

# 12

## Problem Solving

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### CHAPTER QUICK TIPS

#### **Hiring An Attorney**

In a best case scenario, your attorney will: (1) be an experienced contract lawyer; (2) regularly represent farmers; and (3) be familiar with the NOP regulations. At the very least, however, your attorney should either have contract law experience or regularly represent farmers. If your attorney is not responsive to your needs, frequently fails to return calls, or makes you feel uncomfortable, find a different attorney. You can fire an attorney at any time.

#### **Small Claims Court Can Help Farmers**

If the amount of money involved in a contract dispute is relatively small (several thousand to \$10,000+, depending on the state), you may be able to take advantage of state “conciliation courts” or “small-claims courts,” which resolve issues faster and more informally.



## RESOLVING CONTRACT DISPUTES

During the period that the organic contract is in effect, disputes may arise between you and the buyer. If a problem does occur, it is helpful for you to understand your basic legal rights and obligations—even if you never set foot in a courtroom. You have more leverage in negotiating a solution when you can demonstrate to the buyer that you understand your legal rights. Similarly, if you understand your legal obligations, you can make an educated decision about which side has the stronger argument, and whether it would be worth the time, energy, and money it would take to pursue your claims against the buyer.

This chapter discusses some common problems that occur during the course of organic contract performance and provides an overview of the legal principles and arguments frequently used in these situations.

### **IMPORTANT NOTE:**

This guide can provide only a brief overview of the legal landscape related to organic contract disputes. If you encounter a contract problem, the best course of action is to consult an attorney licensed to practice in your state. An attorney can identify the applicable laws for the facts of your particular dispute.

See page 12–4 of this chapter for tips on hiring an attorney.

## **Determining Your Contract Rights and Obligations**

At the outset, it is important to understand that your contract rights and obligations are determined by three main sources, listed in order of importance:

1. The contract
2. Federal contract law
3. State contract law

This means that, in addition to the actual words of the contract, you may have other rights and obligations created by federal and state law. It also means that while the contract language will control the majority of any dispute, it is possible that some contract provisions might be illegal, unenforceable, or superseded by state or federal law. For example, if you are a farmer in Minnesota and you signed a contract with a confidentiality provision prohibiting you from sharing the contract language with anyone, Minnesota state law most likely nullifies that provision.<sup>1</sup>

A detailed discussion of each state's contract laws is beyond the scope of this guide. Each state's laws are unique. Therefore, if you have a contract dispute, it is always best to consult an attorney licensed to practice law in your state—preferably one who is familiar with agricultural contracts and the National Organic Program (NOP) regulations.

### **A Note on the NOP Regulations**



Organic farmers should always be mindful of how any contract dispute (and any potential agreements to settle a dispute) could conflict with the NOP regulations. Do not agree to resolve a dispute in a manner that would cause you to violate your Organic System Plan (OSP) and potentially lose organic certification.

## **ENFORCING AN ORGANIC CONTRACT AGAINST THE BUYER**

### **Farmers Have Options If the Buyer Refuses to Fulfill Contract Promises**

#### First Steps When Problems Arise

Each farmer has his or her own comfort level with confrontation, and it is well known that contract disputes can damage valuable farmer-buyer relationships. Ideally, farmers and buyers will be able to resolve disputes informally outside of court.

If a dispute is brewing, send a letter, call the buyer, or set up a face-to-face meeting with the buyer. Try to come up with a workable solution to the problem. If you and the buyer do resolve the problem, be sure to record any agreement in writing. Still, in case you and the buyer cannot reach an agreement, keep records of the communications you have regarding the problem; they could become important in any later lawsuit.

If legal action is something you would consider, be careful not to let too much time pass between the dispute and filing a lawsuit. A consultation with an attorney can help to determine how to best preserve your legal rights if you decide to go to court (or if the buyer sues you).

Sometimes farmer-buyer disputes simply cannot be resolved without a lawyer or a formal dispute resolution process, such as mediation or litigation. The remainder of this section discusses some of the actions farmers can take to enforce their contracts against buyers who fail to keep contract promises.

#### Consult an Attorney

In the case of a contract dispute, you should consult an attorney for help. Attorneys can help you understand your legal position, and can help you understand the pros and cons of various options for resolving the dispute.

**Tips for Finding an Attorney**

- Look for an attorney licensed in your state who regularly practices contract law. Ask whether the attorney regularly does contract litigation (representing people in court cases about contract disputes). Additionally, ask whether the attorney can help you settle the case outside of court (by negotiating a settlement agreement, for example).
- Look for an attorney who is also familiar with agriculture—someone who frequently represents farmers.
- In a best-case scenario, your attorney will: (1) be an experienced contract lawyer; (2) regularly represent farmers; and (3) be familiar with the NOP regulations. At the very least, however, your attorney should either have contract law experience or regularly represent farmers.
- Hire an attorney you feel comfortable with, and do not hesitate to shop around to find the best fit and value. An experienced contract attorney familiar with agriculture will likely spend fewer hours on your case (and thus, cost less) than an attorney without contract or agriculture experience.
- You can also ask about negotiating a flat rate for the attorney's services instead of paying an hourly rate. Flat fees can lower the cost of both experienced and less-experienced attorneys.
- If your attorney is not responsive to your needs, frequently fails to return calls, or makes you feel uncomfortable, find a different attorney. You can fire an attorney at any time.
- If you are looking for attorney referrals, contact FLAG or your state or local bar association. FLAG maintains a database of attorneys who have expressed interest in representing family farmers. You can reach FLAG by phone at 651-223-5400, or by email at [lawyers@flaginc.org](mailto:lawyers@flaginc.org). Minnesota farmers can call FLAG's toll-free line (877-860-4349).



### Try Mediating the Dispute

If you or your attorney have communicated with the buyer but have been unable to resolve your contract issues, mediation can be a useful process. Many communities offer free or affordable dispute resolution services. You can mediate on your own or with the help of an attorney.

Note, however, that mediation is typically non-binding. This means that you and the buyer could reach a mediated agreement on Monday, and either party could decide to back out on Tuesday without any legal consequences. Unless both sides sign a written settlement agreement, the buyer cannot be compelled to abide by the mediated outcome.

Furthermore, you cannot force an unwilling buyer to mediate (unless the contract states that the buyer must mediate contract disputes).

### File a Lawsuit Against the Buyer

If mediation fails, your next option is likely a lawsuit. Still, it is important to recognize that lawsuits can take years to resolve, can involve expensive court costs and attorney fees, and can be extremely draining in terms of physical and emotional energy.

Lawsuits can take many different routes. In the best-case scenario, simply filing a lawsuit will make the buyer more interested in working out a settlement.

On the other hand, filing a lawsuit might irritate or anger the buyer, and could make settling the dispute impossible. With a view toward protecting itself from future lawsuits, a buyer might choose to adopt a “fight-to-the-death” litigation strategy in the hopes of making you an example of what happens to farmers who sue. In this kind of situation, lawsuits can take many years and cost many tens of thousands of dollars.

- *Arbitration*

It is very important before filing any lawsuit related to a contract dispute to determine whether the contract requires you to resolve contract disputes through arbitration. Arbitration is a private decision-making process in which a private individual (an arbitrator) decides a dispute after hearing from both sides.

**Arbitration Does Not Favor Farmers**

If you signed a contract with an arbitration clause, you have likely waived your right to use the public court system to settle your dispute. This is an undesirable position, because arbitration procedures generally heavily favor larger companies, such as most buyers—not farmers. Perhaps most problematic, arbitration is often prohibitively expensive for individual organic farmers.

If you are in a contract dispute and have a contract with an arbitration provision, consult an attorney familiar with arbitration proceedings who is licensed to practice law in your state. An attorney can help you decide whether to proceed with arbitration, settle with the buyer, or take another course of action. In rare situations, arbitration clauses and arbitrators' decisions can be successfully challenged in court.

See Chapter 10, pages 10–4 through 10–6, for a more detailed discussion of arbitration.



If the contract does include an arbitration agreement, you will likely be required to arbitrate your dispute outside of court. If the contract does not require arbitration, you are generally free to file a lawsuit against a buyer to resolve any contract-based dispute.

See Chapter 10, pages 10–4 through 10–6, for a more detailed discussion of arbitration.

- *Small-Claims Court*

If the amount of money involved in your dispute is relatively small (several thousand dollars to \$10,000+, depending on the state), you may be able to take advantage of a streamlined and less costly court process. Most states have “conciliation courts” or “small-claims courts” which resolve issues more informally and within shorter time frames. Be aware, though, that each state has its own rules about how much money is a “small claim,” as well as what kinds of cases can be heard in small-claims court. Check with your local state court administrator to find out whether your dispute could be handled in small-claims court.



- *Class Action Lawsuits*

Farmers sometimes consider filing class-action lawsuits against certain larger buyers for widespread and ongoing problems. When considering class actions, it is important to know that these lawsuits often take far longer than individual lawsuits; they can take up to a decade or more. Class action lawsuits are very complicated, are extremely expensive, and will not solve anyone's immediate problems. Still, class actions can be useful to help address systemic, long-term problems. In addition, lawyers who litigate class actions will often work on a contingency basis, meaning that they do not get paid unless their clients are successful.

- *There Are Risks: Discovery and Counterclaims*

Filing a lawsuit will mean that both you and the buyer will go through a process called “discovery.” In the discovery phase of a lawsuit, while you will have the opportunity to obtain information about the buyer and its actions, the buyer will have the opportunity to obtain information about you, your family, and your farm. During discovery, parties will often seek information an ordinary person would consider private. The buyer's attorneys might try to find information about you—even if it is unrelated to the dispute—that could place you in an unflattering light or reveal other difficulties you've been having. Much of this information could be made public, since court filings are usually public record.

Additionally, filing a lawsuit against the buyer gives the buyer a convenient setting to file claims against you. These are called “counterclaims” and can be any claims related to the contract. For example, if you are suing the buyer on a price issue, the buyer could turn around and file counterclaims against you for violating other parts of the contract, such as product quality, delivery time, or management practices. These might be issues that the buyer would never have bothered with otherwise, but your lawsuit might give it the opportunity and perhaps the incentive to throw as much at you as it can. Also, if the buyer does file counterclaims, it becomes harder for you to withdraw your lawsuit if you later decide, for example, that it is costing too much or the discovery requests are too burdensome. If the buyer files counterclaims, the lawsuit cannot be dismissed until all of the claims—yours and the buyer's—have either been withdrawn or ruled upon by the judge.

**Weigh Pros and Cons of Litigation**

Farmers should carefully weigh pros and cons before deciding to file a lawsuit against a buyer. There is little downside, however, to learning as much as you can about your options. Educating yourself about contract law or consulting an attorney about your problem is not the same thing as deciding to file a lawsuit. An attorney licensed to practice in your state can help you understand your options and perhaps even resolve your dispute out of court—by giving you behind-the-scenes advice, explaining the laws that apply to your situation, and/or helping you communicate with the buyer.

**Lawsuits Will Only Take You So Far**

Aggrieved farmers wanting revenge against a buyer are not likely to find what they are looking for in a courtroom. In contract disputes, judges generally try to reach a result that leaves each party in the position they would have been in if the contract had been fully performed by both parties. And, even successful parties must generally subtract from any damages award the time and money spent on the lawsuit. In some instances, farmers may be able to recover attorney fees and court costs from buyers as part of a court award, but this “fee-shifting” usually occurs only when the contract explicitly requires the losing side to pay the other side’s fees. Of course, contracts can (and often do) require farmers who lose in court to pay buyers’ attorney fees and court costs.

Also, in a contract lawsuit, you will not be able to use evidence outside the contract language itself to prove that the contract means something other than what it says in black and white. The prohibition of outside evidence is called the “parol evidence rule.” This means you should not count on evidence outside of the contract when analyzing your likelihood of success in court. The court will not consider whether the buyer reneged on oral promises, whether the buyer acted like a jerk, whether your family has encountered tough times, or whether your organic farm is a benefit to society. When you are thinking about your likelihood of success in court, try to take issues like these out of the equation.

**If a Buyer Sues You...**

Finally, if a buyer decides to take legal action against you, consult with an attorney licensed to practice law in your state as soon as possible.

Lawsuits are very difficult for non-lawyers to successfully handle by themselves. In particular, when you are sued, you are required to file very specific legal papers with the court by certain deadlines. If you miss these deadlines, you can lose important rights. For example, failing to respond to a legal complaint can lead to a default court judgment against you (that is, an order saying the buyer wins) that can be difficult or impossible to overturn. Consequently, if you receive notice that a buyer has filed a legal complaint against you, contact a lawyer immediately.



### **Practical Tips If You Are Sued**

- Take the lawsuit seriously. Judges are generally unsympathetic to people who fail to respond to legal notices or fail to show up at required court appearances without a very, very good excuse (such as being hospitalized for a serious illness). So, even if you cannot afford to hire an attorney, make sure to respond to court notices and to attend scheduled court appearances.
- You can always call the court and talk to court employees about court procedures and scheduling court dates. Failing to communicate with the court—either on your own or through your attorney—is usually the worst course of action in a civil lawsuit. You can also write letters to the judge assigned to your case. Be respectful in all communications.
- If you are scheduled to appear in court but you cannot make the hearing, make sure to contact the court as soon as possible (preferably at least 24 hours before your scheduled appearance).
- Make a serious effort to comply with every aspect of any order the judge issues—whether oral or written. If you do not comply, the judge could hold you in contempt and possibly even put you in jail.
- You have a much better chance of success in court if you have attorney representation.

## LAWS GOVERNING CONTRACT DISPUTES

If a party fails to keep a contract promise, that party has “breached” the contract. When a party breaches a contract, the law may provide a remedy to compensate the other party.

### **Determining Farmers' Legal Rights and Obligations After Breach of Contract**

To determine your legal rights and obligations after a breach, first look to the language of the contract. What does it say about your particular situation? If the contract doesn't say anything about your situation, you must look to federal and state contract law for guidance. As mentioned earlier, in a few situations, federal or state law might even nullify parts of the contract.

### **Federal Laws Relevant to Organic Contracts**

Although the majority of contract law is controlled by each individual state, the federal government has enacted a few laws relevant to organic contracts. The most significant federal contract laws apply only to farmers producing certain commodities.

#### **Perishable Agricultural Commodities Act (PACA) for Produce Farmers**

The Perishable Agricultural Commodities Act (known as PACA)<sup>2</sup> covers only the produce industry. PACA, which was designed to ensure fair business dealings in the produce industry, created: (1) an administrative process for farmers seeking full payment under fruit and vegetable sales contracts; and (2) a trust mechanism to provide some payment for farmers if a buyer is bankrupt. Farmers who sell perishable commodities can file PACA complaints against buyers who fail to pay promptly and fully.

- *PACA Money Damages Complaint*

If a buyer fails to pay promptly and fully, you may be able to recover unpaid amounts (plus any losses caused by the buyer's failure to pay fully and promptly) by filing a PACA complaint. Produce buyers are required to pay the full contract price within the time frames PACA establishes (typically 5 – 20 days), unless the contract states a different payment deadline.<sup>3</sup> You can file a

PACA complaint even if the buyer paid you part of the contract price.<sup>4</sup>

You can also file a PACA complaint to recover losses caused by a buyer who wrongfully destroys or “dumps” your produce without reasonable cause or proper documentation.

You must file a PACA complaint for money damages with the U.S. Department of Agriculture’s (USDA) PACA branch within nine months of the failure to make full and prompt payment or within nine months of a wrongful rejection of a farmer’s delivery.<sup>5</sup>

See the PACA website at <http://www.ams.usda.gov/AMSV1.0/PACA> and click on the links under “Dispute Resolution” for more information.

- *PACA Non-Monetary Disciplinary Complaint*

You may file a PACA disciplinary complaint (non-monetary) against a buyer who fails to pay promptly and fully within two years of failure to make full and prompt payment or within two years of a wrongful rejection.<sup>6</sup>

See the PACA website at <http://www.ams.usda.gov/AMSV1.0/PACA> and click on the link under “Reporting Unfair Trade Practices” for more information.

See the PACA website for additional details and to download complaint forms: <http://www.ams.usda.gov/AMSV1.0/PACA>.

### Packers and Stockyards Act (PSA) for Livestock and Poultry Producers

The Packers and Stockyards Act (PSA)<sup>7</sup> applies solely to the livestock (cattle, swine, lamb, and goats) and poultry industries.<sup>8</sup> The goal of the PSA is to promote fair competition and ensure fair trade practices in livestock and poultry markets. To that end, it prohibits livestock packers and poultry processing companies<sup>9</sup> from engaging in any unfair, unjustly discriminatory, deceptive, price manipulative, or trade-restraining practices.<sup>10</sup> In recent years, several federal courts have issued decisions that make it hard for livestock and poultry producers to succeed in lawsuits alleging that packers or processors have engaged in these prohibited practices.<sup>11</sup> If you are considering filing such a lawsuit, you should consult with an attorney familiar with these PSA enforcement issues.

- *PSA Trust*

In addition to the general prohibition against certain unfair practices, the PSA and the rules implementing it, administered by

USDA's Grain Inspection and Packers and Stockyards Administration (GIPSA), also regulate specific aspects of the relationship between (1) livestock and poultry producers,<sup>12</sup> and (2) the packers and processors with which they do business.

One important aspect of the PSA rules is the establishment of a trust to ensure that livestock and poultry producers are fully paid for their products.<sup>13</sup> In order to collect payment through the PSA trust, producers must satisfy detailed written notice and complaint procedures and meet tight deadlines. If you have sold livestock or poultry to a packer or processor, or have raised swine or poultry under a production contract growing arrangement, and have not received timely or full payment, you should immediately determine whether you can obtain payment through the PSA trust.

You can obtain more information about the PSA trust at <http://www.gipsa.usda.gov/psp/livetrust.html> (livestock) or <http://www.gipsa.usda.gov/psp/poultry.html> (poultry), or by contacting USDA's Packers and Stockyards Administration office in your state or in Washington, D.C.

#### Agricultural Fair Practices Act (AFPA) for Farmers in Associations

The Agricultural Fair Practices Act (AFPA)<sup>14</sup> provides certain contract protections for farmers who have joined or wish to join a farmers' association. The AFPA is designed to protect the rights of farmers to associate in cooperative organizations. It prohibits buyers from taking certain retaliatory actions against farmers because of the decision to join (or not to join) a farmers' association. One section of the law prohibits buyers from discriminating against any farmer with respect to price, quantity, quality, or other terms of purchase because of the farmer's membership in an association. This law could protect you if you can prove that a buyer discriminated against you because of your membership in a farmers' association. However, the burden of proving discrimination is on the farmer, and it can often be difficult to prove a discriminatory motivation for a buyer's decision.

Some farm policy groups working on behalf of organic family farmers have advocated making the AFPA stronger by changing the law to close loopholes and make it easier for farmers to bring a claim.<sup>15</sup> Advocates are also calling for more robust enforcement against buyers who violate the law.<sup>16</sup>

## **State Laws Relevant to Organic Contracts**

### **Article 2 of the Uniform Commercial Code**

The Uniform Commercial Code, commonly referred to as the “U.C.C.,” is a comprehensive set of rules for commercial transactions that has been adopted, with small but sometimes significant variations, in all 50 states. The U.C.C. is made up of several sections, called “Articles.” Article 2 of the U.C.C. applies to contracts for the sale of goods worth more than \$500. Because organic commodities are “goods” under the U.C.C., Article 2 of the U.C.C. applies to organic contracts.



### **State Versions of the Uniform Commercial Code**

When states adopt U.C.C. provisions, they often use numbering schemes similar to U.C.C. numbering. Therefore, if you are looking up your state’s version of a U.C.C. section, it may be helpful to look for similar numbering within the state statute. For example, state law versions of U.C.C. § 2-703 (Seller’s Remedies in General) include:

California – Cal. Commercial Code § 2703

Florida – Fla. Uniform Commercial Code § 672.703

Minnesota – Minn. Stat. § 336.2-703

Nebraska – Neb. Uniform Commercial Code § 2-703

New Mexico – N.M. Stat. § 55-2-703

Wisconsin – Wis. Stat. § 402.703

With the exception of Louisiana, every state has adopted a version of U.C.C. Article 2. Although each state’s version of Article 2 is slightly different, the major themes are generally consistent. Pages 12–16 through 12–28 of this chapter will highlight some of the important concepts of Article 2 that come into play when buyers and farmers breach contracts.

### **State Laws Specific to Agricultural Contracts**

In addition to adopting U.C.C. Article 2 provisions that regulate contracts generally, several states have enacted laws specifically regulating agricultural contracts. In general, these laws are designed to ensure some level of fairness in agricultural contracting. Although a detailed

explanation of these laws is beyond the scope of this guide, some of the state laws that might apply to organic farmers are discussed below.<sup>17</sup>

Some states have enacted laws applicable only to certain agricultural sectors and certain types of contracts. For example, some states have enacted laws related to production contracts for livestock and poultry. These laws have goals similar to the goals of the federal Packers and Stockyards Act—eliminating unfair practices in the livestock and poultry industries.

Arkansas has enacted fair-dealing legislation applicable only to livestock production contracts and poultry production contracts.<sup>18</sup> Similarly, Georgia has enacted legislation providing protection only for poultry production contracts,<sup>19</sup> and Kansas has separate laws regulating swine production contracts and poultry production contracts.<sup>20</sup> If you are an organic farmer raising livestock or poultry under a production contract in Arkansas, Georgia, or Kansas, be sure to check whether these laws apply to your contract.

Other states have enacted laws granting broad contract protections for multiple agricultural sectors, including producers of livestock, milk, and field crops. Illinois,<sup>21</sup> Iowa,<sup>22</sup> Minnesota,<sup>23</sup> and Wisconsin<sup>24</sup> have each enacted broad legislation with strong protections against unfair trade practices. Some of these protections include prohibitions against stringent confidentiality provisions, requirements that disputes be resolved in the courts of the state where the farmer is located, allowances for the farmer to cancel the contract within a certain time after signing, and specific disclosure requirements.

In addition, California has enacted an agricultural lien law that creates a lien for farmers which attaches upon delivery of the contracted product and protects farmers when buyers fail to make payment.<sup>25</sup>

Finally, Minnesota has enacted a Wholesale Producer Dealers Act similar to the federal Perishable Agricultural Commodities Act (PACA), protecting Minnesota farmers who sell fruits, vegetables, and other perishables against buyers who do not pay promptly and fully.<sup>26</sup>





**The law of the state where you live or farm may not govern your contract.**

Choice-of-law provisions are contract provisions that specify which state's laws will govern disputes related to the contract. The contract could state, for example, that your contract will be interpreted according to the laws of Delaware—even if you live in Wyoming. These provisions are often enforceable unless you farm in a state that prohibits choice-of-law provisions for agricultural contracts. See Chapter 10, pages 10–2 and 10–3, for further discussion of choice-of-law clauses.

**Additional State Law Protections**

There may be other state laws that affect your contract relationship even though they do not directly regulate agricultural contracts. For example, almost every state has laws generally prohibiting unfair and deceptive trade practices. These laws may also be applicable to organic contract disputes.

Again, if you are involved in a contract dispute, consult an attorney licensed to practice law in your state who is experienced with contract law.

## TEN COMMON ORGANIC CONTRACT PROBLEMS

Some of most common contract breaches occur when **buyers:**

1. Reject delivery
2. Fail to pay
3. Try to terminate the contract (before delivery and payment)
4. Fail to perform other contract promises
5. Declare bankruptcy

On the other hand, breach can also occur when **organic farmers:**

6. Fail to make delivery
7. Fail to deliver goods that meet quality standards
8. Try to terminate the contract (before delivery)
9. Fail to perform other contract promises
10. Declare bankruptcy

For each of the ten common contract problems listed in the box above, this section will discuss legal principles that are potentially applicable. Many of these principles are derived from Article 2 of the U.C.C. (discussed on page 12–13 of this chapter). Your state's version of the U.C.C. may be the same, slightly different, or completely different. The guide will also highlight other potentially relevant federal laws.

The purpose of this section is to make you aware of the range of legal remedies that may be available to farmers and buyers when a common contract dispute arises. You cannot assume that these principles will apply to your situation. First, the terms of the contract will often control the outcome of a contract dispute. Many of the legal principles discussed in this section are “fallback” principles, meaning that they apply only if

the contract is silent on a particular topic.<sup>27</sup> Second, applicable state laws (which may differ from the laws discussed here) will likely have a big impact on the meaning of your contract and the outcome of your dispute. Finally, this section does not cover the entirety of contract law; many other details and specialized rules must be taken into account.

As a result, if you are involved in a contract dispute, you should consult an attorney licensed to practice law in your state. This overview cannot substitute for an experienced lawyer who is familiar with the latest changes in federal and state laws and regulations. See page 12–4 of this chapter for tips on hiring an attorney.

## BUYER BREACHES

### Wrongful Rejection

If the buyer wrongfully rejects delivery of your product, first look to see what the contract says about the situation. If it says nothing, or is unclear, you may be able to:

- Withhold or stop any additional deliveries.<sup>28</sup>
- Cancel the contract.<sup>29</sup>
- Sell your products to another buyer.<sup>30</sup>
- Sue the buyer for money damages. Damages could be measured in three different ways:
  - (1) The difference between the contract price and the actual price you receive for the product from a new buyer, plus incidental damages (defined below), minus any savings you realize, if any, as a result of the breach.<sup>31</sup>
  - (2) The difference between the contract price and the organic market price, plus incidental damages, minus any savings.<sup>32</sup>
  - (3) If damages based on the actual price you received or the organic market price are inadequate to compensate you for the breach, damages could be based on your lost profits, plus incidental damages, minus any savings.<sup>33</sup>

Incidental damages include your commercially reasonable expenses in connection with: (1) stopping delivery; (2) transporting, storing, or caring for the products after the buyer's breach; (3) reselling the products; or (4) other issues resulting from the buyer's breach.<sup>34</sup>

If you sell fruit, vegetables, or other produce, and the buyer rejects your produce delivery without reasonable cause, you may be able to recover the contract price and any losses caused by the wrongful rejection by filing an administrative complaint under the federal Perishable Agricultural Commodities Act (PACA). See the earlier discussion on PACA (pages 12–10 and 12–11 of this chapter) for more information on PACA complaints.

If you raise and/or sell livestock, swine, or poultry, a wrongful rejection could give you a claim against the buyer under the federal Packers and Stockyards Act (PSA). As discussed earlier, the PSA prohibits buyers from

engaging in unfair, unjustly discriminatory, or deceptive trade practices.<sup>35</sup> However, to succeed on a PSA claim, you will likely have to prove in court that the buyer's practices adversely affect competition.

### **Failure to Pay in Full**

If the buyer fails to pay in full for your deliveries, first look to see what the contract says about such a situation. If it says nothing, or is unclear, you may be able to:

- Withhold or stop deliveries.<sup>36</sup>
- Cancel the contract.<sup>37</sup>
- Sell your products to another buyer (this likely works only if you still have the products in your possession).<sup>38</sup>
- Sue the buyer for damages. Damages could be measured in two ways, based on whether you can sell the products to another buyer:
  - (1) The difference between the contract price and the actual price you receive for the product from a new buyer, plus incidental damages (defined on the previous page), minus any savings you realize as a result of the breach.<sup>39</sup>
  - (2) If you can't sell the products to another buyer, the contract price of the accepted goods, plus incidental damages, minus any savings (such as avoiding shipping costs if you did not deliver the product).<sup>40</sup>

In some states, you may have the right to a state law agricultural lien against the buyer for the full contract price.<sup>41</sup> This type of lien grants the farmer a security interest in the commodity delivered to the buyer or the proceeds from the sale of the commodity. However, even if the applicable state law creates such a lien, the lien may or may not give you priority over the buyer's other creditors. Consult an attorney licensed in your state for advice about this type of lien.

If you sell fruit, vegetables, or other produce, and the buyer accepts the produce but fails to pay you fully and promptly, you may be able to recover the unpaid amounts (plus any losses caused by the buyer's failure to pay fully and promptly) by filing a PACA complaint. See pages 12–10 and 12–11 of this chapter for more information on PACA complaints.

If you raise and/or sell livestock, swine, or poultry, and the buyer fails to make full and prompt payment, you can initiate the PSA trust process by providing written notice to the packer or processor and USDA's Grain

Inspection, Packers and Stockyards Administration (GIPSA) within 30 days of the final date for the buyer to make prompt payment, or within 15 business days of being notified that a promptly presented payment check was dishonored.<sup>42</sup>

If the buyer continues not to pay after receiving this written notice, you may need to file a complaint in court to obtain an order directing the packer or processor to pay you. The court can order a packer whose average annual purchases of livestock exceed \$500,000 and a poultry processor whose average annual sales, purchases, or value of poultry raised under a growing arrangement exceeds \$100,000 to hold specified property in trust for your benefit as an unpaid cash seller or poultry producer. You can then get paid from this trust without competing with the buyer's other creditors.

You can obtain more information about making a claim against the PSA trust at <http://www.gipsa.usda.gov/psp/livetrust.html> (livestock) or <http://www.gipsa.usda.gov/psp/poultry.html> (poultry), or by contacting the GIPSA office in your state or in Washington, D.C.

### **Buyer's Repudiation**

When a buyer tells you it doesn't intend to perform its contract promises before you have made a delivery or received payment, this is considered "repudiation" of the contract. Repudiation can occur for all or a portion of the organic farm products under contract. If this happens to you, first look to see whether the contract addresses repudiation. If it does not, or is unclear, you may be able to:

- Withhold or stop deliveries.<sup>43</sup>
- Cancel the contract.<sup>44</sup>
- Sell your products to another buyer.<sup>45</sup>
- Sue the buyer for damages. Damages could be measured in three different ways:
  - (1) The difference between the contract price and the actual price you receive for the product from a new buyer, plus incidental damages (defined on page 12–18 of this chapter), minus any savings you realize as a result of the breach.<sup>46</sup>
  - (2) The difference between the contract price and the organic market price, plus incidental damages, minus any savings.<sup>47</sup>
  - (3) If damages based on the actual price you received or the organic market price are inadequate to compensate you for

the breach, damages could be based on your lost profits, plus incidental damages, minus any savings.<sup>48</sup>

If you sell fruit, vegetables, or other produce, and the buyer repudiates the contract before delivery, you may be able to recover the unpaid amounts by filing a PACA complaint. However, be aware that you must still make all reasonable attempts to try to sell your produce to another buyer (even for a lower price). You must file a PACA complaint for money damages with the USDA's PACA branch within nine months of the repudiation.<sup>49</sup> See pages 12–10 and 12–11 of this chapter for more information on PACA complaints.

If you raise and/or sell livestock, swine, or poultry, and the buyer repudiates the contract, you could have a claim against the buyer under the PSA if you could prove that the repudiation amounted to an unfair, unjustly discriminatory, deceptive, price manipulative, or trade-restraining practice.<sup>50</sup> In recent years, several federal courts have issued decisions that make it hard for livestock and poultry producers to succeed in lawsuits alleging that packers or processors have engaged in these prohibited practices. If you are considering filing such a lawsuit, you should consult an attorney familiar with PSA enforcement issues.

### **Buyer's Failure to Perform Other Contract Promises**

If the buyer fails to perform any other contract promise, first look to see what the contract says about the situation. If it says nothing, or is unclear, you may be able to:

- Sue the buyer for money damages, if you have been financially harmed.<sup>51</sup>
- Make a claim under the applicable state's unfair and deceptive trade practices law.

If you sell fruit, vegetables, or other produce, you could file a PACA disciplinary complaint (non-monetary) against the buyer within two years of the breach, but you would not recover any money damages from a disciplinary complaint.<sup>52</sup> Instead, you can request that USDA take disciplinary action against a buyer, including assessing fines, issuing warning letters, or suspending/revoking a buyer's PACA license. See pages 12–10 and 12–11 of this chapter for more information on PACA complaints.

If you raise and/or sell livestock, swine, or poultry, you could have a claim against the buyer under the PSA if you could prove that the failure to perform under the contract amounted to an unfair, unjustly discriminatory, deceptive, price manipulative, or trade-restraining

practice.<sup>53</sup> As discussed above, recent court decisions have made such claims much more difficult. If you are considering filing such a lawsuit, you should consult with an attorney familiar with these PSA enforcement issues.

## **Buyer Goes Out of Business or Is in Bankruptcy**

### **Buyer Goes Out of Business**

If the buyer goes out of business, the terms of your contract and state law will control what happens to your contract relationship. Thus, if the buyer goes out of business, or otherwise becomes insolvent, be sure to check what the contract says about the situation. The buyer's insolvency may also trigger certain state law-related outcomes; for example, you may be able to:

- Withhold or stop deliveries, unless the buyer will pay with cash.<sup>54</sup>
- Reclaim delivered products if the buyer has received the products on credit while insolvent. To reclaim, you must demand reclamation within 10 days after the buyer received the goods. Also, if you reclaim the products, you cannot sue the buyer for damages related to those products.<sup>55</sup>

The sections above on buyer's failure to pay in full and buyer's failure to keep other contract promises may also apply in situations when the buyer goes out of business.

You may also have the right to a state law agricultural lien against a buyer in bankruptcy for the contract price for delivered products. Consult an attorney licensed in your state for advice about state agricultural liens.

### **Buyer in Bankruptcy**

If the buyer enters bankruptcy proceedings, the federal Bankruptcy Code will control what happens to your contract relationship—with some reference to state law and the terms of your contract. Bankruptcy rules are complex and can often override the language of a contract. It is always recommended to consult a bankruptcy attorney if you are dealing with a buyer in bankruptcy.

You may also have the right to a state law agricultural lien against a buyer in bankruptcy for the contract price for delivered products. However, a state law lien may or may not have priority over the buyer's other creditors. Consult an attorney licensed in your state for advice about state agricultural liens.



If you sell fruit, vegetables, or other produce, and comply with the notice provisions required by PACA, PACA trust protection can help you if the buyer files for bankruptcy. PACA trust protection means that certain of the buyer's assets should be protected and only used to pay for the produce that the buyer purchased.<sup>56</sup> If the buyer files bankruptcy, these assets are not considered to be part of the bankruptcy estate.<sup>57</sup> They are supposed to be held in trust for the farmer until the entire purchase price has been paid.<sup>58</sup>

In order for produce farmers to benefit from the PACA trust protection, they must have complied with the notice requirements as part of the produce sale transaction (prior to the buyer filing bankruptcy). The PACA notice requirement is a written notice to the buyer of a seller's intent to preserve PACA trust benefits.<sup>59</sup> The PACA notice is often routinely included in farmers' invoices to buyers (a recommended practice).

To be effective, the PACA notice must be received by the buyer within 30 days from the date payment was due on a delivery or the date you received notice that a check from the buyer has been dishonored.<sup>60</sup> The notice must also be received prior to the buyer filing bankruptcy. For more information, see the PACA website at <http://www.ams.usda.gov/AMSV1.0/PACA> and click on "How to Preserve Trust Rights" for more information.

If you raise and/or sell livestock, swine, or poultry, the PSA provides a trust mechanism for certain unpaid livestock and poultry producers that ensures trust assets sufficient to pay the unpaid sellers remain separate from the buyer's bankruptcy estate. Keeping the trust assets separate from the estate means the trust assets cannot be used to pay the buyer's other creditors, so the unpaid livestock and poultry producers do not have to compete with the buyer's other creditors for payment.

The PSA trust mechanism requires both written notice and a court filing—generally before the buyer files bankruptcy. To benefit from the PSA trust, you must provide written notice to the packer or processor and GIPSA within 30 days of the final date for making prompt payment, or within 15 business days of being notified that a buyer's payment check was dishonored.<sup>61</sup> If you file a timely notice and a complaint in court, the court can order a packer whose average annual purchases of livestock exceed \$500,000 and a poultry processor whose average annual sales, purchases, or value of poultry raised under a growing agreement exceeds \$100,000 to hold specified property in trust for your benefit as an unpaid producer. You would then be paid from this trust without competing with the buyer's other creditors.

- *Timing of buyer's debts in bankruptcy*

Under bankruptcy law, it makes a difference when you sold your goods to the buyer and when the buyer was supposed to pay you. If the buyer was supposed to pay you a long time before the buyer files for bankruptcy, you will have an unsecured claim against the buyer's bankruptcy estate (meaning you will be one of the last in line to get paid) unless: (1) you have preserved your PACA or PSA rights as discussed above; or (2) you have perfected a statutory lien against livestock delivered to the buyer (if applicable).

If you sold your goods shortly before the bankruptcy filing, your claim may be categorized as a priority claim under § 507 of the Bankruptcy Code. This section provides some priority to debts for sellers of products that were delivered in the ordinary course of business to the buyer within 20 days before the petition was filed.<sup>62</sup> This means that, if there is money available, you could be paid before the buyer's general unsecured creditors—but after the secured creditors.<sup>63</sup>

If you continue to sell your goods to the buyer after it has filed bankruptcy, you should be certain that the sale is authorized under the Bankruptcy Code. In some cases, it may have to be approved by the bankruptcy court, and the buyer will need to reaffirm your contract. In this case, however, payment to you should be treated as a priority expense, and you will be paid before almost all others.

Again, bankruptcy law is extremely complex. Be sure to consult a bankruptcy attorney if you are dealing with a buyer who has become insolvent or filed for bankruptcy.

## ORGANIC FARMER BREACHES

### Failure to Deliver

If you fail to deliver as promised in a contract, first look to see what the contract says about the situation. If it says nothing, or is unclear, the buyer may be able to:

- Recover any money already paid to you under the contract.<sup>64</sup>
- Deduct any costs the buyer incurs due to your lack of delivery from any other payments owed to you under the same contract.<sup>65</sup>
- Cancel the contract.<sup>66</sup>
- Buy similar goods from another farmer. The legal term for this is “cover.”<sup>67</sup>
- Sue you for damages. Damages could be measured in two ways, based on whether the buyer buys replacement products:
  - (1) If the buyer does cover, any amount the buyer had to pay for the replacement products above the contract price, plus incidental or consequential damages (defined below), minus any savings realized from your failure to deliver.<sup>68</sup>
  - (2) If the buyer does not cover, the difference between the contract price and the organic market price, plus incidental or consequential damages, minus any savings.<sup>69</sup>
- Take the contracted goods from you (assuming you have them), if they are unique or the buyer cannot cover.<sup>70</sup>

A buyer’s incidental damages include commercially reasonable expenses in connection with buying replacement products, and any other reasonable expenses resulting from your breach.<sup>71</sup>

A buyer’s consequential damages include any financial loss resulting from not receiving products that meet the buyer’s particular requirements, if the farmer knew about the requirements and there are no replacement products available that satisfy the requirements.<sup>72</sup>

You may have a defense to a failure-to-deliver breach if it is commercially impracticable for you to deliver. This could happen if the products are destroyed without the fault of either party before the risk of loss passes to the buyer, or if something happens that negates a basic assumption upon

which the contract was made.<sup>73</sup> Commercial impracticability generally means something that could not have been foreseen at the time the contract was signed, and generally does not include price fluctuations. Examples of commercial impracticability include war, embargo, crop failures, and failure of a major source of necessary supplies.

### **Failure to Meet Contract Quality Standards**

If you are unable to deliver products that meet the buyer's quality standards, first look to see what the contract says about this situation. If it says nothing, or is unclear, the buyer may be able to:

- Reject some or all of the products (within a reasonable time).<sup>74</sup>
- Recover any money already paid to you under the contract.<sup>75</sup>
- Deduct any damages incurred due to your failure to meet the quality standards from any payments owed to you under the same contract.<sup>76</sup>
- Cancel the contract.<sup>77</sup>
- Reject the products, buy similar products from another farmer (cover), and sue you for any extra amount the buyer had to pay above the contract price, plus incidental or consequential damages (defined on the previous page), minus any savings.<sup>78</sup>
- Accept the lower-quality goods, and dock or sue you for the difference between the value of the goods accepted and the value they would have had if they had met quality standards, plus any incidental or consequential damages.<sup>79</sup>
- Sell lower-quality goods in the buyer's possession, if at least partially paid for, to cover the buyer's costs. The buyer can do this without technically "accepting" the goods under the contract.<sup>80</sup>
- Take the contracted goods from you (assuming you have them), if they are unique or the buyer cannot cover, and pay you a reduced amount based on the lower quality.<sup>81</sup>

Your contract may set out alternative remedies to the options listed here. Also, whether or not it is set out in the contract, you may be able to provide the buyer with substitute products that do meet the quality standards (assuming you have them) if you notify the buyer of your intent to do so, and either: (1) the contract time has not yet expired; or (2) you had reasonable grounds to believe that the original products would be acceptable and you deliver substitute products meeting the quality standards within a reasonable time.<sup>82</sup> To substitute products, you would

likely have to either provide another portion of your crop that meets the contract quality standards (including proof of organic certification) or purchase suitable commodities on the spot market.

If the buyer rejects your products, it may have a duty to care for them long enough to permit you to remove them. If you have no agent or place of business at the rejection site, the buyer may be required to follow your reasonable instructions for transferring or disposing of the products. If you fail to give instructions, the buyer may be further required to make reasonable efforts to sell the goods for your account if they are perishable or threaten to quickly decline in value. You would likely be required to compensate the buyer for all of these efforts.<sup>83</sup>

### **Farmer's Repudiation**

If, for some reason, you need or want to repudiate the contract (that is, tell the buyer, before delivering products, that you will not be fulfilling your contract promises), be sure to check what the contract says about repudiation. You can repudiate with respect to all or a portion of the products under contract. If the contract says nothing about repudiation, or is unclear, the buyer may be able to:

- Recover any money already paid to you under the contract.<sup>84</sup>
- Deduct from any other payments owed to you under the same contract any damages the buyer incurs due to your failure to fulfill your promises.<sup>85</sup>
- Cancel the contract.<sup>86</sup>
- Buy similar goods from another farmer (cover).<sup>87</sup>
- Sue you for damages. Damages could be measured in two ways, based on whether the buyer buys replacement products:
  - (1) If the buyer does cover, any amount the buyer had to pay for the replacement products above the contract price, plus incidental or consequential damages (defined on page 12–25 of this chapter), minus any savings realized from your repudiation.<sup>88</sup>
  - (2) If the buyer does not cover, the difference between the contract price and the organic market price, plus incidental or consequential damages, minus any savings.<sup>89</sup>
- Take the contracted goods from you (assuming you have them), if they are unique or the buyer cannot cover, and pay you the

contract price less any consequential or incidental damages your repudiation caused the buyer.<sup>90</sup>

### **Farmer's Failure to Perform Other Contract Promises**

If you are unable to perform one or more of your contract duties other than delivery of acceptable products, look to see what the contract says about the situation. If it says nothing, or is unclear, the buyer may be able to:

- Recover in any manner that is reasonable.<sup>91</sup> This could include suing you for money damages or asking a court to either stop you from doing something or force you to do something (by getting an injunction against you).

You may have a defense to your failure to perform certain contract promises. For example, some state laws and the federal Packers and Stockyards Act nullify some types of contract provisions (for example, broad confidentiality provisions). If you breach an organic contract and it becomes clear the buyer plans to take action against you, consult an attorney licensed to practice in your state to see what defenses you might have under state law or otherwise.

### **Farmer Files For Bankruptcy**

If your farm is experiencing financial distress, it is important to consider whether or not there are bankruptcy options that may help to restructure or reduce farm debts. For example, Chapter 12 of the Bankruptcy Code provides special reorganization options for family farmers. Careful pre-bankruptcy planning may be critical to the success of any bankruptcy case and can help manage contract obligations.

As discussed above, bankruptcy rules are complex and can override contract language. Farmers should consult a bankruptcy attorney familiar with farm bankruptcy (commonly referred to as "Chapter 12" bankruptcy) before a debt situation becomes too severe.

**CHAPTER 12 — ENDNOTES**

- <sup>1</sup> Minn. Stat. § 17.710 (2012).
- <sup>2</sup> 7 U.S.C. §§ 499a-499s. See also U.S. Department of Agriculture PACA website at [www.ams.usda.gov/PACA](http://www.ams.usda.gov/PACA) and the National Agricultural Law Center PACA Reading Room at <http://www.nationalaglawcenter.org/assets/overviews/perishablecommodities.html>.
- <sup>3</sup> See generally 7 C.F.R. § 46.2(aa) (2012).
- <sup>4</sup> In re Craig-Ann Hunts Point Corporation, 50 Agric. Dec. 1850 (U.S.D.A. 1991); In re Baltimore Tomato Company, Inc., 39 Agric. Dec. 412 (U.S.D.A. 1980). Farmers should consult an attorney licensed to practice in their state about how partial payment might affect any related state law claims.
- <sup>5</sup> See 7 U.S.C. §§ 499e(a), 499f(a) (2012); 7 C.F.R. §§ 47.2, 47.3 (2012).
- <sup>6</sup> See 7 U.S.C. §§ 499c, 499d, 499f, 499h, 499i, 499m (2012); 7 C.F.R. § 46.45 (2012).
- <sup>7</sup> 7 U.S.C. §§ 181-231 (2012).
- <sup>8</sup> The Packers and Stockyards Act (PSA) includes specific regulations for livestock, poultry and swine producers.

For livestock and poultry producers who do business with packers and processors covered by the PSA, the PSA rules also include detailed provisions addressing such matters as: (1) setting a deadline for prompt payment for cash sales and under production contract growing arrangements, 9 C.F.R. § 201.43 (2012); (2) requiring the weighing of livestock and poultry delivered for slaughter and of any feed provided by a packer or processor, 9 C.F.R. §§ 201.55, 201.108-1, 201.82 (2012); and (3) requiring explicit contract language allowing producers to choose not to be covered by an arbitration provision in the contract and setting criteria that the U.S. Department of Agriculture (USDA) will consider when determining whether an arbitration provision in a contract violates the PSA, 9 C.F.R. § 201.218 (2012).

For growers raising swine or poultry under production contract growing arrangements, the PSA rules also establish criteria that USDA will use when determining whether a swine contractor or poultry processor has violated the PSA by: (1) requiring the producer to make additional capital investments in equipment or facilities during the life of the growing arrangement, 9 C.F.R. § 201.216 (2012); or (2) failing to give the producer a reasonable time to correct a breach of contract that might lead to termination of that contract, 9 C.F.R. § 201.217 (2012).

Poultry processing companies covered by the PSA must also: (1) give the producer the contract language at the same time specifications for the poultry houses are given; (2) allow the producer to discuss offered contract provisions with state or federal agency staff, family members, financial and legal advisors, lenders, and other producers raising birds for the same processor; (3) give the grower a written contract that clearly spells out specified provisions, including those related to the duration of the contract, all payment information, and performance or improvement plans; (4) include in the settlement sheet information that explains how the producer's pay on each

flock was calculated; and (5) provide written notice of contract termination, 9 C.F.R. § 201.100 (2012).

The PSA rules also establish criteria that USDA will use when determining whether a processor has given a poultry producer reasonable notice before suspending delivery of birds, 9 C.F.R. § 201.215 (2012).

- <sup>9</sup> The Packers and Stockyards Act uses the term “live poultry dealer” to refer to companies that either purchase poultry for slaughter or enter into production contracts with producers to raise birds that the company owns. This guide uses the term “poultry processor” instead of “live poultry dealer.”
- <sup>10</sup> 7 U.S.C. § 192 (2012).
- <sup>11</sup> See, for example, *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005), cert. denied, 126 S.Ct. 1619 (2006) (holding that “unfair” practices proscribed by the Packers and Stockyards Act (PSA) are those that do or are likely to adversely affect competition); *Adkins v. Cagle Foods JV, LLC*, 411 F.3d 1320, 1326-27 (11th Cir. 2005) (affirming summary judgment for processor where producers did not produce sufficient evidence for the PSA claim to go to the jury); *Mims v. Cagle Foods, JV, LLC*, 148 Fed. Appx. 762, 767-69 (11th Cir. 2005) (same); *Wheeler v. Cagle Foods JV, LLC*, 148 Fed. Appx. 760, 762 (11th Cir. 2005) (same); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005), cert. denied, 126 S.Ct. 752 (holding that to succeed on a claim under the PSA, a plaintiff must show that the defendant's unfair, discriminatory, or deceptive practice does or is likely to adversely affect competition).
- <sup>12</sup> In this discussion of the Packers and Stockyards Act, this guide uses the term “grower” to refer to those who raise poultry or swine owned by a poultry processor or swine contractor under what is referred to as a growing arrangement or production contract.
- <sup>13</sup> 9 C.F.R. §§ 201.27-201.42 (2012).
- <sup>14</sup> 7 U.S.C. §§ 2301-2306 (2012).
- <sup>15</sup> See, for example, Testimony of Steven Etko, Submitted to U.S. Senate Committee on Agriculture, Nutrition and Forestry, 2012 Farm Bill Field Hearing (May 31, 2011), available at [www.nationalorganiccoalition.org/policycomments/NOC%20Testimony%202012%20Farm%20Bill%20Field%20Hearing,%20Lansing,%20MI.pdf](http://www.nationalorganiccoalition.org/policycomments/NOC%20Testimony%202012%20Farm%20Bill%20Field%20Hearing,%20Lansing,%20MI.pdf).
- <sup>16</sup> See, for example, Rural Advancement Foundation International-USA, *Contract Agriculture Policy Recommendations* (December 2008), available at <http://www.rafiusa.org/programs/contractag/transition.html> and [http://www.rafiusa.org/docs/ag\\_fair\\_practices\\_act.pdf](http://www.rafiusa.org/docs/ag_fair_practices_act.pdf).
- <sup>17</sup> For a detailed overview of state laws related to agricultural production contracts, see Alison Peck, *State Regulation of Production Contracts* (The National Agricultural Law Center, May 2006), available at [http://www.nationalaglawcenter.org/assets/articles/peck\\_contractregulation.pdf](http://www.nationalaglawcenter.org/assets/articles/peck_contractregulation.pdf). Because the laws may have changed since the publication of this article, consult an attorney or check the individual state statutes and case law for the most up-to-date information.
- <sup>18</sup> See Arkansas Livestock and Poultry Contract Protection Act, Ark. Code Ann. § 2-32-201 (2012).



- <sup>19</sup> See Ga. Code Ann. §§ 2-22-1 to 2-22-5 (2012).
- <sup>20</sup> See Kan. Stat. Ann. §§ 16-1501 to 16-1506 (2012) (swine); Kan. Stat. Ann. § 16-1701 (2012) (poultry).
- <sup>21</sup> See Illinois Agricultural Production Contract Code, 505 Ill. Comp. Stat. §§ 17/1-17/99 (2012); see also Office of the Attorney General for the State of Illinois, *Agricultural Production Contract Code and Guidelines* (2005), available at <http://illinoisattorneygeneral.gov/environment/agprodguide.pdf>.
- <sup>22</sup> See Iowa Code Ann. §§ 202.1-202.5; 714.8; 714.11; 579B.1-579B.7; 654B.1-654B.11 (2012).
- <sup>23</sup> See Minn. Stat. §§ 17.90-17.98 (2012); see also Minnesota Wholesale Produce Dealers Act, Minn. Stat. §§ 27.001-27.20 (2012).
- <sup>24</sup> See Wis. Admin. Code (Agriculture, Trade, & Consumer Protection (ATCP)) §§ 101.01-101.07 (2012); Wis. Stat. § 100.04 (2012).
- <sup>25</sup> See Cal. Food & Agric. Code §§ 55631-55635 (2012) (upon delivery, producer lien attaches to all farm products in possession of processor, and has priority over most other liens).
- <sup>26</sup> Minnesota Wholesale Produce Dealers Act, Minn. Stat. §§ 27.001-27.20 (2012).
- <sup>27</sup> See, for example, U.C.C. § 2-719, comment 1 (1977) (“parties are left free to shape their [own] remedies”).
- <sup>28</sup> See U.C.C. §§ 2-703(a), (b), 2-705 (1977).
- <sup>29</sup> See U.C.C. § 2-703(f) (1977).
- <sup>30</sup> See U.C.C. §§ 2-703(d), 2-706 (1977).
- <sup>31</sup> See U.C.C. §§ 2-703(d), (e), 2-706 (1977).
- <sup>32</sup> See U.C.C. §§ 2-703(e), 2-708(1) (1977).
- <sup>33</sup> See U.C.C. §§ 2-703(e), 2-708(2) (1977).
- <sup>34</sup> See U.C.C. § 2-710 (1977).
- <sup>35</sup> See 7 U.S.C. §§ 209(a), 208(b) (2012).
- <sup>36</sup> See U.C.C. §§ 2-703(a), (b), 2-705 (1977).
- <sup>37</sup> See U.C.C. § 2-703(f) (1977).
- <sup>38</sup> See U.C.C. §§ 2-703(d), 2-706 (1977).
- <sup>39</sup> See U.C.C. §§ 2-703(d), 2-706 (1977).
- <sup>40</sup> See U.C.C. §§ 2-703 (e), 2-709 comment 2 (1977).
- <sup>41</sup> See, for example, Cal. Food & Agric. Code §§ 55631-55634 (2012); Iowa Code § 579B.1-579B.7 (2012).
- <sup>42</sup> See 7 U.S.C. §§ 196, 197 (2012).
- <sup>43</sup> See U.C.C. §§ 2-703(a), (b), 2-705 (1977).
- <sup>44</sup> See U.C.C. § 2-703(f) (1977).

- <sup>45</sup> See U.C.C. §§ 2-703(d), 2-706 (1977).
- <sup>46</sup> See U.C.C. §§ 2-703(d), 2-706 (1977).
- <sup>47</sup> See U.C.C. §§ 2-703(e), 2-708(1) (1977).
- <sup>48</sup> See U.C.C. §§ 2-703(e), 2-708(2) (1977).
- <sup>49</sup> See 7 U.S.C. §§ 499e(a), 499f(a) (2012); 7 C.F.R. §§ 47.2, 47.3 (2012).
- <sup>50</sup> See 7 U.S.C. § 192 (2012).
- <sup>51</sup> You would sue the buyer under common law contract principles, and could also have a remedy for incidental damages under U.C.C. § 2-715 (1977).
- <sup>52</sup> See 7 U.S.C. §§ 499c, 499d, 499f, 499h, 499i, 499m (2012); 7 C.F.R. § 46.45 (2012).
- <sup>53</sup> See 7 U.S.C. § 192 (2012).
- <sup>54</sup> See U.C.C. § 2-702(1) (1977).
- <sup>55</sup> See U.C.C. § 2-702(2), (3) (1977).
- <sup>56</sup> The PACA trust 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 debt. See *Continental Fruit Co. v. Gatzliolis & Co.*, 774 F. Supp. 449, 453-54 (N.D. Ill. 1991) (holding that PACA seller's interest trumps nearly all others). See also *In re Kornblum & Co., Inc.*, 81 F. 3d 280, 286 (2nd Cir. 1996) (holding all assets of produce buyer which are derivatives or proceeds of produce form single PACA trust which exists for benefit of all produce sellers and which continues in existence until all of outstanding beneficiaries have been paid in full).
- <sup>57</sup> See *In re Al Nagelberg & Co.*, 84 B.R. 19, 21 (Bankr. S.D.N.Y. 1988) (holding that assets held in trust under PACA are not part of bankrupt debtor's estate).
- <sup>58</sup> If there has been wrongful diversion of trust assets, and if those assets can be traced into another asset held by debtor, the new asset may be impressed with a constructive trust under ordinary trust principles, even though it might be impossible to recover trust monies paid for such asset from bona fide purchaser for value. In *re Al Nagelberg & Co.*, 84 B.R. 19, 21-22 (Bankr. S.D.N.Y. 1988) (holding that where debtor, wholesale receiver, and seller of perishable foods utilized proceeds of fruits and vegetables subject to PACA trust to purchase three stores at time when it had unpaid vendors, U.S. Department of Agriculture may impose trust upon proceeds of sale of such stores).
- <sup>59</sup> See 7 U.S.C. § 499e(c); 7 C.F.R. § 46.46 (2012).
- <sup>60</sup> See 7 U.S.C. § 499e(c) (2012); 7 C.F.R. § 46.46 (2012).
- <sup>61</sup> See 7 U.S.C. §§ 196, 197 (2012).
- <sup>62</sup> See 11 U.S.C. § 503(b)(9) (2012).
- <sup>63</sup> See 11 U.S.C. § 507(a)(2) (2012).
- <sup>64</sup> See U.C.C. § 2-711(1) (1977).
- <sup>65</sup> See U.C.C. § 2-717 (1977).

- <sup>66</sup> See U.C.C. § 2-711(1) (1977).
- <sup>67</sup> See U.C.C. § 2-711(1)(a) (1977).
- <sup>68</sup> See U.C.C. §§ 2-711(1)(a), 2-712 (1977).
- <sup>69</sup> See U.C.C. §§ 2-711(1)(b), 2-713 and comment 5 (1977).
- <sup>70</sup> See U.C.C. §§ 2-711(2)(b), 2-716 (1977).
- <sup>71</sup> See U.C.C. § 2-715(1) (1977).
- <sup>72</sup> See U.C.C. § 2-715(2) (1977). The law does not currently recognize consequential damages for sellers. This is the case under the unamended version of Article 2 that has been adopted in every state but Louisiana. Under the revised Article 2 proposed in 2003, sellers would also be eligible for consequential damages. However, revised Article 2 has not been adopted in any state.
- <sup>73</sup> See U.C.C. §§ 2-613, 2-614, 2-615 (1977).
- <sup>74</sup> See U.C.C. §§ 2-601, 2-602 (1977).
- <sup>75</sup> See U.C.C. § 2-711(1) (1977).
- <sup>76</sup> See U.C.C. § 2-717 (1977).
- <sup>77</sup> See U.C.C. § 2-711(1) (1977).
- <sup>78</sup> See U.C.C. §§ 2-711(1)(a), 2-712 (1977).
- <sup>79</sup> See U.C.C. § 2-714 (1977).
- <sup>80</sup> See U.C.C. §§ 2-711(3) and comment 2, 2-706 (1977).
- <sup>81</sup> See U.C.C. §§ 2-711(2)(b), 2-716 (1977).
- <sup>82</sup> See U.C.C. § 2-508 (1977).
- <sup>83</sup> See U.C.C. §§ 2-602, 2-603 (1977).
- <sup>84</sup> See U.C.C. § 2-711(1) (1977).
- <sup>85</sup> See U.C.C. § 2-717 (1977).
- <sup>86</sup> See U.C.C. § 2-711(1) (1977).
- <sup>87</sup> See U.C.C. § 2-711(1)(a) (1977).
- <sup>88</sup> See U.C.C. §§ 2-711(1)(a), 2-712 (1977).
- <sup>89</sup> See U.C.C. §§ 2-711(1)(b), 2-713 and comment 5 (1977).
- <sup>90</sup> See U.C.C. §§ 2-711(2)(b), 2-716 (1977).
- <sup>91</sup> See U.C.C. § 2-714, comment 2 (1977).