

> CAUTION
>
> These materials are for general information only. For advice about your situation, consult an attorney who is licensed to practice law in your state, preferably one who is familiar with the PACA and your state's contract laws.

See cautionary note on page 1.

A. What to Include in a Contract: The Terms

In general, a contract for the sale of goods must include at least two details: price and quantity. However, it is not necessary that the price and quantity be exact numbers, so long as it is clear what the buyer and seller intend. For example, a standard contract might have a farmer and buyer agreeing that the farmer will sell 50 boxes of squash to the buyer, and the buyer will pay the farmer $5 per box. But the contract could also use an open-ended quantity, stating that the buyer will pay $5 per box for "as many boxes as the farmer can pick." Or the agreement might be that the buyer will buy 50 boxes of squash at the prevailing market price at the time of delivery.

Even though the price and quantity are generally the only two terms which are required to create a contract, farmers may want to include additional terms to avoid misunderstandings and confirm that the farmer and the buyer have the same expectations. These terms might include:

- Identification of the farmer and the buyer.
- The type of produce being sold, including the quality and quantity of the produce.
- The price to be paid and the basis, for example, by weight or by container.
- The time period in which payment must be made.
- The time and manner of delivery, including who is responsible for transporting the produce to the delivery point.
- Any fees that will be charged for activities performed by the farmer or the buyer.
- A description of any circumstances, such as a natural disaster, that will excuse the farmer or the buyer from doing what they promised to do under the contract.

Ultimately, any written contract should define and reflect the farmer's and the buyer's mutual understanding of their duties and responsibilities under their agreement. Failure to include all of these terms will not necessarily make a contract unenforceable, but it will make it more difficult to prove what the farmer and buyer agreed to do if they later disagree.[3]

B. What Does It Mean to Call a Contract Enforceable?

In simple terms, a contract is "enforceable" when one person can go to court to force the other person to fulfill his or her promises or pay money for the broken promise. So long as both sides are fulfilling their promises, the question of enforceability will not come up. However, if someone does not fulfill their side of the bargain, or if an unexpected problem arises, having an enforceable contract can mean the difference between full payment and no payment.

For a farmer selling fresh produce, an enforceable sales contract allows the farmer to go to court if the buyer does not pay as promised.[4] A farmer enforcing a contract for the sale of produce would typically be seeking payment of money, though in some situations it may be possible to get a court order requiring the buyer to follow through with its end of the agreement.[5]

If the buyer knows that a sales contract is not enforceable, it will not have an incentive to work with the farmer to resolve problems. Having an enforceable contract therefore gives farmers more security and more options to resolve disputes even without resorting to court action. Thus, although many farmers do not wish to take their buyers to court, or find that the costs of going to court outweigh the benefits they might gain, it is still important to have a contract that could be enforced in court if needed.

C. Written Contracts Are Best to Ensure Enforceability

A contract is created by the exchange of promises.[6] This can be done in writing or simply through spoken conversation.[7] In some circumstances, a spoken, or "oral," contract can be just as valid as a written contract. However, farmers' contracts for the sale of fruits and vegetables will almost always have to be in writing to be enforceable. This is because most states, including Florida, have a law requiring that agreements for the sale of goods worth $500 or more generally need to be in writing to be enforceable.[8] Agreements that have no end date or that will not be completed in a year may also need to be in writing for a court to enforce them.[9]

Furthermore, even if a court would enforce an oral agreement, it is often difficult to prove what the specific details of a spoken agreement are. When farmers and buyers are forced to rely on their memories of a conversation creating an oral agreement, they often have difficulty proving what their agreement was; few people's memories are good enough to recall all of the

See cautionary note on page 1.

important details of an agreement. If the farmer's and buyer's memories are incomplete or not in agreement, the court is likely to be reluctant to find any contract to enforce. Instead, when the two sides have different understandings about what their agreement was, and there is nothing in writing to provide any proof, the courts may determine that no true agreement ever existed.[10]

It must be noted that, although an oral contract for sale of fresh produce might not be enforceable under state law, it may still be enforced under the PACA.[11] This is not to encourage the use of oral contracts, but rather to ensure that those farmers who have only an oral agreement will still secure some payment protection. A farmer who is deciding whether to enforce an oral agreement in state court or under the PACA should consult with an attorney licensed to practice law in that state, preferably one who is familiar with state contract law and the PACA, before deciding which process to use.

D. Creating a Written Contract

Creating a written contract can be a simple process. Either the farmer or the buyer can write the contract; it is not necessary to have an attorney do so. However, before signing a contract, a farmer should read the contract carefully and make sure it is understood how the contract addresses important issues that may arise. If there is any doubt about the meaning of contract terms, the farmer should consult an attorney licensed to practice law in that state who is familiar with contract law and the PACA.

Farmers must be sure that all of the important parts of their agreement with the buyer are included in the written contract. A farmer cannot rely on a buyer's spoken promise that things will be handled differently than in the written contract. It is not possible to have a contract that is partly written and partly oral. Typically, where there is a written contract, only that contract can be considered as evidence of the parties' agreement. Thus, spoken changes to the agreement and spoken side agreements will generally not be considered part of the contract and will not be enforceable.[12]

After reading the contract and making sure he or she understands it and all important points are included, the farmer may sign the contract and send it to the buyer. Farmers should make sure they receive a signed copy of the contract from the buyer, too.[13] Contracts can be exchanged in a number of ways, including face-to-face, by fax, mail, or e-mail. After receiving signed contracts from buyers, farmers should keep copies of the contracts for their records.

In addition to the written contract, it is important for farmers to keep good records of all of their dealings with buyers in order to be able to prove exactly what the parties have done. It is a good idea to keep copies of all documents (such as invoices, packing lists, delivery logs, and payments) and note the date they were signed, sent, or received. Some farmers make a habit of writing a letter after every important conversation they have with a buyer, describing the conversation and any agreements reached. They send one copy of the letter to the buyer and keep a copy for themselves. The letter might ask the buyer to respond in writing by a certain date if the buyer disagrees with anything the farmer has said about the conversation. In order to verify that such letters were sent and received, consider mailing them by certified mail, return receipt requested, and keep evidence of the receipt.

III. WHAT IS THE PACA AND WHEN DOES IT APPLY?

The PACA is a federal law designed to protect farmers from unfair business practices in the produce industry. The PACA strives to meet this goal by: (a) establishing rules of fair play in the produce industry, (b) creating a streamlined alternative to the court process for farmers to seek payment under their fruit and vegetable sales contracts, and (c) protecting farmers' rights to be paid under their fruit and vegetable sales contracts when their buyers file for bankruptcy or go out of business.[14]

The agency authorized to enforce the PACA and investigate complaints of violations is USDA's Agricultural Marketing Service (AMS), which has a special PACA Branch. The USDA's PACA Branch has a toll-free number (800-495-7222) that you can call to report possible violations of the PACA or ask general PACA questions.

The PACA applies to commission merchants, dealers, and brokers who buy or sell perishable agricultural commodities in interstate or foreign commerce.[15] These terms are explained in this section.

A. The PACA Regulates Certain Types of Buyers and Sellers

For a person to be regulated under the PACA, he or she must be a commission merchant, broker, or dealer as defined by the PACA.

Commission merchant: A commission merchant is any person who receives perishable agricultural commodities for the purpose of sale for or on behalf of another, and receives a commission for the service. The PACA covers commission merchants of every size.[16]

 See cautionary note on page 1.

"Grower's agents" are a common type of commission merchant. The regulations define agents as "any person operating at shipping point who sells or distributes produce in commerce for or on behalf of growers and others and whose operations may include the planting, harvesting, grading, packing, and furnishing containers, supplies or other services."[17] The PACA regulations governing agents would likely apply to packing houses if they sell produce on behalf of farmers.[18] Otherwise, packing houses are most likely to be classified as dealers.

Dealer: A person or company that buys or sells 2,000 or more pounds of perishable agricultural commodities in any given day is generally defined as a dealer.[19]

Farmers who sell only produce they grew are **not** classified as dealers and are not subject to the PACA's licensing requirements. However, if a farmer wants to obtain a PACA license, he or she may do so.[20]

Brokers: Persons who negotiate purchases and sales of perishable agricultural commodities amounting to $230,000 or more in a calendar year on behalf of a buyer or seller are generally defined as brokers. [21]

B. The PACA Regulates Sales of Perishable Agricultural Commodities

For a transaction to be regulated under the PACA, it must involve the sale or purchase of a perishable agricultural commodity. The PACA defines perishable agricultural commodities to include fresh, frozen, and iced fruits and vegetables, and cherries in brine.[22] Under the PACA, fruits and vegetables that are manufactured into articles of food of a "different kind or character" are not considered perishable commodities, and PACA does not cover their sale or purchase.[23]

The PACA regulations contain a list of processing operations that may be performed on fruits and vegetables. [24] Generally, produce subjected to the type of processing described in the PACA regulations is included in the definition of perishable agricultural commodities.[25]

The PACA Branch of USDA's Agricultural Marketing Service (AMS) maintains an internal list of fruits and vegetables that are considered perishable agricultural commodities. Farmers with questions about whether their product would be defined as a perishable agricultural commodity may contact the PACA Branch for more information by calling USDA's toll-free PACA number: 800-495-7222.

C. The PACA Regulates Sales and Purchases Made in Interstate or Foreign Commerce

For a produce sale to be regulated under the PACA, the sale must be made in "interstate or foreign commerce." The PACA defines "interstate commerce" to include sales made with the "expectation" that the produce will ultimately be moved through one state to another.[26] Farmers who sell produce to in-state buyers who, in turn, sell solely to an in-state market should be aware that the PACA might not apply to these sales.

In Florida, the Florida License and Bond Law may protect farmers selling to in-state buyers.[27] Although a discussion of state law is beyond the scope of these materials, Florida farmers who have not been properly paid by a produce buyer should be aware that they may file a claim for payment with the Florida Department of Agriculture and Consumer Services. For further information about filing a payment claim, farmers may contact the Florida Department of Agriculture and Consumer Services, Bureau of License and Bond, by calling: 850-488-4101.

IV. FARMERS' RIGHTS TO PROMPT AND FULL PAYMENT UNDER THE PACA

The PACA prohibits commission merchants, dealers, and brokers from engaging in unfair conduct.[28] Failure to promptly and fully pay for fruits and vegetables after accepting them is unfair conduct that violates the PACA.[29]

A. Commission Merchants, Dealers, and Brokers Must Promptly Pay Farmers for Accepted Goods

In general, farmers must be paid within 5 to 20 days from the date on which a buyer accepts produce.[30] The specific number of days in which payment must be made depends on the nature of the transaction. Examples of common payment timelines required under the PACA regulations are set forth below:

- Where produce is sold directly to a buyer, payment is required within 10 days after the date the buyer accepts the produce.[31]
- Where produce is received by a commission merchant and sold for the farmer on a consignment basis, payment must be made to the farmer by the first of two possible dates: (1) within 10 days of the final sale, or (2) within 20 days from the date the produce is accepted at its destination.[32]

 See cautionary note on page 1.

- Where produce is sold through an agent, payment must be made to the farmer by the first of two possible dates: (1) within 5 days from the date the agent receives payment from the buyer (as described above, the buyer must pay the agent within 10 days from accepting the produce), or (2) within 30 days from the date the agent receives the farmer's produce. [33]

The PACA regulations allow parties to agree to extend the time for payment. The regulations require that these agreements be in writing and be made before the sale is made.[34] The PACA regulations also require the parties to maintain copies of the agreement in their records.[35]

> Farmers should avoid entering into agreements extending the time for payment beyond 30 days from the date the buyer accepted the produce. If a farmer agrees to extend the time for payment beyond 30 days from the date of the buyer's acceptance, the farmer will lose the right to claim payment through a statutory trust should the buyer file bankruptcy or go out of business.[36] Before agreeing to any payment plans or extensions, the farmer should consult with an attorney licensed in his or her state who is familiar with the PACA to ensure the farmer is fully informed about whether entering into a particular agreement could cause the farmer to lose any rights under the PACA.

B. In Addition to Prompt Payment, Full Payment is Also Required

USDA interprets the PACA provisions requiring full payment to mean that farmers must be paid the agreed upon purchase price.[37] Thus, USDA has reasoned that farmers retain their right to full payment regardless of whether they accept partial payment in lieu of full payment.[38]

The PACA further helps protect farmers' rights to full payment by prohibiting buyers from using unfair or deceptive practices to determine the quantity or weight of produce received, and by prohibiting misrepresentations about the quality of delivered produce.[39]

C. What Does It Mean to Accept Produce?

The buyer's acceptance of produce is what triggers the PACA's prompt and full payment requirement.

The PACA regulations define a variety of acts by a buyer as "acceptance." Under the PACA regulations, commission merchants, dealers, and brokers "accept" produce by:

- Partially or totally unloading delivered produce.
- Diverting produce while it is on its way to the agreed-upon delivery place.
- Acting in a manner that is inconsistent with the farmer's continued ownership of the goods (for example, by beginning to unload produce).[40]
- Failing to provide the farmer with notice of rejection within a reasonable time after receiving the produce.[41] Under the PACA regulations, a "reasonable time" for rejecting fresh produce is generally within 8 hours of delivery if the produce was shipped by truck, and within 24 hours of delivery if the produce was shipped by other means.[42] Under limited circumstances, those receiving produce are entitled to an extension of time to give notice of rejection.[43]

Once a commission merchant, dealer, or broker "accepts" produce they cannot later reject it. A rejection following acceptance has the same legal consequences as acceptance: the buyer owns the produce and the farmer is entitled to be promptly and fully paid.[44]

V. UNDER WHAT CIRCUMSTANCES MAY COMMISSION MERCHANTS, DEALERS, AND BROKERS REJECT OR DESTROY PRODUCE?

The PACA requires commission merchants, dealers, and brokers to have "reasonable cause" for rejecting or destroying produce.[45] Under the PACA, farmers remain entitled to receive the agreed-upon price for delivered produce if the produce is rejected or destroyed without reasonable cause. However, where there is reasonable cause for rejecting or destroying produce, farmers may lose their right to payment.

The PACA regulations give two definitions of "reasonable cause": one that applies to rejection of produce, and one that applies to the destruction of produce.

See cautionary note on page 1.

A. Rejection of Produce

Generally, where farmers deliver the type, quantity, and quality of produce they agreed to provide, the buyer has no "reasonable cause" for rejecting the produce.[46]

Under the PACA regulations, the following circumstances do **not** represent "reasonable cause":

- failing within a "reasonable time" to accept produce that complies with the agreement (as described earlier, under the PACA regulations, a "reasonable time" is generally within 24 hours of delivery of fresh produce).
- refusing produce that complies with the parties' agreement.
- indicating an intention not to accept the produce by an act that is inconsistent with the agreement.[47]
- rejecting produce after accepting it.[48]

B. Destroying Produce

As defined above, a commission merchant is someone who sells a farmer's produce for the farmer and earns a commission.[49] This means that a commission merchant often has possession of a farmer's produce while the farmer is still the produce owner. If the commission merchant is unable to sell the farmer's produce, it will typically be destroyed, or "dumped." This can present difficulties for farmers who need to trust that the commission merchant has done all it could to make a sale. To protect farmers in this situation, the PACA prohibits commission merchants from destroying produce without reasonable cause.[50]

Under the PACA regulations, reasonable cause for destroying produce exists when any of the following is true:

- The produce has no commercial value.
- A local health officer or other authorized official orders that the produce must be dumped.
- The person shipping the produce to the commission merchant (typically the farmer or a shipper who bought the produce from the farmer or is selling the produce jointly with the farmer) consents to the produce being dumped.[51]

If a commission merchant is claiming reasonable cause to dump or destroy more than five percent of a shipment of produce, the PACA regulations will, in some circumstances, require the commission merchant to provide the farmer with documentation verifying that the produce could not be sold.[52]

USDA and some Florida courts have taken the position that if a packing house sells produce for a farmer, the packing house would most likely be defined as a commission merchant and would also need reasonable cause to dump produce.[53] However, the PACA regulations requiring documentation to verify produce could not be sold have not typically been applied to packing houses.[54]

VI. WHAT RELIEF IS AVAILABLE TO FARMERS WHEN PRODUCE BUYERS VIOLATE THE PACA?

The PACA provides protections to farmers through its reparation and disciplinary processes and through the PACA trust. The PACA does not require that farmers use its administrative processes to enforce their rights under the PACA. Rather, it gives farmers the option of enforcing their rights either through PACA's administrative processes or in court.[55]

A. Administrative Proceedings to Recover Payment from a Non-Paying Buyer

Under the PACA, a farmer who was not fully and promptly paid may seek payment by filing a complaint for reparation with USDA.[56] Commission merchants, dealers, and brokers are liable to the farmer for any losses caused by their failure to make prompt and full payment.[57]

The PACA authorizes both informal and formal complaint processes for reparations. Typically, farmers using the PACA's reparations process file an informal complaint first and later file a formal complaint if they are unable to resolve matters through the informal complaint process.

The informal complaint process is typically used first because it is designed to be an inexpensive process that provides quick results. However, the informal complaint process does not include a mechanism through which buyers can be forced to pay farmers. Rather, under the informal complaint process, buyers must voluntarily agree to resolve matters. Thus, if buyers are unwilling to make payment, going through the informal complaint process may simply delay farmers from receiving payment for their produce.

See cautionary note on page 1.

1. *The Informal Complaint Process*

To initiate a reparation action, farmers may file an informal complaint with USDA.[58] This is done by sending a letter to the USDA's PACA Branch office covering the state where the buyer's business is located. Generally, an informal complaint should include:

- the names of the persons selling and buying the produce.
- the date the agreement was made.
- a description of the problem and the date the problem occurred.
- the amount of money not paid or in dispute, as well as the date and amount of any payment received by the farmer.[59]

A sample informal complaint form is included at the end of these materials and is available on USDA's Web site at: http://www.ams.usda.gov/fvpaca/informalcomplaintsample.pdf.

Copies of documents related to the farmer's claim—such as invoices, contracts, and correspondence about the transaction—should be included with the informal complaint.[60]

The complaint must be filed within nine months of the date the PACA violation occurred.[61]

There is a $60 filing fee for informal complaints, which can be paid by check or credit card.[62] The PACA does not allow for any fee waivers.

After receiving information and evidence from the person filing the complaint, USDA will conduct an investigation. If the complaint and investigation show that a PACA violation may have occurred, USDA will notify the commission merchant, dealer, or broker of the complaint. USDA will then give the commission merchant, dealer, or broker an opportunity to voluntarily comply with the PACA's requirements and may also offer mediation services to the parties.[63] The PACA Branch does not charge for its mediation services.

Informal complaints are generally processed within four months of being filed.[64]

2. *The Formal Complaint Process*

If a farmer is unsatisfied with the outcome of the informal complaint process or no informal settlement is reached, the farmer can file a formal PACA complaint.[65] The formal PACA complaint process can result in the buyer being ordered to pay money to the farmer, including payment for the farmer's attorney fees and costs, and may also result in the suspension or revocation of a buyer's license.[66]

In addition to the information contained in an informal complaint, formal complaints must include a statement of the money damages that the farmer is seeking to recover.[67]

There is a $300 filing fee for formal PACA complaints.[68] Formal complaints must be filed within 90 days from the date the USDA notifies the farmer that he or she may file a formal complaint.[69]

Suggestions for preparing formal complaints can be found on USDA's Web site at: http://www.ams.usda.gov/fvpaca/suggest.htm.

The formal complaint process may or may not include an oral hearing, depending on the amount of money being claimed. Where no hearing is required, the farmer and the buyer may submit written statements and evidence to USDA.[70]

Based on the evidence submitted by the parties, USDA will make a decision and may award money damages to the farmer. Either the farmer or the buyer may appeal USDA's decision to federal court within 30 days from the date the order was entered.[71] If there is no appeal, the buyer must pay the reparation award within five days of the date allowed in the reparation order. If payment is not made within the required time period, USDA will suspend the buyer's license until payment is made.[72]

B. Statutory Trust to Secure Payment

The PACA's statutory trust provision is intended to protect unpaid farmers by providing them with a secure source of payment from buyers who have gone out of business or filed for bankruptcy. If a farmer does not receive prompt and full payment for produce, he or she may send the buyer a "notice of intent to preserve trust benefits."

If the PACA trust notice is properly given, as described here, the PACA requires that the buyer hold in trust the income earned from the sale of the farmer's produce.[73] This amount cannot be used by the buyer for any other expense or debt, and the farmer can be paid before any of the buyer's other creditors, even if there are not enough assets to cover all of the buyer's debts.

See cautionary note on page 1.

Typically, farmers with payment problems will first seek payment through a PACA reparations claim, while at the same time preserving their rights to trust benefits by sending the buyer a "notice of intent to preserve trust benefits." It is important that farmers pursuing reparations claims remember to preserve their statutory trust rights by timely sending notices of their intent to preserve trust benefits. Doing so protects farmers' rights to seek payment through the PACA statutory trust, in the event that buyers go out of business or file for bankruptcy before farmers receive payment through their reparations complaint or court case. To ensure they preserve their trust rights under the PACA, many farmers make it a practice to send a notice of intent to preserve trust benefits to the buyer before payment is even due.

Additionally, where the farmer knows that the buyer is in financial difficulty and may not be able to pay all of its debts, the farmer should generally immediately pursue the PACA trust rights in federal court.[74] Farmers may also choose to use the PACA complaint process and pursue PACA trust claims at the same time.

1. *Notice of the Farmer's Intention to Preserve Trust Benefits Must Be Received by the Commission Merchant, Dealer, or Broker Within 30 Days*

Farmers who have not been paid for produce must provide written notice of their intent to preserve PACA trust benefits within 30 calendar days from the date payment was due, or within 30 calendar days from the date on which they were notified that the buyer's payment failed.[75]

> It is important for farmers to note that it is not enough to just send the notice on the 30th day; the PACA requires that the notice be **received** by the buyer no later than 30 days from the payment due date.[76] Farmers seeking to enforce their statutory trust rights should keep a copy of the trust notice sent to the buyer, as well as records verifying how and when the trust notice was sent.[77] To ensure they meet the PACA's time requirements, some farmers routinely include their notice of intent to preserve PACA trust rights with the produce delivery itself, even before the payment due date.

2. *Content of the Notice*

The PACA provides two methods for farmers to give notice of their intent to preserve trust benefits: by invoice or by written notice.

a. *Farmers Licensed under the PACA May Use an Invoice Notice*

Only farmers who are licensed under the PACA may use the invoice method to give notice of their intent to preserve trust rights. PACA-licensed farmers using this method give notice of their intent to preserve trusts benefits by including the following language on their invoice:

> *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, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.*[78]

Some farmers become licensed as dealers under the PACA just to take advantage of the invoicing notice option. By obtaining a PACA license, however, these farmers become subject to regulation under the PACA and must follow the same rules as any other licensed dealer.[79]

b. *Farmers Not Licensed under the PACA Must Provide Separate Written Notice*

Farmers who are not licensed under the PACA must send the buyer a separate written trust notice stating that they intend to preserve PACA trust benefits. The written notice must include:

- a statement that it is a notice of intent to preserve PACA trust benefits.
- the name and address of the person benefiting from the trust (typically the farmer).
- the names of the farmer, the buyer, and any other parties to the transaction.
- the date of the transaction.

 See cautionary note on page 1.

- the type of produce that was purchased.
- the contract terms.
- the price.
- the payment due date.
- any past due or unpaid amounts.

If the farmer's claim arises because the buyer has given a bad check or other failed payment instrument, the PACA trust notice must also include the date the farmer received notice of the failed payment.[80] If the farmer and the buyer agreed to a payment time period different from that established by the PACA regulations, a copy of their agreement must be included with the notice.[81]

3. *No Exceptions to PACA Notice Requirements*

The PACA's notice requirements are generally strictly enforced.[82] Thus, it is essential that farmers seeking to preserve their PACA trust rights send notice to the commission merchant, dealer, or broker within the specified time limits, and include all necessary information in the notice.

4. *Payment Extension Might Cancel PACA Trust Rights*

A buyer and a farmer may sometimes agree that the buyer will make payment later than the standard time period set out in the PACA regulations. This is permitted under the PACA, but farmers must understand that if they agree to let the buyer pay for produce more than 30 days after the produce was received and accepted by the buyer, they will generally be prohibited from claiming their statutory trust rights.[83] This is true even if all of the PACA notice requirements are met. A farmer should therefore consider very carefully before agreeing to accept payment more than 30 days after the produce was accepted by the buyer.

5. *Farmers File Action in Federal Court to Recover Payment from a PACA Trust*

After providing notice of the intent to preserve statutory trust rights, the farmer may file an action in federal court asking the court to enforce payment from the trust.[84] The PACA does not specify an express time frame in which farmers must bring their actions to recover payment under the PACA trust. Instead, the PACA and its regulations explain that the trust continues until sellers who have preserved their trust rights receive full payment from the buyer.[85] In practice, unpaid farmers who have preserved their trust rights will typically want to file an action to enforce payment from the trust upon realizing that the buyer might have problems meeting its payment obligations. If the buyer has filed bankruptcy, the farmer would submit a claim in bankruptcy court; if the buyer has not filed bankruptcy, the farmer would file an action in federal district court.

In some cases, in addition to awarding payment due from a PACA trust, courts have awarded a farmer interest on the payment as well as the farmer's expenses of enforcing the PACA trust rights. Specifically, the federal court of appeals covering Florida has ruled that people enforcing their statutory trust rights under the PACA may recover attorney fees and interest where their contracts with buyers give them the right to do so.[86] Thus, farmers seeking to enforce their trust rights should certainly consider asking the court to award interest and attorney fees and costs, and should consult with their attorneys about the likelihood of obtaining such recovery.

C. Disciplinary Proceedings Against a Non-Paying Buyer

USDA is authorized to take disciplinary action against a licensed commission merchant, dealer, or broker who violates the PACA requirements. These disciplinary actions may include assessing fines, issuing warning letters, and issuing orders suspending or revoking the violator's PACA license.[87] Activities that may lead to disciplinary actions by USDA include: basing payment on inaccurate records, flagrant misbranding, repeated failure to promptly and fully pay produce sellers, and fraud.[88]

A farmer wishing to initiate disciplinary proceedings against a buyer who has violated the PACA requirements may make an informal complaint to USDA by calling USDA's toll-free PACA number: 800-495-7222. The identity of a person filing a disciplinary complaint is confidential information and should not be disclosed by the PACA Branch.[89]

Generally, disciplinary complaints can be brought any time within two years from the date the PACA violation occurred.[90] Farmers may choose to report a buyer for disciplinary action at the same time they are seeking payment through the complaint processes and PACA trust claims; or a farmer may seek disciplinary action against a PACA violator without seeking other relief.

See cautionary note on page 1.

VII. WHAT CAN FARMERS DO TO PROTECT THEIR RIGHTS TO PROMPT AND FULL PAYMENT?

A. Have a Written Contract

As discussed earlier in these materials, the best way for farmers to minimize their risk of not being paid for produce is to put their agreements in writing and to keep copies of all records relating to their transactions.

Farmers should read their contracts carefully and should be sure that they understand what the contract means. As discussed earlier, the contract should set out all of the important details of the agreement, including price, quantity, quality requirements (if any), who will pay for transportation costs, and what circumstances might excuse either the farmer or the buyer from carrying out the contract promises.

The PACA regulations set out the meanings of several words and phrases that are used in those regulations and are commonly found in produce contracts and related documents. Farmers should try to be familiar with these terms to better understand their rights and responsibilities in produce sales.[91] Included in these key terms are detailed descriptions of different types of contracts that may be used in sales of fresh produce. Some of the more common contract types are highlighted here.

"F.O.B. " contracts

In F.O.B. ("free on board") contracts, the seller (farmer) only commits to place the produce on the truck or other transport in suitable shipping condition. Either the seller or the buyer may pay the shipping costs, depending on what is agreed between them. The buyer assumes the risk of any damage or delay during transit, except for damage or delay directly caused by the seller. The buyer has the right to inspect the produce when it arrives to determine whether it complied with the contract requirements when it was shipped.[92] Sellers who use F.O.B. contracts typically have a USDA inspection performed before the produce is shipped to have proof of the condition of the produce at the shipping point.

"F.O.B. inspection and acceptance arrival" contracts

In an "F.O.B. inspection and acceptance arrival" contract, the seller (farmer) agrees to place the produce on a truck or other transport and to assume the risk of any loss or damage in transit, except anything directly caused by the buyer. The buyer agrees to pay for transporting the produce. When the produce arrives, the buyer may inspect the produce and reject it if it does not meet the specifications of the contract.[93]

"F.O.B. acceptance" or "Shipping point acceptance" contracts

In an "F.O.B. acceptance" or "Shipping point acceptance" contract, the seller (farmer) agrees to make the produce available for shipping in a suitable condition. The buyer accepts the produce before it is shipped and has no right to reject it. But the buyer may seek to recover money from the seller if the produce is not in a suitable condition or otherwise does not comply with the contract.[94]

"F.O.B. acceptance final" or "Shipping point acceptance final" contracts

Under an "F.O.B. acceptance final" or "Shipping point acceptance final" contract, the seller (farmer) agrees to make the produce available for shipping but is not required to make the produce available in a suitable shipping condition. The buyer accepts the produce at its shipping point and has no right of rejection when the produce arrives at its destination. The buyer may seek to recover money from the seller if the produce does not comply with the contract.[95]

"Delivered" or "Delivered sale" contracts

Under a "delivered" or "delivered sale" contract, the seller (farmer) agrees to deliver the produce to an agreed-upon market location. The seller pays for all transportation costs and assumes the risk of any loss or damage during transit. The seller agrees that, when the produce is delivered to the buyer, it will be in the condition agreed to in the contract.[96]

B. Document Quantity and Quality Before Delivery

Commission merchants, brokers, and dealers frequently argue that they have reasonable cause for rejecting produce because it does not meet the requirements of the sales agreement.[97] To show that produce does satisfy contract requirements, it is a good practice for farmers to make and keep written records about produce deliveries, including details about the condition and quantity of the produce. Farmers may also wish to have another person present to verify what produce was delivered to the buyer.

Some farmers request a USDA inspection of their produce before delivery. Typically, inspections are performed when produce is being shipped over a long distance and farmers wish to confirm that their produce was in good condition when it was placed in transit. After the produce is inspected, the inspector will provide the farmer with an inspection certificate certifying the quality of the produce before it was shipped. Should a dispute arise about the quality or condition of inspected produce, the inspection certificate will help the farmer establish the quality and condition of the produce at the time it was shipped to the buyer.[98]

Inspection costs are typically paid by the person who requests the inspection. The cost amount will depend on the type of inspection services requested.[99] Farmers might negotiate to have their buyers pay the inspection fee. Alternatively, a group of farmers selling their produce together could split the inspection fee among themselves. Regardless of who is paying the inspection fee, farmers should make sure they have the right to be present when the inspection is performed.

To get more information about inspections, farmers may call USDA's toll-free PACA number: 800-495-7222.

C. Ask Regulated Parties for Documentation When They Reject or Dump Produce and When They Ask for Discounts

Everyone who is licensed under the PACA—including commission merchants, dealers, and brokers—is required to maintain records about their transactions.[100] Additionally, the PACA regulations specifically require farmers' agents to maintain records verifying what happens to produce from delivery through sale or dumping.[101] When commission merchants, dealers, and brokers reject or dump produce, it is a good practice for farmers to request documentation confirming their statements that the produce did not comply with the agreement or could not be sold.[102] If a commission merchant attempts to dump produce amounting to more than five percent of any shipment, the PACA regulations require that documentation supporting the decision to dump be provided to the farmer if the commission merchant operates on a receiving market.[103]

Moreover, everyone subject to regulation under the PACA is prohibited from misrepresenting the "character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity," or place of origin of produce.[104] Farmers who suspect a buyer should be keeping records but is not, or who believe a buyer is engaging in misrepresentation, may call USDA's toll-free PACA number (800-495-7222) to request that a branch office covering the area where the buyer's business is located perform an audit of the buyer's records.

VIII. SPECIFIC STEPS FARMERS MAY TAKE: TWO EXAMPLES

Even when a farmer has taken the precaution of putting an agreement in writing and documenting his or her produce deliveries, there remains a risk that the person on the other side of the transaction might reject the produce or refuse to pay in full. This section describes two such situations and discusses specific actions farmers can take to protect themselves and receive payment for their produce.

A. Buyer Refuses to Pay Quoted Price

Farmer A calls the local packing house in the morning. The packing house agrees to buy a specific quantity of tomatoes from him for a set price. When Farmer A arrives at the packing house with the tomatoes later that day, the packing house refuses to pay him the price quoted over the phone and will only pay a lower price. What can Farmer A do?

Through their phone conversation, Farmer A and the packing house formed an oral contract. If Farmer A delivered the quality and quantity of tomatoes he agreed to provide the packing house, Farmer A has the right to be paid the agreed upon contract price.

Although Farmer A has the right to be paid the agreed-upon price for his produce, he would be in a much stronger position to enforce that right if he had a written contract. Farmer A can still try to enforce the oral contract, but it will be more difficult for him to prove what the agreement was, and, therefore, more difficult to recover the money the buyer owes him under the contract. Farmer A may choose to enforce the contract under the PACA or in state court. For the reasons described earlier in these materials, if the value of Farmer A's contract is $500 or more, the contract might not be enforceable in state court because it is not in writing. These materials will focus on Farmer A's rights under the PACA.

Because their contract is not in writing, if Farmer A wants to enforce the contract, he must consider how he will prove what he and the packing house agreed to. If Farmer A took notes during his conversation with the packing

 See cautionary note on page 1.

house, got the packing house's offer in writing, or sent a confirming letter, fax, or e-mail to the packing house, he could use these to confirm that the agreement is what he says it is. Otherwise, Farmer A's only proof is his word against that of the packing house.

1. *May Accept the Lower Payment as Partial Payment and File PACA Complaint to Recover Additional Money Due*

Under the PACA, Farmer A may choose to accept the lower price from the packing house as partial payment. Thereafter, Farmer A may file an informal complaint with the PACA branch office, seeking to recover the difference between the agreed-upon price and the actual price.

In response to Farmer A's complaint, the packing house might argue that when Farmer A accepted the lower price, he created a new contract that excused the packing house from paying under the earlier agreement. To prevent this argument from succeeding, Farmer A should make it clear to the packing house when accepting a partial payment that he does not believe the packing house has fully paid him for the tomatoes.

The packing house might refuse to buy the tomatoes at all if it knows Farmer A views its payment as a partial one. In that case, Farmer A could file an informal complaint to recover the full contract price.

To file a complaint, Farmer A may call USDA's toll-free PACA number (800-495-7220), or send a letter of complaint to the appropriate branch office. The claim must be filed within nine months from the date when payment was due to Farmer A.

2. *May Reject the Lower Payment, Sell the Tomatoes to Another Buyer, and File a PACA Complaint for any Difference in Price and Sale Expenses*

Instead of accepting partial payment from the packing house, Farmer A could seek another buyer for his tomatoes. If the other buyer pays less than the price that the packing house was supposed to pay, Farmer A may file an informal complaint against the packing house to recover the difference. In the complaint, Farmer A could also seek to recover from the packing house any expenses he had to pay to make the sale to the second buyer (for example, any delivery costs).

To file a complaint, Farmer A may call USDA's toll-free PACA number (800-495-7220), or send a letter of complaint to the appropriate branch office. The claim must be filed within nine months from the date when payment was due to Farmer A.

3. May Reject Payment, and File a PACA Complaint for the Agreed Upon Contract Price

Farmer A may choose to reject the packing house's partial payment and file a PACA complaint to recover the full amount promised by the packing house. This is not likely to be the best option for Farmer A, since it exposes him to greater financial risks than his other options.

If the packing house used the proper procedure to reject the tomatoes (by giving clear notice of rejection to Farmer A within the required period of time), the PACA requires Farmer A to take possession of the tomatoes and attempt to sell them to another buyer, even if the packing house rejected the tomatoes without reasonable cause. In this situation, if Farmer A fails to take possession of the tomatoes and does not try to resell them, he might not be able to recover any payment from the packing house. In fact, the packing house could try to recover money from Farmer A for any expenses the packing house had to pay to remove the tomatoes from its premises.

On the other hand, if the packing house did not properly reject the tomatoes (for example, by failing to give clear notice of its rejection or by rejecting the tomatoes after the passage of a "reasonable time"), the PACA would not require Farmer A to take possession of the tomatoes and attempt to resell them. Indeed, under the PACA, Farmer A could lose his right to recover against the packing house if he unconditionally accepts improper rejection of the tomatoes. Consequently, in most cases, the best practice is for Farmer A to: (1) ask the packing house for information about why it is rejecting the tomatoes; (2) tell the packing house he does not "accept" its rejection, but will nevertheless take possession of the tomatoes and try to resell them in an attempt to minimize losses; (3) attempt to resell the tomatoes; and (4) keep records verifying he tried to resell the tomatoes.

To file a complaint, Farmer A may call USDA's toll-free PACA number (800-495-7220), or send a letter of complaint to the appropriate USDA PACA office. The claim must be filed within nine months from the date when payment was due to Farmer A.

 See cautionary note on page 1.

4. *Should Immediately Send the Packing House a Notice of Intent to Preserve Trust Benefits*

Regardless of whether the farmer accepts partial payment, sells the tomatoes to a second buyer, or simply files a complaint to recover the full agreed-upon price from the packing house, Farmer A should immediately send the packing house a notice of his intent to preserve his PACA trust rights. The notice should contain all of the required information described earlier in these materials and must be **received** by the packing house no later than 30 days from the date payment was due for the tomatoes. It is recommended that the notice be sent in a way that Farmer A can prove when it was received by the packing house. For example, Farmer A may wish to send the notice by certified mail, return receipt requested, and retain a copy of the receipt.

B. Commission Agent Says Produce Could Not Be Sold

The local packing house agrees to sell Farmer B's squash on commission. Farmer B delivers the squash to the packing house on the agreed-upon date. Thirty days later, Farmer B has not been paid. Farmer B asks the packing house when it will pay him. The packing house responds that it could not sell Farmer B's squash, and that he will not receive any payment for the squash. What can Farmer B do?

1. *Ask for Information and Documentation*

First, Farmer B needs to know what the packing house did with the squash he delivered. Farmer B also needs to know why the packing house could not sell the squash.

Farmer B should ask the packing house the following questions:

- What efforts were made to sell the squash?
- Why was the packing house unable to sell the squash? If the packing house says Farmer B's squash could not be sold because it was of poor quality, Farmer B should ask for details: exactly what was wrong with the squash, and when was the problem discovered?
- When did the packing house dump the squash?
- Did the packing house obtain a dumping certificate or other documentation verifying the produce could not be sold?

As an "agent" selling Farmer B's produce on commission, the packing house is generally required to have kept records detailing what happened to Farmer B's squash from delivery through dumping.[105] In particular, the packing house is required under the PACA regulations to provide Farmer B with documentation verifying the results of all packing and grading operations, including the quantity of any produce lost through packing and grading.[106] Farmer B should ask for copies of those records, including all records detailing efforts the packing house made to sell the squash, and all records documenting the quality of the squash. If the packing house says it does not have the records or refuses to provide them, Farmer B may wish to call USDA's toll-free PACA number (800-495-7222) to initiate a confidential disciplinary complaint, and to request the PACA Branch audit the packing house's records.

2. *Review the Contract Made with the Packing House*

The PACA regulations related to agents who commit to sell produce on behalf of farmers require the packing house to have a written contract with Farmer B.[107] Agents can satisfy the PACA's requirement for a written contract by providing farmers with a written statement of company policy prior to receiving the first shipment of a farmer's crop.[108] Farmer B should review his contract with the packing house (or the statement of packing house policy) to see what rights he and the packing house have. If the contract or company policy allows the packing house to decide on its own to dump produce, Farmer B may not be able to argue that it violated the PACA by doing so.

However, as Farmer B's agent, the packing house is required to represent Farmer B's best interests and provide documentation supporting its decision.[109] If it did not do so, it may have to reimburse Farmer B for the reasonable value of the squash.

3. *May File PACA Complaint to Recover Payment*

If the packing house was not authorized to dump the squash, failed to provide the required documentation, and/or failed to use its best efforts to sell the squash, Farmer B may wish to file a complaint with PACA to claim payment.

To file a complaint, Farmer B may call the USDA's toll-free PACA number (800-495-7222) or send a letter of complaint to the appropriate

 See cautionary note on page 1.

PACA Branch office. The claim must be filed within nine months from the date when the PACA violation occurred.

4. May File PACA Complaint for Disciplinary Action Against the Packing House

If Farmer B does not have a written contract with the packing house and the packing house never provided a written statement of its payment policy, it is likely that the packing house violated the PACA regulation requiring that agents have written contracts with farmers. Similarly, if the packing house dumped the squash shipment but failed to maintain documentation detailing what happened to Farmer B's produce from delivery to dumping, it is likely that the packing house violated the PACA regulation requiring it to maintain such documentation. Farmer B may choose to file a disciplinary complaint against the packing house if he wishes. Farmer B can begin a disciplinary complaint by calling USDA's toll-free PACA number: 800-495-7222.

Of course, Farmer B will want to consider the possible consequences of filing a disciplinary complaint against the packing house. If the packing house is the only buyer in town and it loses its PACA license in the disciplinary process, Farmer B may be without any place to sell his produce in the future. Even if the packing house doesn't lose its PACA license, it may be less willing to work with Farmer B in the future if it learns Farmer B filed a disciplinary complaint against it.

5. Should Immediately Send the Packing House a Notice of Intent to Preserve Trust Benefits

Regardless of whether Farmer B files a complaint against the packing house for payment for the dumped squash or files a disciplinary complaint against the packing house, Farmer B should immediately send the packing house a notice of his intent to preserve his PACA trust rights.

The notice should contain all of the required information described earlier in these materials and must be **received** by the packing house no later than 30 days from the date payment was due for the squash.[110] It is recommended that the notice be sent in a way that Farmer B can prove when it was received by the packing house. For example, Farmer B may wish to send the notice by certified mail, return receipt requested, and retain a copy of the receipt.

IX. RESOURCES

A. USDA Web Site

USDA resources in English:

1. PACA Web site: http://www.ams.usda.gov/fv/paca.htm

2. PACA statute: http://www.ams.usda.gov/fvpaca/7usc499a.htm

3. PACA regulations: http://www.ams.usda.gov/fvpaca/7cfr-prt.htm

4. PACA Fact Finder: http://www.ams.usda.gov/fvpaca/FactFinder.htm

5. Search engine to determine if a business is licensed under the PACA and find trade names, branch locations, principal owners, and other related license information: http://apps.ams.usda.gov/pacasearch/

   Farmers who are unable to locate a business using the on-line search engine can request a more extensive search by sending an e-mail to PACASearch@usda.gov or calling USDA's toll-free PACA number: 800-495-7222.

USDA resources in Spanish:

1. PACA statute: http://www.ams.usda.gov/fvpaca/7uscspn.htm

2. PACA regulations: http://www.ams.usda.gov/fvpaca/7cfrspn.htm

3. PACA Fact Finder: http://www.ams.usda.gov/fvpaca/Brochures/Fact%20Finder%20Spanish.pdf

B. Contact Information for the PACA Branch Offices of the USDA Agricultural Marketing Service (AMS)

1. *National Headquarters*

U.S. Department of Agriculture
Agricultural Marketing Service
Fruit & Vegetable Programs, PACA Branch
1400 Independence Avenue, SW, Room 2095-S
Washington, DC 20250-0242

 See cautionary note on page 1.

Business Hours: 8 a.m. - 4:30 p.m. Eastern Time

Telephone: 877-622-4716 (toll free)
202-720-4180 (local)

Fax: 202-720-8868

2. *National License Center*

Farmers may contact this office to obtain information about whether a business or person is licensed under the PACA and to obtain a licensed business's PACA violation record.

U.S. Department of Agriculture
Agricultural Marketing Service
Fruit & Vegetable Programs, PACA Branch
National License Center
8700 Centreville Road, Suite 202
Manassas, VA 20110-8411

Business Hours: 7 a.m. - 5 p.m. Eastern Time

Telephone: 800-495-7222 (toll free)
703-331-4570 (local)

Fax: 703-330-4555

Email: PACAsearch@usda.gov

3. *Tucson, Arizona—Branch Office*

U.S. Department of Agriculture
Agricultural Marketing Service
Fruit & Vegetable Programs, PACA Branch
Tucson Federal Building, Room 7 T
300 West Congress Street
Tucson, AZ 85701-1319

Business Hours: 8 a.m. - 4:30 p.m. Mountain Standard Time (Nov. - March); 8 a.m. - 4:30 p.m. Pacific Standard Time (April - Oct.)

Telephone: 800-495-7222 (toll free)
520-879-4361 (local)

Fax: 520-670-4798

4. *Fort Worth, Texas—Branch Office*

U.S. Department of Agriculture
Agricultural Marketing Service
Fruit & Vegetable Programs, PACA Branch
819 Taylor Street, Suite 8B02
Fort Worth, TX 76102-9727

Business Hours: 8 a.m. - 4:30 p.m. Central Time

Telephone: 800-495-7222 (toll free)
817-978-0777 (local)

Fax: 817-978-0786

5. *Manassas, Virginia—Branch Office*

U.S. Department of Agriculture
Agricultural Marketing Service
Fruit & Vegetable Programs, PACA Branch
8700 Centreville Road, Suite 206
Manassas, VA 20110-8411

Business Hours: 8 a.m. - 4:30 p.m. Eastern Time

Telephone: 800-495-7222 (toll free)
703-331-4550 (local)

Fax: 703-330-4856

See cautionary note on page 1.

ENDNOTES:

[1] A detailed discussion of state contract law is beyond the scope of these materials. Thus, general concepts of state contract law will be discussed only to the extent that they help explain farmers' rights under the PACA.

[2] 7 U.S.C. §§ 499a-s (2007).

[3] *See,* Fla. Stat. § 672.201(1) (2007) (stating that a writing which "omits or incorrectly states a term agreed upon" will not be enforceable beyond the quantity of goods shown).

[4] Restat. 2d of Contracts, § 8 (defining unenforceable contracts).

[5] Restat. 2d of Contracts, § 344, 345.

[6] *See generally,* Restat. 2d of Contracts, § 1 (defining a contract as "a promise or a set of promises" for which the law requires a remedy when broken).

[7] Restat. 2d of Contracts, § 4 (explaining that promises may be stated orally or in writing).

[8] Fla. Stat. § 672.201(1) (2007). Courts may make an exception to this rule where goods were accepted by the buyer or the buyer made partial payment to the seller. Fla. Stat. § 672.201(3)(c) (2007); Fla. Stat. § 672.606 (2007).

[9] Restat. 2d of Contracts, § 110, 130.

[10] *See, for example, Roberts & Schaefer Co. v. Hardaway Co.,* 152 F.3d 1283, 1291 (11th Cir. 1998) (misunderstanding concerning an essential term of the agreement meant no contract was formed); *Jacksonville Port Authority v. W.R. Johnson Enterprises, Inc.*, 624 So. 2d 313, 315 (Fla. App. 1993) (finding insufficient evidence of a binding agreement between port authority and machinery contractor because the parties had different understandings about the scope of the work to be performed and never agreed on price); *Blum v. Morgan Guaranty Trust Co,* 709 F.2d 1463 (11th Cir. 1983) (refusing to enforce an oral agreement because its alleged terms were not clear and definite, and therefore could easily be misunderstood, thus preventing contract formation).

[11] *Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 528 (3d Cir. 1950) (involving the applicability of a state statute of frauds to an action for payment under the PACA and holding that the statute could not cut off right to remedies under the PACA); *United Potato Co., Inc. v. Burghard & Sons, Inc.*, 18 F. Supp 2d 894 (N.D. Ill. 1998) (state statute of frauds did not affect buyer's liability under the PACA).

[12] Fla. Stat. § 672.202 (2007).

[13] Restat. 2d of Contracts, § 135 (explaining that the person against whom a written contract is being enforced generally must have signed the contract to be charged with any obligation arising under the contract).

[14] *In re Lombardo Fruit & Produce Co.*, 12 F.3d 806, 808 (8th Cir. 1993); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976); *Chidsey v. Guerin*, 443 F.2d 584 (6th Cir. 1971).

[15] 7 U.S.C. § 499a (2007).

[16] 7 U.S.C. § 499a(b)(5) (2007).

[17] 7 C.F.R. § 46.2(q) (2007).

[18] *Combined Professional Resources, Inc. v. Limeco, Inc.*, 801 F. Supp. 664 (S.D. Fla. 1992).

[19] 7 U.S.C. § 499a(b)(6) (2007).

[20] 7 U.S.C. § 499a(b)(6)(A) (2007).

[21] 7 U.S.C. § 499a(b)(7) (2007).

[22] 7 U.S.C. § 499a(b)(4) (2007).

[23] 7 C.F.R. § 46.2(u) (2007).

[24] *See,* 7 C.F.R. § 46.2(u) (2007) (providing that: "[f]ruits and vegetables that have been subjected to the following operations are included in the definition of perishable agricultural commodities: water, steam, or oil blanching, battering, coating, chopping, color adding, curing, cutting, dicing, drying for the removal of surface moisture; fumigating, gassing, heating for insect control, ripening and coloring; removal of seed, pits, stems, calyx, husk, pods, rind, skin, peel, et cetera; polishing, precooling, refrigerating, shredding, slicing, trimming, washing with or without chemicals; waxing, adding of sugar or other sweetening agents; adding ascorbic acid or other agents to retard oxidation; mixing of several kinds of sliced, chopped, or diced fruit or vegetables for packaging in any type of containers; or comparable methods of preparation.").

[25] Given the extensive litigation about whether specific products are perishable agricultural commodities, it is apparent that PACA's list of approved processing operations does not provide a bright-line definition of perishable agricultural commodities.

[26] 7 U.S.C. § 499a(b)(8) (2007). USDA and the federal courts have broadly interpreted this provision of the PACA to include a wide range of sales. *See, for example, In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733 (1992) (finding that a buyer and seller being within the same state does not preclude interstate commerce); *Produce Place v. USDA*, 91 F.3d. 173 (D.C. Cir. 1996) (finding that a transaction involving particular berries reserved for intrastate commerce was in "interstate commerce," because such berries regularly moved in interstate commerce and the dealers involved were regularly engaged in interstate commerce); *United*

 See cautionary note on page 1.

States v. Produce Hawaii, Inc., 716 F. Supp. 461 (D. Hawaii 1989) (shipping perishable commodities between Hawaiian Islands is interstate commerce).

[27] Fla. Stat. §§ 604.15-604.34 (2007).

[28] 7 U.S.C. § 499b (2007).

[29] 7 U.S.C. § 499b(4) (2007).

[30] *See generally*, 7 C.F.R. § 46.2(aa) (2007).

[31] 7 C.F.R § 46.2(aa)(5) (2007).

[32] 7 C.F.R. § 46.2 (aa)(1) (2007).

[33] 7 C.F.R. § 46.2 (aa)(8) (2007).

[34] 7 C.F.R. § 46.2(aa)(11) (2007).

[35] 7 C.F.R. § 46.2(aa)(11) (2007).

[36] 7 C.F.R. § 46.46(e)(2) (2007).

[37] *In re Craig-Ann Hunts Point Corporation*, 50 Agric. Dec. 1850 (1991).

[38] *In re Baltimore Tomato Company, Inc.*, 39 Agric Dec 412 (1980). Farmers should consult an attorney licensed in their state about how partial payment might affect any state law claims.

[39] 7 U.S.C. § 499b (2007).

[40] *See, for example, Conn & Scalise Co. v. Frank J. Crivella & Co.*, 20 Agric Dec 415 (1961) (unloading of 75 of 608 crates was an act of control over shipment sufficient to indicate acceptance).

[41] *See,* 7 C.F.R. § 46.2(dd) (2007).

[42] 7 C.F.R. § 46.2(cc) (2007).

[43] 7 C.F.R. § 46.2(cc) (2007).

[44] 7 U.S.C. § 499b (2007); 7 C.F.R. § 46.2(bb) (2007); *Dew-Gro, Inc. a/t/a Central West Produce v. First National Supermarkets, Inc.*, 42 Agric. Dec. 2020 (1983); *Cal Mex Distributors, Inc. v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1113 (1987) (both holding that an ineffective rejection has the same legal consequences as acceptance).

[45] 7 U.S.C. § 499b (2007).

[46] 7 C.F.R. § 46.2(bb)(2007) (defining reasonable cause); *Cove Valley Packers, Inc. v. Pilgrim Fruit Co.*, Inc., 297 F. Supp. 200 (D. Mass. 1969).

[47] A buyer's failure to act can also result in circumstances where the buyer does not have "reasonable cause" for rejecting produce. *See,* 7 C.F.R. § 46.2(bb) (2007).

[48] 7 C.F.R. § 46.2 (2007); *see, for example*, *Grasso Foods, Inc. v. The Quaker Oats Co.,* 46 Agric. Dec. 188 (1987) (by unloading produce, buyer accepted it, making buyer's later rejection lack reasonable cause); *Yakima Fruit & Cold Storage Co. v. Ag West Growers, Inc.,* 44 Agric. Dec. 1348 (1985) (partial unloading of apples amounted to acceptance, so buyer's later rejection lacked reasonable cause); *J&J Produce Co., Inc. v. Weis-Buy Services, Inc.,* 58 Agric. Dec. 1095 (1999) (unloading tomatoes prior to inspection was acceptance; buyer's subsequent rejection was thus unlawful); *Robert Ruiz Inc. v. Hale Brothers, Inc.,* 43 Agric. Dec. 572 (1984) (buyer failed to communicate rejection within the period of time required by the PACA, and thus remained liable to the seller for the purchase price of the produce); *Washburn Potato Co. v. Rex E. Sparks Produce,* 42 Agric. Dec. 955 (1983) (buyer rejected produce without reasonable cause because prior to delivery of potatoes, buyer refused to sign written contract confirming oral agreement and said it did not want to buy the potatoes); *Cove Valley Packers, Inc. v. Pilgrim Fruit Company, Inc.,* 297 F. Supp. 200 (D. Mass. 1969) (buyer's statement that it would take plums for twenty-five cents less a crate than agreed upon showed an intent to reject original contract terms).

[49] 7 U.S.C. § 499a(b)(5) (2007) (defining commission merchants as those who receive produce for sale in interstate or foreign commerce, on commission, or on behalf of another party).

[50] 7 U.S.C. § 499b(3) (2007).

[51] 7 C.F.R. § 46.23 (2007) (defining reasonable cause for dumping). *See also,* 7 C.F.R. § 46.2(o) (2007) (defining shippers as persons who: (1) purchase produce from growers and resell the produce, or (2) agree to handle the sale of produce jointly with the growers, thus sharing the costs, profits, or losses resulting from the sale).

[52] 7 C.F.R. § 46.22, 46.23 (2007) (requiring "receiving market commission merchants" to maintain records establishing they had reasonable cause for dumping produce); 7 C.F.R. § 46.2(r) (2007) (defining a "receiving market commission merchant" as "any person operating on a receiving market who is engaged in the business of receiving produce and commerce for sale, on commission, for or on behalf of another."

[53] *See, for example, Combined Professional Resources, Inc. v. Limeco, Inc.,* 801 F. Supp. 664 (S.D. Fla. 1992).

[54] *Combined Professional Resources, Inc. v. Limeco, Inc.,* 801 F. Supp. 664 (S.D. Fla. 1992).

[55] 7 U.S.C. § 499e(b) (2007).

[56] 7 U.S.C. § 499f(a) (2007); 7 C.F.R. § 47.2 (2007) (defining a "reparations proceeding"); 7 C.F.R. § 47.3 (2007) (setting forth requirements for filing informal complaints).

See cautionary note on page 1.

[57] 7 U.S.C. § 499e(a) (2007).

[58] 7 U.S.C. §§ 499e(b), 499f (2007); 7 C.F.R. § 47.3 (2007).

[59] 7 U.S.C. § 499f (2007); 7 C.F.R. § 47.3 (2007).

[60] *See*, http://www.ams.usda.gov/fvpaca/claim.htm (USDA instructions for filing a PACA claim) (last visited September 24, 2007).

[61] 7 U.S.C. § 499f (2007); 7 C.F.R. § 47.3 (2007).

[62] 7 U.S.C. § 499f (2007); 7 C.F.R. § 47.3 (2007).

[63] 7 C.F.R. § 47.3 (2007); *see also*, http://www.ams.usda.gov/fv/paca.htm (PACA Fact Finder listing common questions and answers about PACA) (last visited on September 18, 2007).

[64] *See*, http://www.whitehouse.gov/omb/expectmore/detail/1002430.2004.html (last visited on September 24, 2007).

[65] 7 C.F.R. § 47.6 (2007).

[66] 7 U.S.C. § 499g (2007); 7 C.F.R. § 47.19(d)(2) (2007).

[67] 7 C.F.R. § 47.6 (2007).

[68] 7 C.F.R. § 47.6 (2007).

[69] 7 C.F.R. § 47.6 (2007).

[70] 7 U.S.C. § 499f(c)(2) (2007) (stating that if the complaint claims less than $30,000 in damages, "a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of fact"); 7 C.F.R. § 47.15 (2007) (describing oral hearing process); 7 C.F.R. § 47.19 (2007) (describing post-hearing procedure before hearing examiner); 7 C.F.R. § 47.20 (2007) (describing documentary procedure).

[71] 7 U.S.C. § 499g (2007).

[72] 7 U.S.C. § 499g (2007).

[73] 7 U.S.C. § 499e(c) (2007); 7 C.F.R. § 46.6 (2007).

[74] 7 U.S.C. § 499e (2007); *see also*, http://www.ams.usda.gov/fv/paca.htm (PACA Fact Finder listing common questions and answers about PACA) (last visited on September 18, 2007).

[75] 7 U.S.C. § 499e(c) (2007); 7 C.F.R. § 46.46 (2007). Under the PACA, "calendar days" are defined to include every day of the week, including Saturdays, Sundays, and holidays. If the

30th calendar day falls on a Saturday, Sunday, or holiday, the final day with respect to the time for filing a written notice of intent to preserve the benefit of the trust is the next day there is postal delivery service. *See,* 7 C.F.R. § 46.46(a)(4) (2007).

[76] 7 U.S.C. § 499e(c) (2007).

[77] *See, In re East Coast Brokers and Packers, Inc.*, 961 F.2d 1543 (11th Cir. 1992) (Florida courts presume properly mailed documents were received; to show proper mailing, seller was required to establish that the document was properly addressed, stamped, and mailed).

[78] 7 U.S.C. § 499e(c) (2007); *see also,* 72 Fed. Reg. 29,837 (May 30, 2007) (final rule) (affecting 7 C.F.R. pt. 46) (amending PACA regulations to ensure that sellers using electronic invoicing are able to electronically submit invoices containing trust preservation language).

[79] 7 U.S.C. § 499a(b)(6)(A) (2007).

[80] 7 U.S.C. § 499e(c)(3) (2007); 7 C.F.R. § 46.46(f) (2007).

[81] 7 U.S.C. § 499e(c)(3) (2007).

[82] *See, for example, In re D.K.M.B., Inc.*, 95 Bankr. 774 (Bankr. D. Colo. 1989).

[83] 7 C.F.R. § 46.46(e)(2) (2007) (stating that the maximum time for payment to which a seller can agree and still qualify for coverage under the PACA statutory trust is 30 days after the buyer receives and accepts produce); *see also, Patterson Frozen Foods v. Crown Foods Int'l*, 307 F.3d 666 (7th Cir. 2002) (produce supplier forfeited its rights to enforce statutory trust against produce dealer when parties entered post-default agreement, which satisfied statute of frauds writing requirement and allowed dealer more than 30 days to repay debt); *American Banana Co., Inc. v. Republican National Bank of New York,* 362 F.3d 33 (2d Cir. 2004) (seller lost its PACA trust rights because it had entered into a post-default oral agreement extending the seller's payment terms beyond the maximum 30 days allowed by PACA); *but see, Hull Co. v. Hauser's Foods, Inc.,* 924 F.2d 777, 781-82 (8th Cir. 1991) (only a written, not an oral post-default extension agreement between a seller and a buyer destroys the seller's PACA trust protection).

[84] 7 U.S.C. § 499e(c)(5) (2007).

[85] 7 U.S.C. § 499e(c)(2) (2007); 7 C.F.R. § 46.46(c) (2007).

[86] *Country Best v. Christopher Ranch*, 361 F.3d 629 (11th Cir. 2004) (holding that suppliers of perishable agricultural commodities were allowed to collect attorney fees and prejudgment interest incurred in an action to enforce statutory trust rights).

[87] 7 C.F.R. § 46.45 (2007) (warning letters and penalties); 7 U.S.C. §§ 499c, 499d, 499h, 499i, 499m (2007) (license suspension or revocation).

[88] 7 U.S.C. § 499h (2007).

[89] 7 U.S.C. § 499f(b) (2007).

[90] 7 C.F.R. § 47.3(a) (2007).

[91] The current full list of PACA definitions for contract terms is set out in 7 C.F.R. § 46.43 (2007). This regulation can be found at local law libraries or on-line at http://oregonstate.edu/potatoes/PACA%20Regulations.pdf.

[92] 7 C.F.R. § 46.43(i) (2007).

[93] 7 C.F.R. § 46.43(dd) (2007).

[94] 7 C.F.R. § 46.43(l) (2007).

[95] 7 C.F.R. § 46.43(m) (2007).

[96] 7 C.F.R. § 46.43(p) (2007). The PACA regulations defining "delivered" or "delivered sale" contracts do not expressly provide that a buyer may reject produce that does not meet the specifications of the contract. However, given that these types of contracts expressly require the seller to provide the buyer with produce that meets the contract specifications, and do not expressly limit the buyer's right to reject produce, it appears that under these types of contracts, buyers retain any rights they would otherwise have to reject nonconforming produce.

[97] *See, for example*, *J.R. Simplot Company v. L. Yukon & Son Produce Company*, 227 F.2d 67 (8th Cir. 1955) (seller agreed to provide buyer with a car of "washed potatoes" but delivered dirty potatoes; buyer had reasonable cause to reject potatoes because parties understood that "washed potatoes" meant seller would deliver clean potatoes).

[98] 7 U.S.C. § 499n(a) (2007).

[99] *See*, http://www.ams.usda.gov/fv/fpboverview.htm (last visited August 17, 2007).

[100] 7 U.S.C. § 499i (2007).

[101] 7 C.F.R. § 46.32 (2007).

[102] *Walters Produce, Inc. v. Frances Produce Co.*, 44 Agric. Dec. 380 (1985) (seller is responsible for asking "all necessary questions to get the facts it needs" to determine whether to accept a buyer's rejection of produce; absent fraud, or the willful withholding or deliberate misstatement of facts by the buyer, the seller cannot rescind its acceptance of the rejected produce "when it learns of other facts").

[103] 7 C.F.R. § 46.23 (2007). *See also*, 7 C.F.R. 46.2(r) (defining receiving market commission merchant). As described earlier in these materials, packing houses selling produce on behalf of farmers are not generally required to provide farmers with documentation supporting their

decision to dump produce because they do not fall within the definition of "receiving market commission merchants." *See, for example, Combined Professional Resources, Inc. v. Limeco, Inc.*, 801 F. Supp. 664 (S.D. Fla. 1992).

[104] 7 U.S.C. § 499b(1), (5) (2007).

[105] 7 C.F.R. §§ 46.14, 46.15, 46.29, 46.32 (2007).

[106] 7 C.F.R. § 46.32 (2007).

[107] 7 C.F.R. § 46.32 (2007).

[108] Under the PACA regulations, farmers are considered to have agreed to those terms when they begin to deliver produce to the agent. *See,* 7 C.F.R. § 46.32 (2007) (setting forth the duties of growers' agents).

[109] 7 C.F.R. §§ 46.29, 46.32 (2007).

[110] 7 U.S.C. § 499e(c). Under the PACA regulations, if the packing house agreed to sell an individual lot of Farmer B's squash, payment is due within 30 days from the date the packing house received the squash from Farmer B. If Farmer B and the packing house have an agreement that the packing house will distribute Farmer B's entire squash crop or multiple lots from it, payment for the initial squash shipment must be made within 30 days after the packing house receives the squash or within five days after the date it receives payment for the squash, whichever comes first. Payment for subsequent squash shipments must be made at ten-day intervals from the date of the accounting for the initial shipment or within five days after the date the packing house receives payment for the squash, whichever comes first. The packing house is required to give Farmer B an accounting on the initial squash shipment within 30 days of its receipt of the squash. Final payment for the season's squash crop must be made to Farmer B within 30 days from the date the packing house receives the last shipment for the season from Farmer B. 7 C.F.R. §§ 46.2(aa)8, 46.2(aa)9 (2007).

**INFORMAL COMPLAINT
TO BE FILED UNDER
THE PERISHABLE AGRICULTURAL COMMODITIES ACT**

Complaining Party:

Date:____________________

Company Name:____________________

Contact Person:____________________

Address: ____________________

Phone No:____________________

____

Fax No:____________________

Complaint To Be Filed Against:

Company Name:____________________

Contact Person:____________________

Address: ____________________

Phone No:____________________

____

Fax No:____________________

If complaint is for unpaid invoices, list below. If more than 5, attach a separate sheet of paper listing invoices and amounts due.

Invoice No.	Shipping Date	Invoice Amount	Amount Paid	Balance Due

TOTAL AMOUNT DUE: ____________________

If there is a dispute involved, or the complaint does not involve unpaid invoices, please describe below or attach a separate sheet of paper describing the dispute, and attach all relevant documents.

Documents required with this complaint: $60.00 filing fee (Please make your check payable to "USDA-AMS")
A copy of each unpaid invoice
Any other documents relating to the transaction(s) such as Bills of Lading, Inspection Certificates, etc.

If you prefer, you may pay the $60.00 filing fee with a credit card. If so, please provide the following information:

Type of Credit Card: __________Visa __________ MasterCard

Account No:____________________ Expiration Date:____________________

Card Holder Name:____________________ Card Holder Signature:____________________
(Please Print as Shown on Card)

Daytime Phone No:____________________ Contact Name:____________________

-- Please note: If you are paying by credit card, you may fax your complaint to ________________. --

This sample informal complaint form is available on USDA's Web site at: http://www.ams.usda.gov/fvpaca/informalcomplaintsample.pdf.