



FARELLA BRAUN + MARTEL LLP

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Grape Purchase Agreements and Custom-Crush Arrangements

How to Protect Yourself In Trying Economic Times

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big firm know how + small firm know you

Overview

- Hanging Out With The “Right” Crowd
- Using Standard Contract Terms To Motivate Compliance
- Lien Rights
- Pre-Judgment Alternatives
- Bankruptcy Issues

Hanging Out With The “Right” Crowd

- Know Your Customer
 - History
 - References
 - Due Diligence
 - Communication

Using Standard Contract Terms To Motivate Compliance

- Attorneys' Fees
 - Include A Clause In Your Contract
 - Allowable As Secured (Or At Least Unsecured) Claim In Bankruptcy
 - Expand Beyond "Prevailing Party" To Include All Collection Costs/Fees, Including All Fees And Costs Incurred In Connection With Bankruptcy Proceeding

Using Standard Contract Terms To Motivate Compliance

- Finance Charges/Late Fees/Interest
 - Include A Clause
 - Can Recover Up To 1.5% Per Month Without Violating Usury Laws
 - Provides Incentive And Bargaining Chip

Using Standard Contract Terms To Motivate Compliance

- Guaranty
 - Negotiate For One, Particularly Where Buyer Has Limited Funds Or Is Small Subsidiary Of Larger Company
 - Provides Another “Pocket” To Recover And Motivates Payment
 - Creates Leverage In Negotiation
 - Permits Attachment Of Assets Beyond Grapes/Wine

Using Standard Contract Terms To Motivate Compliance

- Subordination/Waiver Of Lien Rights
 - Don't Do It Unless Absolutely Necessary
 - Get Paid Up Front As Much As Possible
 - Secure Guaranty Or Other Protection In Exchange

Lien Rights

- Producer's Lien ("Grower's Lien")
- Artisan and Services Lien
- Harvester's Lien
- Warehousemen Lien
- UCC-1 Security Interest

Lien Rights

- Producer's Lien ("Grower's Lien") -- Section 55631 of Food & Ag Code
 - Granted To "Producers" (Growers) Selling "Farm Products" (Grapes) To "Processors" (Wineries)
 - Priority Over All But Wage/Hour Liens Of Laborers And Warehousmen Liens
 - Attaches To Grapes And Resulting Wine Without Segregation
 - Extends to Grapes And Resulting Wine In Possession of Processor – Does This Mean Once Delivered To Custom-Crush Facility, Lien Is Lost?
 - Automatic – No Filing Or Documentation Required

Lien Rights

- Attaches Upon Delivery (Or Last Delivery If More Than One)
- May Attach To Cash Proceeds Or Receivables From Sale Of Grapes Or Wine – *Frazier Nuts*
- Must Sue To Foreclose
- No Right Of Repossession Or Self-Help
- No Notice Of Foreclosure By Lenders
- Probably Does Not Bind Bona Fide Purchaser Without Knowledge

Lien Rights

- Artisan And Service Lien – Civil Code § 3051-52
 - Applies To Any Person With Possession Of Article Of Personal Property Who Renders Service To Owner For Improvement Or Safekeeping Of Property
 - Right To Retain Until Paid
 - If In Excess Of \$200, Must Provide Owner With Notice By Personal Service Or Registered Letter – Can Do This In Contract

Lien Rights

- Artisan And Service Lien – Civil Code § 3051-52
 - If Not Paid In 10 Days, May Sell At Public Auction
 - Notice In Newspaper Or By Public Posting – No Specific Notice To Grower
 - Owner Has Right To Redeem After Sale If Lien Satisfied With Costs Of Sale Paid At 12% Interest

Lien Rights

- Interplay Of Producer's Lien And Artisan's Lien
 - By Statute, Producer's Lien Has Priority Over Artisan's Lien
 - But, No Clear Precedent
 - Producer Should Seek TRO/Injunction To Protect Interests
 - Custom-Crush Facility Should Consider Public Auction And Refusal To Release Wine Until Paid

Lien Rights

- UCC-1 Security Interest
 - What Is It?
 - Consensual Lien – Requires Agreement
 - What Does It Provide That A Producer's Lien And Artisan's Lien Don't?
 - Clearly Applies To Proceeds/AR – But May Be Subordinate To Other Lenders
 - Permits Non-Judicial Foreclosure
 - Permits Repossession Without Breach of Peace– But Be Aware Of Licensing Restrictions
 - Insures Notice From Other Foreclosing Lenders – Allows For Challenge To Commercial Reasonableness
 - Insures Others Have Notice Of Interest
 - How Do You Create One And Perfect It?
 - Contractual Language
 - Filing Of UCC-1 Financing Statement

Pre-Judgment Remedies

- Demand For Adequate Assurance Under Commercial Code § 2609
 - Concern/Insecurity Must Be Reasonable
 - 30 Days To Provide Adequate Assurance
 - If Adequate Assurance Not Provided, Contract Deemed Repudiated
 - Potential Risks If Wrong And Practical Considerations

Pre-Judgment Remedies

- Attachment
 - Lawsuit Required
 - Permits Attachment Of Assets Over Which No Security Interest Exists
 - Provides Substantial Leverage
 - Small Bond Required
 - Requirements Simple To Meet
 - Contract Based Claim
 - Probability of Success
 - Over \$500 Liquidated Or Reasonable Certain

Perishable Agricultural Commodities Act (“PACA”)

- Produce Buyer/Seller Licensing
- Statutory Trust For Payment
- Prompt Payment Default – 10 Days
- Agreed Payment Terms Must Not Be More Than 30 Days
- Preserve Rights By Notice Within 30 Days Or With Invoice Notice

Bankruptcy Issues

- Statutory Liens Enforceable
- Automatic Stay Applies
- Rejection Of Executory Agreements Permitted – Leaving Claim For Damages
- Possibility of Cram Down In Reorganization
- Establishment Of Grower's Committee In Winery Bankruptcy – Agree Up Front?

Questions

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