The National Agricultural Law Center

A research project from The National Center for Agricultural Law Research and Information of the University of Arkansas • NatAgLaw@uark.edu • (479) 575-7646 • www.NationalAgLawCenter.org

---

An Agricultural Law Research Article

Perishable Agricultural Commodities Act Round-Up: A Review of Recent Cases

by

Harrison M. Pittman

The National Agricultural Law Center
University of Arkansas
1 University of Arkansas
Fayetteville, AR 72701

December 2003

Perishable Agricultural Commodities Act Round-Up: A Review of Recent Cases

Harrison M. Pittman
Staff Attorney

Introduction

The Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499t, was enacted in 1930 "for the purpose of regulating the interstate business of shipping and handling perishable agricultural commodities such as fresh fruit and vegetables" and to "provide a practical remedy to small farmers and growers . . . vulnerable to sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities." *George Steinberg & Son, Inc. v. Butz,* 491 F.2d 988, 990 (2d. Cir. 1974); *Chidsey v. Geurin,* 443 F.2d 584, 587 (6th Cir. 1971). PACA is important legislation for individuals and entities involved in the buying and selling of perishable agricultural commodities.

Numerous legal issues arise in court actions brought pursuant to PACA. These issues include whether lending institutions are required to disgorge funds they receive from a buyer of perishable agricultural commodities, whether a produce supplier holds a valid claim to the assets of a PACA statutory trust, whether a produce buyer's or seller's conduct violates certain PACA requirements, and whether the officers and directors of a corporation that purchased perishable agricultural commodities could be held personally liable for the corporation's failure to pay the produce seller. Litigation dealing with these issues and others are addressed in this article, which summarizes significant cases brought pursuant to PACA that were issued between January 1, 2002, and June 1, 2003.

PACA Beneficiaries Ordered to Disgorge Funds; Prejudgment Interest Awarded on Amount Disgorged

"Fresh Kist I"

In *Fresh Kist Produce, L.L.C. v. Choi Corp., Inc.*, 223 F.Supp.2d 1 (D.D.C. 2002), Fresh Kist Produce, L.L.C. (Fresh Kist"), a produce seller, brought an action against three other produce sellers, J.C. Watson, Norfolk Banana, and Berkley Tomato (collectively "seller defendants") seeking to collect funds paid to the defendants by another defendant, Washington Wholesale Produce Company a/k/a Choi Corporation ("Washington Produce"), after Washington Produce had become insolvent. *See Fresh Kist*, 223 F.Supp.2d at 4-5. The seller defendants each supplied Washington Produce with perishable agricultural commodities. *See id.* Washington Produce defaulted on the payments it owed to all of its produce suppliers, including the seller defendants. *See id.*

On June 5, 2001, one of the seller defendants, J.C. Watson ("Watson") brought an action against Washington Produce for breach of contract and breach of trust, alleging that he was owed $70,946.90 for produce delivered to Washington Produce. *See id.* Washington Produce subsequently agreed to tender weekly payments of $4,729.80 to Watson until the amount owed was paid, but defaulted after making $59,189.40 in payments. *See id.* On August 6, 2001, Watson filed an amended complaint demanding that Washington Produce pay the balance of the amount owed. *See id.* The court resolved this conflict by ordering Washington Produce to make the remaining payments to Watson. *See id.*

On August 28, 2001, Fresh Kist filed its action against the seller defendants and Washington Produce seeking "(1) a temporary restraining order and (2) [an] entry of an order establishing a non-party PACA claims procedure." *Id.* at 5. The court issued a temporary restraining order that "effectively froze" Washington Produce's PACA trust assets and required Washington Produce to pay $11,757.50 into the court's registry until the action was resolved. *See id.*

On September 24, 2001, the court issued "an order establishing a PACA trust and a claims procedure for the beneficiaries ("PACA Claims Order") pursuant to which a number of companies who sold produce to [Washington Produce] for which they had not received payment filed PACA claims against [Washington Produce]." *Id.* Fresh Kist and Watson then filed motions for summary judgment. *See id.*

Fresh Kist asserted that the seller defendants violated PACA when they received funds from Washington Produce after they had knowledge that Washington Produce was insolvent. *See id*. Fresh Kist argued that the court should require the $59,189.40 received by the seller defendants from Washington Produce to be disgorged so that they could be distributed pro rata to all beneficiaries of the statutory trust. *See id.* Fresh Kist also asserted that Watson knew of Washington Produce's insolvency on June 5, 2001, because Watson stated in his complaint against Washington Produce that Washington Produce was insolvent. *See id.* (citation omitted). Finally, Fresh Kist argued that the payments made by Washington Produce to Watson "depleted the trust assets to such an extent that other claimants will receive nothing, thereby making those payments to [Watson] a breach of the trust." *Id.* (citation omitted).

Watson argued that Fresh Kist's claims were not supported by the law because he did not dissipate the trust and that Fresh Kist had the burden of proving that the funds received by Watson derived from the sale of produce. *See id.* He also argued that he could not be forced to disgorge the funds he received from Washington Produce because he was a bona fide purchaser of the trust assets. *See id.*

Brief Summary of District Court's Holdings

The court granted partial summary judgment for Fresh Kist. *See id.* at 5-14. It granted Fresh Kist's request that $59,189.40 be disgorged from Watson. *See id.* at 5. It rejected Fresh Kist's arguments that argued that Watson lost its PACA trust beneficiary status and that Berkley and Norfolk were required to disgorge the funds they received from Washington Produce. *See id.* The court also denied Watson's motion for summary judgment. *See id.* The court rejected Watson's assertions that he did not breach or dissipate the PACA trust, that the burden was on Fresh Kist to prove that the funds paid to Watson by Washington Produce derived from the sale of produce, and that Watson was a bona fide purchaser of the PACA trust assets. *See id.* at 11-14.

Fresh Kist's Argument that Watson Disgorge Trust Funds

In addressing Fresh Kist's argument that Watson was required to disgorge the trust funds that he received from Washington Produce for a pro rata distribution among the PACA beneficiaries, the court explained that PACA trusts are governed by general trust principles and that "[u]nder trust law, co-beneficiaries are in a fiduciary relationship with each other so that one beneficiary may not secretly secure for himself a special advantage in the trust administration." *Id.* at 8. (citing *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1067 (2d Cir. 1995) (citation omitted)). The court also explained that the assets of a PACA trust are to be distributed among its beneficiaries in a pro rata fashion when the PACA trust becomes insolvent. *Id.* (citing *In re Milton Poulos, Inc*., 947 F.2d 1351, 1352 (9th Cir. 1991)).

The court relied on *Finest Fruits, Inc. v. Korean Produce Corp*., No. 87 CIV. 6579, 1998 WL 96028 (S.D.N.Y. Sept. 6, 1998), and *Milton Poulos*, to determine whether Watson was required to disgorge the trust funds. *See id.* In *Finest Fruits*, a beneficiary of a PACA trust "attempted to claim the trust benefits of two co-beneficiaries who filed complaints after the plaintiff on a 'first in time, first in right' theory." *Id.* (citation omitted). In that case, the district court explained that "the purpose of PACA is to protect all unpaid sellers or suppliers of agricultural commodities and Congress intended that trustees distribute assets pro rata among beneficiaries when the trust amount is insufficient to pay all unpaid sellers." *Id.* (citing *Finest Fruits*, 1998 WL 96028, at *2-3). It added that "'[a] race to the courthouse with winner take all does not seem to accord with this purpose.'" *Id.* (quoting *Finest Fruits*, 1998 WL 96028, at *2-3) (citing 49 Fed. Reg. 45735-36 (1984)). The court also noted the holding in *Milton Poulos* held "that a PACA beneficiary's failure to participate in a bankruptcy proceeding did not preclude the beneficiary's priority above other creditors." *Id.* (citing *Milton Poulos*, 947 F.2d at 1353). The court concluded that *Finest Fruits* and *Milton Poulos* "indicate that a PACA trust beneficiary who has perfected his claim is entitled to a pro rata distribution of an insolvent trust regardless of whether the PACA trust beneficiary arrived at the courthouse before or after a co-beneficiary." *Id.*

Moreover, the court noted that in *Frio Ice, S.A. v. Sunfruit, Inc*., 918 F.2d 154 (11th Cir. 1990), the Eleventh Circuit stated that

> [u]pon a showing that the [PACA] trust is being dissipated or threatened with dissipation, a district court should require the PACA debtor to escrow its proceeds from produce sales, identify its receivables, and inventory its assets. It should then require the PACA debtor to separate and maintain these produce-related assets as the PACA trust for the benefit of all unpaid sellers having a bona fide claim. Each beneficiary would then be entitled to its pro rata share.

Id. at 9 (quoting *Frio Ice*, 918 F.2d at 159) (citing 7 U.S.C. § 499e(c)(3)). In the present case the court stated that "allowing one beneficiary to obtain a judgment for greater than its pro rata share of an insolvent trust would be contrary to both the duty of co-beneficiaries in trust law and judicial interpretation of PACA." *Id.*

The court noted that Watson knew–evidenced by his June 5, 2001, complaint against Washington Produce–that Washington Produce was insolvent at the time it sought and accepted funds from the statutory trust. *See id.* Watson's complaint stated, in relevant part, that "'[p]laintiff alleges that Defendants have failed to maintain the trust assets and keep them available . . . in that Defendant [Washington Produce] is now insolvent, or is on the verge of insolvency.'" *Id.* (citation omitted) (emphasis supplied).

The court concluded that by June 5, 2001, Watson knew that Washington Produce was insolvent, and Watson nevertheless enforced its PACA beneficiary rights by receiving money from Washington Produce after June 5, 2001. *See id.* at 10-11 (citation omitted). Thus, the court ordered Watson to disgorge the $59,189.40 he received "on or after June 5, 2001 for pro rata distribution among all of [Washington Produce's] PACA creditors." *Id.* The court emphasized that it intended its holding to be interpreted narrowly and to only apply "to situations in which a beneficiary knows that a PACA trustee is insolvent or nearly so and the remedies prescribed by the court reflect the rights among beneficiaries that already exist when a trustee becomes bankrupt." *Id.*

<u>Watson's Argument that He Was a Bona Fide Purchaser</u>

Addressing Watson's argument that even if Fresh Kist had a valid claim to the PACA benefits that he received from Washington Produce, he was a bona fide purchaser and therefore the court could not force him to disgorge his benefits in the statutory trust, the court recognized that "[i]t is settled law that a bona fide purchaser of trust assets 'receives the assets free of any claim by the trust beneficiaries.'" *Id.* (quoting *Endico Potatoes*, 67 F.3d at 1067). It also explained that some PACA statutory trust cases involving the issue of a bona fide purchaser have held that the PACA creditors could not force the bona fide purchaser to disgorge proceeds from the receivables. *Id.* (citing *Boulder Fruit*, 251 F.3d at 1269). The court noted, however, that these cases involved disputes between bankruptcy creditors and PACA beneficiaries, whereas "the instant case involves a dispute between two beneficiaries." *Id.*

It stated that "[a] beneficiary who receives trust assets pursuant to a PACA judgment, as [Watson] did, is a beneficiary for purposes of obtaining the judgment." *Id.* (citing 7 U.S.C. § 499e). It explained that for Watson "to then become a bona fide purchaser to protect against the claims of other beneficiaries would be illogical." *Id.* "In contrast," the court concluded, "while [Watson] was entitled to payment for the commodities it provided to [Washington Produce], it obtained the assets in question *pursuant* to trust obligations and thereby dissipated the trust assets. Thus, the bona fide purchaser defense is unavailable for [Watson]." *Id.*

Watson's Argument that Fresh Kist Had Burden of Tracing Trust Assets

Next, addressing Watson's argument that Fresh Kist had the burden of proving that the funds received by Watson from Washington Produce derived from produce sales, the court stated that "[i]f a bankruptcy trustee cannot prove which of her assets derived from PACA receivables, all of her assets are treated as part of the PACA trust and applied to the claims of PACA beneficiaries prior to other creditors." *Id.* (citing *In re Lombardo Fruit & Produce Co.*, 12 F.3d 806, 809 (8th Cir. 1993) and *Sanzone-Palmisano*, 986 F.2d at 1014)). The court explained that "placing the burden of tracing on PACA beneficiaries would make recovery of benefits nearly impossible." *Id.* (citing *In re Lombardo*, 12 F.3d at 809 and *Sanzone-Palmisano*, 986 F.2d at 1014)). It also explained that "[b]ankrupt debtors must first pay PACA claims from pooled assets if they cannot prove the assets did not derive from the sale of a particular beneficiary's products. Thus, actual monies paid by a PACA debtor quite possibly may derive from sources other than the sale of the beneficiary's produce." *Id.* at 12 (citing *Sanzone-Palmisano*, 986 F.2d at 1014).

The court concluded that because the funds Watson received from Washington Produce resulted from litigation that arose pursuant to PACA, those funds necessarily constituted trust benefits. *See id.* It therefore concluded that "Fresh Kist has no burden to prove the origin of those monies and [Watson] should return $59,189.48 to the [Washington Produce] PACA trust for pro rata distribution to the PACA beneficiaries." *Id.*

Fresh Kist's Request that Norfolk and Berkley Disgorge Payments

The court determined that neither Berkley Banana or Norfolk Tomato were required to disgorge the funds "because the plaintiff has shown no evidentiary basis on which the court could find that Norfolk or Berkley knew of [Washington Produce's] insolvency." *Id.* It stated that unlike Watson's complaint against Washington Produce, neither Berkley Banana or Norfolk Tomato mentioned in their complaints that Washington Produce was insolvent. *See id.*

Fresh Kist's Argument that Watson Lost Its Rights as a PACA Beneficiary

The court also rejected Fresh Kist's assertion that Watson lost his status as a PACA beneficiary because the fifteen-week payment schedule agreed to by Watson and Washington Produce in their settlement of payment terms violated the PACA requirement that "the buyer and seller of produce agree to payment terms that do not exceed 30 thirty days." *Id.* (citing 7 C.F.R. § 46.46(e)(1)). The court concluded that the settlement agreement did not affect either Watson's or Washington Produce's rights because Watson and Washington Produce agreed to the fifteen-week payment schedule after Watson brought an action against Washington Produce. *See id.*

"Fresh Kist II"

Following entry of judgment, Fresh Kist filed a motion requesting the court to amend its judgment by ordering Watson to pay prejudgment interest on the $59,189.40 it was ordered to disgorge. *See Fresh Kist Produce, LLC v. Choi Corp., Inc.*, 251 F.Supp.2d 138 (D.D.C. 2003). Fresh Kist argued that prejudgment interest was needed to compensate PACA trust beneficiaries for the interest that would have accrued had Washington Produce promptly paid them as required by PACA. *See id.* at 140 (citation omitted). It also argued that prejudgment interest should be calculated from June 5, 2001, the date that Watson's complaint alleged that Washington Produce was insolvent, through, July 31, 2002, the date the court ordered Watson to disgorge the $59,189.40. *See id.*

The court explained that although the PACA is silent with respect to the issue of prejudgment interest, the Ninth Circuit has ruled that "district courts have the discretion to award reasonable prejudgment interest to PACA claimants when the award is needed to protect the interests of PACA claimants." *Id.* at 141 (citing *Middle Mountain*, 307 F.3d 1220, 1226 (9th Cir. 2002)). It also explained that "[c]ourts have consistently awarded pre-judgment interest to compensate . . . produce sellers where . . . produce buyers failed to make adequate payments." *Id.* (citations omitted). The court stated that to determine whether prejudgment interest should be awarded it had to consider "(1) the need to make the plaintiff whole, (2) the degree of wrongdoing on the part of the defendant, (3) the availability to the plaintiff of investment opportunities, (4) whether [the] plaintiff delayed in bringing the action, and (5) other considerations of fairness." *Id.* at 142 (citation omitted).

With respect to the first factor, the court determined that prejudgment interest was needed to make Fresh Kist whole. *See id.* It explained that while Watson had the $59,189.40, the other PACA beneficiaries were prevented from earning interest on the funds. *See id.* Not only were the other beneficiaries denied their pro rata share of the $59,189.40 improperly held by Watson, it explained, they were also denied the interest their pro rata shares would have earned had the funds remained in the statutory trust. *See id.*

The court determined that the degree of wrongdoing on Watson's part was minimal. *See id.* It noted that although Watson knew that Washington Produce was insolvent when it accepted the $59,189.40, there was no reason to believe that Watson acted in bad faith. *See id.* The court did not analyze the third factor because the record did not reflect any evidence pertaining to investment possibilities available to Fresh Kist. *See id.*

With respect to the fourth factor, the court determined that Fresh Kist did not delay in bringing its action. *See id.* It noted that Fresh Kist brought the current action less than two months after Watson's PACA violation, which was within the permissible timeframe recognized in *In re W.L. Bradley Co.*, 78 B.R. 92, 94 (Bankr. E.D. Pa. 1987). In *Bradley*, the bankruptcy court "found no inequity when the plaintiff waited eight months to file a claim under PACA." *Id.* (citing *Bradley*, 78 B.R. at 93).

Finally, the court determined that fairness required an award of prejudgment interest. *See id.* at 143. It stated that PACA was enacted "'to increase the legal protection for unpaid sellers and suppliers of perishable agricultural commodities until full payment of sums due have been received by them'" and "to remedy the failure of buyers to pay for goods and to do so in a timely manner." *Id.* (citing *Bradley*, 78 B.R. at 93). It ruled that "[a]n award of prejudgment interest effectively remedies the harm caused by payment delays by providing to the plaintiff the amount of interest it would have earned had the payment occurred without delay." *Id.*

The court concluded that Fresh Kist was "entitled to prejudgment interest from the date of the PACA violation through the date of entry of the court's judgment. [Watson] must pay interest on all funds received from [Washington Produce] on or after June 5, 2001 . . . up to July 31, 2002, . . . and shall be paid at the statutory rate" set forth in the general federal interest statute, 28 U.S.C. § 1961. *Id.* at 143-44 (citing 28 U.S.C.A. § 1961; *Morris Okum*, 814 F.Supp. at 351).

Reparations Award and Award of Attorneys' Fees and Costs Entered In Favor of Produce Seller Upheld

"Koam I"

In *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 213 F.Supp.2d 314 (S.D.N.Y. 2002), Koam Produce, Inc. ("Koam"), appealed a reparation award of $4,800.00 plus interest and costs issued by the United States Department of Agriculture in favor of Dimare Homestead, Inc. ("DiMare"). *See Koam Produce*, 213 F.Supp.2d at 317; *See also Koam Produce, Inc. v. DiMare Homestead, Inc.,* No. 01 Civ. 2494, 2002 WL 1758921, (S.D.N.Y. July 29, 2002) (unreported decision). Koam was a produce wholesaler at the Hunts Point Wholesale Produce Market ("Hunts Point"). *See Koam,* 213 F.Supp.2d at 317. Dimare also was a produce seller and supplied perishable agricultural commodities to Koam. *See id.*

The parties' dispute arose out of a three-year criminal investigation known as "Operation Forbidden Fruit," in which twenty-one individuals at Hunts Point were arrested for bribery. *See id*. Eight of those arrested were USDA inspectors and thirteen were owners and employees of several produce wholesalers that conducted business at Hunts Point. *See id.* The USDA inspectors were charged "'with accepting cash bribes in exchange for reducing the grade of the produce they inspected, which then allowed the Hunts Point companies to pay some amount less than the invoice price to their suppliers.'" *Id.* (citation omitted). One of the individuals charged with bribery, Marvin Friedman, was an employee of Koam who later pled guilty to the charges against him. *See id.*

After the arrests were made, the USDA sent letters to "members of the produce industry informing them of the indictments that had been made in connection with the scandal, its plans to improve the inspections process, and a process by which injured parties could file PACA reparations claims for damages." *Id.* at 318. DiMare filed a reparations claim, seeking recovery of $4,800.00 in "unjustified price reductions based on fraudulent certificates issued by bribed inspectors." *Id.*

The USDA hearing officer determined that "as a matter of law . . . Koam's negotiation of the adjustments, without disclosure of its involvement of the bribery of the federal inspectors, constituted a misrepresentation basic to the adjustment process, rendering the adjustments voidable because of misrepresentation and mistake." *Id.* The hearing officer also determined that "because Koam could not rely on the tainted inspection certificates, or affidavits of its employees, it could not carry its burden of showing that the quality of the tomatoes DiMare had shipped to it was inferior." *Id.* The hearing officer ordered Koam to pay the full contract price to DiMare. *See id.*

Koam filed a request with the Secretary for reconsideration of the $4,800.00 award, which was denied. *See id.* Koam appealed the Secretary's decision to the United States District Court for the Southern District of New York. *See id.* at 316.

The district court explained that pursuant to PACA § 499g(c), "such an appeal is tried *de novo* in the federal district court, in the same manner as other civil damage suits, except that the factual findings in the reparation order are prima facie evidence of the facts found." *Id.* at 317. It also explained that under the Uniform Commercial Code, when a buyer accepts goods from a seller but claims that there should be adjustments for defects in those goods, it is the buyer that has the burden of establishing the existence of defects. *See id.* at 322.

Koam asserted that in seven sales transactions between it and DiMare, none of which were at issue in this litigation, DiMare agreed to price adjustments due to defects in the delivered goods. *See id.* at 323. Koam contended that as a result of these price adjustments, the court should infer that there were "pervasive defects" in the tomatoes at issue. *See id.* The court rejected this argument because Koam failed to provide evidence that would support such an inference. *See id.* 326.

Koam also asserted that affidavits produced by two of its employees demonstrated that the tomatoes in question actually were defective, and therefore the $4,800.00 in price adjustments was legitimate. *See id.* The affidavits stated that, "[a]t no time did I or any other employee of Koam pay any money or take an action for the purpose of creating a fraudulent inspection." *Id.* The court stated that the employees' affidavits could not be relied upon because they directly contradicted the testimony that Marvin Friedman provided when he entered his guilty plea. *See id.* Friedman testified that

> [o]n approximately the dates stated in the indictment, I paid cash to an inspector of the United States Department of Agriculture. The purpose of the payments was to influence the outcome of the inspection of fresh fruit and produce conducted at [Koam] . . . . I was an employee of [Koam] at the time. I acted knowingly and intentionally and I knew that the payments were unlawful.

Id.

The court stated that the affidavits were unreliable in light of the employees' "willingness to make that broad statement under oath, when at the very least they were unaware whether it was true or false . . . [because it] bespeaks a willingness to testify to whatever they see as their employer's interest." *Id.* at 323-24.

Koam also argued that the inspections that were conducted for transactions at issue were not shown to be corrupt. *See id.* at 324. Koam asserted that "'there was no showing that the inspections in question were falsified' and point[ed] to the Judicial Officer's statement that '[t]here is no showing on this record that falsified inspections were issued as to the specific lots of tomatoes listed[.]'" *Id.* (citations omitted).

The court rejected this argument, noting, among other things, that when Friedman entered his guilty plea he stated that the "'purpose of the payments was to influence the outcome of the inspection of fresh fruit and produce conducted at [Koam] . . . .'" *Id.* It also noted that a letter sent to DiMare by the USDA contained copies of inspection certificates that the Office of Inspector General had identified as "directly correspond[ing] to bribes that were offered and accepted." *Id.*

Finally, Koam argued that because it was Friedman who offered the bribe and that Koam was merely Friedman's employer, it could not be responsible for Friedman's actions. *See id.* at 325.

"Acceptance of that proposition," the court stated, "would fly in the face of the evidence, of statute and common law, and of common sense." *Id.* It cited, among other things, PACA § 499p, which imposes liability on licensees for acts and omissions of agents. *See id.* It also cited the common law rule that a master is liable for tortious acts of his servant committed within the scope of the servant's employment. *See id.*

The court determined that "DiMare can recover the adjustments it granted to Koam in reliance on official certificates, not knowing that Koam had bribed the inspectors to falsify them." *Id.* at 326. It stated that "[a] mutual mistake of the parties, or (as here) a mistake on plaintiff's part and a fraud by defendant 'are the classic grounds for reformation of an instrument in equity.'" *Id.* (citation omitted).

The court explained that

> [w]here a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake.

Id. (quoting Restatement (Second) of Contracts § 153)).

The court determined that all of these requirements were satisfied. *See id.* It stated that DiMare did not bear the risk of mistake under § 154 "because the risk was not allocated to it by agreement of the parties, there was no occasion to contemplate the risk of bribery, and it would be unreasonable to allocate that risk to DiMare[.]" *Id.* It also stated that it was "obvious that Koam's fault caused the mistake, and enforcement of the discounts would be unconscionable." *Id.* The court therefore entered judgment in favor of DiMare for the $4,800.00 in price adjustments, together with costs, interest, and attorney's fees pursuant to PACA § 499g(c). *See id.*

"Koam II"

Dimare subsequently filed a motion to collect $73,250.00 in attorneys' fees and $7,067.67 in costs and fees, for a total of $80,317.67. *See Koam Produce, Inc. v. Dimare Homestead, Inc.*, 222 F.Supp.2d 399 (S.D.N.Y. 2002). The district court granted Dimare's motion, even though its requests for attorneys' fees, cost, and other fees totaled more than sixteen times the amount of the reparations award. *See id.* at 400-02.

The court explained that under PACA, "when a decision of the Secretary is appealed to the district court, the '[a]ppellee shall not be liable for costs in said court and if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as part of his costs.'" *Id.* at 400-01 (quoting 7 U.S.C. § 499g(c)). It also explained that "[i]f the appellee prevails, an award of attorney's fees is mandatory; it is not within the discretion of the district court." *Id.* at 401 (citing *Robinson Farms Co. v. D'Acquisto*, 962 F.2d 680, 684 (7th Cir. 1992) and *Tray-Wrap, Inc. v. Meyer Tomatoes*, No. 90 Civ. 7688(DLC), 1996 WL 54321, at *1 (S.D.N.Y. Feb. 9, 1996)).

Koam asserted that § 499g(c) was "unconstitutional . . . because it allows for fees to an appellee but not to an appellant." *Id.* (citation omitted). The court rejected this argument, stating that

> Congress recognized that in almost every case the amount of the Secretary's award would be less than the cost of appeal to, and trial *de novo* in, a federal district court. Accordingly,

> it provided for attorneys fees and costs to a prevailing appellee, regardless of whether the appellee was a shipper or a purchaser. That involves no denial of due process to either party . . . . If the costs of defending its favorable decision by the Secretary were not reimbursed to a prevailing appellee, then the losing party could destroy the value of the Secretary's award, by merely noticing an appeal. As between shippers and buyers, the statute is neutral.

Id.

The court stated that "[t]ogether with the preparation, court conferences, and other necessary incidental work, 307.6 hours of work were required. Thus, the $73,250 of legal fees represents a blended rate of $238 per hour." *Id.* at 400. It also stated that the per-hour rates for the attorneys involved in the action and their $7,067.67 bill for costs and expenses were reasonable. *See id.* at 401. The court awarded prejudgment interest "at ten percent per annum from November 16, 2000, the date of the award," and allowed the $300.00 handling fee awarded by the USDA Judicial Officer. *Id.* (citation omitted).

"Koam III"

Koam appealed the district court's initial decision to approve the $4,800.00 reparations award issued by the USDA and its subsequent decision to award Dimare $73,250.00 in attorneys' fees and costs to the United States Court of Appeals for the Second Circuit. *See Koam Produce, Inc. v. DiMare Homestead, Inc.*, No. 02-9023, 2003 WL 21040284 (2d Cir. May 9, 2003). The Second Circuit affirmed both rulings. *See id.* at 130-31.

The Second Circuit first considered Koam's argument that the court erred "in voiding the five price adjustments because DiMare failed to show that falsified inspection reports were issued with respect to the five shipments." *Id.* at 126. The court stated that "[w]e agree with the Secretary and the District Court that the five-price adjustment agreements are voidable under the doctrine of mistake." *Id.* It explained that mistake is "'a belief that is not in accord with the facts.'" *Id.* (citation omitted). It also explained that

> [w]here a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake.

Id. at 127 (quoting Restatement (Second) of Contracts § 153).

The appellate court stated, "[i]t is clear that, when the parties agreed to the price adjustments, DiMare was mistaken as to both whether Koam had paid bribes to USDA inspectors to influence the outcome of inspections and whether the USDA inspectors who examined the tomatoes had accepted the bribes." *Id.* It added that "[i]t is equally clear that these mistakes impacted the basic assumptions on which DiMare made the price adjustments and that the effect of the mistakes was both material and adverse to DiMare." *Id.*

The appellate court also determined that DiMare did not bear the risk of mistake in accordance with § 154 of the Restatement (Second) of Contracts. *See id.* Under § 154, a party bears the risk of mistake when "'the risk is allocated to him by agreement of the parties,'" the party "'is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient,'" or "'the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.'" *Id.* (quoting Restatement (Second) of Contracts § 154).

The appellate court explained that none of the parties' agreements provided that DiMare would bear the risk of mistake, that DiMare was not aware that Koam had compromised the integrity of the inspections process when the parties agreed to the price adjustments, and that it would be unfair to shift to the risk of mistake to DiMare in light of the fact that Koam had bribed federal officials without DiMare's knowledge. *See id.* Explaining that the final requirement of § 153 was satisfied, the appellate court stated that

> Koam's fault obviously caused DiMare's mistake, as Koam knew that its employee had bribed USDA inspectors, yet Koam neglected to inform DiMare of this fact. In addition, in light of Koam's involvement in bribery (as demonstrated by Friedman's guilty plea), it would be unconscionable to enforce the price-adjustment agreements, which resulted from the work of inspectors who had accepted bribes. As all of the requirements of § 153 have been satisfied, we agree with the District Court and the Secretary that the five price-adjustment agreements are voidable.

Id.

The appellate court also rejected Koam's argument that DiMare "breached the underlying contracts–which are unaffected by the voiding of the price-adjustment agreements–by supplying nonconforming tomatoes." *Id.* at 128. Based upon the Secretary's finding that "'[t]here is no showing on this record that falsified inspections were issued as to the specific lots of tomatoes [in question],'" Koam asserted that DiMare could not prove that the tomatoes conformed to the parties' specification. *See id.* The appellate court rejected this argument, stating that "DiMare need not prove that it delivered conforming tomatoes; rather, because Koam accepted the tomatoes, its burden is to prove that DiMare delivered non-conforming tomatoes." *Id.* (citations omitted). The appellate court added, "[i]n summary, we agree with the District Court that the parties' five price-adjustment agreements are voidable under the doctrine of mistake and that Koam has failed to prove that DiMare breached the parties' supply agreements by shipping substandard tomatoes." *Id.* at 130.

Finally, the appellate court rejected Koam's argument that the district court's award of attorneys fees to DiMare was unreasonable. *See id.* It noted that "'[o]ur review of an award of attorneys' fees is highly deferential to the district court; we will reverse on appeal only for an abuse of discretion.'" *Id.* (citation omitted). It concluded that "[b]ecause Koam has made no showing that the fees awarded to DiMare are unreasonable, we see no abuse of discretion. Accordingly, we affirm the District Court's fee award." *Id.*

Bank Receives Trust Assets from Produce Buyer in Breach of PACA Trust

In *Overton Distributors Inc. v. Heritage Bank,* 179 F.Supp.2d 818 (M.D. Tenn. 2002), Overton Distributors, Inc. ("Overton") brought an action against Heritage Bank ("Heritage") to recover PACA trust assets that were alleged to have been retained by Heritage in violation of PACA. *See Overton*, 179 F.Supp.2d at 822. Overton was a buyer and seller of wholesale quantities of perishable agricultural commodities. Heritage was a commercial bank that provided loans to Quality Foods of Tennessee, Inc. ("Quality"). *See id.* Quality purchased perishable agricultural commodities from Overton from 1993 through 2000. *See id.*

Overton "included language on its invoices indicating its intent to retain a trust claim over commodities sold to Quality." *Id.* (citation omitted). Specifically, Overton's invoices contained the following language:

> [T]he 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 claim over these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.

Id. at 825-26.

Quality had a long history of financial difficulties and obtained loans from Heritage to help improve its financial situation. *See id.* at 823. On August 8, 1996, Quality and Heritage entered into a "Business Management Agreement" ("Agreement") in which Heritage "allowed Quality to obtain advances from Heritage against the face value of various accounts receivable that it presented to Heritage." *Id.* (citation omitted). Under the terms of the Agreement, Heritage was to become "the absolute owner of Quality's interest in its outstanding receivables, and account proceeds were owned and controlled by Heritage . . . ." *Id.* (citation omitted). Quality was also required under the Agreement to remain liable for all advances it received from Heritage if the proceeds from the accounts receivable were not sufficient to cover the advanced funds. *See id.* at 824.

In February, 2000, Quality defaulted on the loan payments it owed to Heritage and ceased operations. *See id.* On March 30, 2000, Overton brought an action against Heritage "alleging that Heritage had retained PACA trust assets in the form of Quality's accounts receivable and the proceeds of those accounts." *Id.* (citation omitted). Overton sought $220,529.06 in PACA trust assets, which represented the value of the produce it sold to Quality and the fees that Heritage collected pursuant to the Agreement. *See id.* at 824-25.

The district court first considered whether Overton had properly preserved its rights in the PACA statutory trust. *See id.* at 825. It explained that for a qualified beneficiary to preserve its rights in the assets of a PACA trust, it "must either send notice to the buyer within 30 days of a payment default . . . or include statutory language on its invoices." *Id.* The court stated that

> [h]ere, Overton satisfied the notice requirement by including the requisite language on the face of their invoices. Because there was no clear agreement otherwise, the default ten day period is the applicable payment period. Hence, Quality and Heritage were put on notice by the language included on the invoices. Therefore, the Court finds that Overton has preserved its rights under the trust, and thus may assert its rights as a PACA trust beneficiary.

Id. at 827.

The court stated that "[a]lthough Overton preserved its rights as a PACA beneficiary, it still must show that Heritage received trust assets, and that this constituted a breach of trust, allowing Overton to recover under the PACA provisions." *Id.* at 828. It noted that the parties agreed that Heritage bought Quality's accounts receivable, "approximately 90% of Quality's business was the sale of produce covered by PACA, and that Quality was a PACA licensee." *Id.* (citation omitted). It also noted that Heritage failed to present proof that "the assets it received from Quality in payment of the 'service charge' or through liquidation after default are not the proceeds of PACA trust assets." *Id.* (citation omitted). Thus, it concluded that Heritage received trust assets and "the $220,529.06 unpaid produce debt constitutes trust assets received by Heritage." *Id.*

Next, the court examined whether Heritage received the trust assets in breach of the trust. *See id.* It explained that if the Agreement, as Overton suggested, was a loan or a credit arrangement, then Heritage breached the trust. *See id.* However, if the Agreement was "a purchase of Quality's accounts receivable, combined with services that the bank had provided in exchange for 2.5%-3% of the accounts, then Heritage did not breach the trust." *Id.* It also explained that whether the Agreement "constituted a breach of trust and whether Heritage gave value for the trust assets can only be determined by the actual nature of the agreement, regardless of the terminology used." *Id.* (citing *Endico Potatoes,* 67 F.3d at 1068).

The court ruled that the Agreement constituted a breach of trust, stating the evidence "makes clear that the . . . [Agreement], while certainly a service rendered by the bank to Quality, did not involve Heritage Bank's purchase of receivables," but rather the Agreement "was more analogous to a loan or line of credit than a purchase." *Id.* at 828-29. It added that, because under the terms of the Agreement

> Quality retained the risk of nonpayment, Heritage did not actually purchase the accounts receivables. Thus, because Heritage held only a security interest in Quality's accounts receivables, and did not purchase those accounts for value, its interest was subject to the rights of the PACA trust beneficiaries– Overton. Thus, in making the . . . credit arrangement with Heritage Bank, Quality encumbered PACA trust proceeds, the very arrangement that Congress sought to redress by passing the PACA statute. As discussed above, PACA creates a trust in favor of the seller, Overton, which is superior to the interest of Quality's secured lender, Heritage. Hence, Heritage Bank's arrangement with Quality constituted a breach of the PACA trust, and Heritage received trust assets in breach of trust.

Id. (citations omitted).

Corporate Officers Liable to Produce Supplier for Failure to Preserve Trust Assets

In *Red's Market v. Cape Canaveral Cruise Line, Inc.*, 181 F.Supp.2d 1339 (M.D. Fla. 2002), Red's Market brought an action under PACA against Cape Canaveral Cruise Lines, Inc. ("Cape"), and several of Cape's officers and directors to recover payment for produce that it delivered to Cape. *See Red's Market*, 181 F.Supp.2d at 1340. Red's Market was a Florida corporation that was engaged in the business of buying and selling wholesale quantities of perishable agricultural commodities. *See id.* Cape was a Florida corporation that was "engaged in the management of a cruise ship and restaurants of the ship." *Id.*

Red's Market and Cape agreed to settle their dispute for $24,553.70, and the district court entered a judgment that finalized this agreement. *See id.* However, because it was insolvent, Cape failed to make any payments. *See id.* Red's Market then sought to collect the $24,553.70 from Cape's directors and officers (hereinafter "defendants"). *See id.* Thus, the only issue before the court was whether the defendants were liable to Red's Market under the PACA. *See id.*

The parties stipulated that the defendants "were in positions of control over the PACA trust assets and were responsible for all aspects of Cape's business, which included directing payments to be made to Cape's creditors." *Id.* The defendants argued, however, that "the PACA trust ceased to exist when the produce was converted to meals, contending that the 'PACA trust applies only to perishable goods, receivables and sale proceeds thereof, and not to those products which have been manufactured into a food product of a different kind or character.'" *Id.* They also argued that in accordance with *Farm-Wey Produce, Inc. v. Wayne L. Bowman Co.*, 973 F.Supp 778 (E.D. Tenn. 1997), "that a plaintiff in a PACA case should be limited to seeking relief from the corporate defendant in the absence of a finding of fraud or other improper conduct on the part of individuals in positions of control over PACA assets." *Id.* The district court rejected both of these arguments. *See id.*

Conversion of Produce

The court first examined the defendants' argument that the trust ceased to exist when the produce was converted to meals. *See id.* The court stated that "this theory is based on the premise that the trust asset–the produce–was no longer in existence and therefore the defendants' trust responsibilities terminated. This theory simply does not square with the statute, federal regulations, or relevant case law." *Id.*

The court explained that "the plain language of the statute provides that the *res* of a PACA trust includes not only the produce itself but also those products derived from the produce and the proceeds from the sale of the products." *Id.* It also explained that when Congress enacted § 499e(c)(2) it "intended that PACA trusts remain in effect until full payment is made by the purchaser of agricultural commodities." *Id.* The court noted that 7 C.F.R. § 46.46(d)(1) requires that dealers "'maintain trust assets in a manner that such assets are *freely available* to satisfy outstanding obligations to sellers of perishable agricultural commodities.' Neither of these provisions contains an exemption eliminating a dealer's responsibility once the dealer converts the commodities to meals which it later sells." *Id.* (citation omitted).

The court also stated that the case law dealing with "the application of the PACA trust to processed food makes clear that–as plainly set forth in the statute–the trust applies to both the perishable agricultural commodities themselves and to products derived from those commodities." *Id.* at 1342. It noted that in *J.C. Produce, Inc. v. Paragon Steakhouse Restaurants, Inc.*, 70 F.Supp.2d 1119 (E.D. Cal. 1999), the court determined that the PACA statutory trust provisions applied to produce that was purchased by restaurants and made into meals that were sold to the restaurants' customers. *See id.* (citing *J.C. Produce*, 70 F.Supp.2d at 1121). Specifically, in *J.C. Produce* the court stated that "'[t]he trust provisions at issue here apply not only to produce, but also to the revenue derived from the sales of produce and produce-derived products, which plainly encompasses menu items, such as those sold in Paragon's restaurants, and revenues derived therefrom." *Id.* at 1342-43 (quoting *J.C. Produce*, 70 F.Supp.2d at 1121) (accord *Sysco Food Servs. of Seattle, Inc. v. Country Harvest Buffet Rests., Inc.*, 245 B.R. 650, 652 (B.A.P. 9th Cir. 2000)).

The court added that

> [a]lthough the . . . defendants do offer case law in support of their theory that the PACA trust did not extend to the food incorporated into meals by Cape, the cases are distinguishable. Those cases– *A & J Produce Corp. v. CIT Group/Factoring Inc.,* 829 F.Supp. 651 (S.D.N.Y. 1993), and *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.,* 67 F.3d 1063 (2d Cir. 1995)– involved the efforts of sellers of processed food to impose PACA trust liability on the purchasers of the processed food products. Both courts in those related cases took the view that it was not the intent of the Act that distributors of processed food be entitled to the protection of PACA. Unlike the sellers in the cases cited, in the instant case Red's was the seller of raw produce rather than of processed food, and the PACA trust plainly applies to the products purchased by defendants both before and after they converted the perishable agricultural commodities into meals. Hence, the . . . defendants first argument is without merit.

Id. at 1343.

<u>Liability of Officers and Directors</u>

Next, even though there was no evidence that as corporate officers they did not effectively execute their responsibilities to Cape, the court ruled that they were subject to liability. *See id.*

The court explained that under PACA, dealers owe a fiduciary duty to protect the *res* of the trust once they accept delivery of the produce. *See id.* at 1343. It also explained that extending liability "to those in control of the trust assets is reasonable and necessary in order to enforce the goals of Congress in establishing the statutory trust. If liability were limited to corporate dealers, the intent of the federal statute to protect consumers and sellers of produce would be easily frustrated." *Id.* at 1343-44 (citations omitted). The court stated that

> [t]he defendants are correct in asserting that there is no evidence that as corporate officers they did not effectively execute their responsibilities to Cape. However, that is not the test to determine whether they breached their responsibilities as PACA trustees . . . . In sum, case law generally holds that an individual in control of PACA trust assets may be liable for failure to preserve the *res* of the trust without regard to whether the failure was intentional or whether the individual was an otherwise responsible corporate officer.

Id. (citing *Morris Okun*, 814 F.Supp. at 348).

The court noted that in *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280 (9th Cir. 1997), the United States Court of Appeals for the Ninth Circuit held that individuals in a position of control over PACA trust assets who breach their duty to preserve the trust assets can be personally liable under PACA. *See id.* at 1344 (citing *Sunkist*, 104 F.3d at 283). It further noted that in *Golman-Hayden Co.*, *v. Fresh Source Produce Inc.,* 217 F.3d 348 (5th Cir. 2000), the Fifth Circuit agreed with the holding in *Sunkist*, stating that "'it is appropriate to impose personal liability on shareholders, officers, and directors, of corporate buyers who are in a position to control PACA trust assets and fail to maintain the assets.'" *Id.* (citing *Golman-Hayden Co.,* 217 F.3d at 350) (quoting *Hawkins v. Agric. Mktg. Serv.*, 10 F.3d 1125, 1130 (5th Cir. 1993)).

The district court in the instant case concluded that

> the individual defendants failed to account for the trust assets. Because these defendants admittedly had total control over Cape, the trust assets, and the payment of corporate debts, they are liable to Red's for failure to preserve the trust assets. As discussed above, use of trust assets for any purpose other than to pay Red's was a violation of the individual defendants' fiduciary duty to Red's. Findings of misappropriation or bad faith are not essential to an imposition of individual liability upon these individual defendants who were in total control of the PACA trust assets. A simple finding that they failed to account for the trust assets is sufficient.

Id.

The court rejected the defendants' argument that under *Farm-Wey*, Red's Market was limited to seeking relief from Cape unless it could establish fraud or other improper conduct on their part as directors and officers of Cape. *See id.* at 1345. In *Farm-Wey* the district court held that "a PACA dealer may dissipate trust assets to maintain its operation, including by paying wages and salaries to the dealer's employees." *Id.* The court's underlying concern in *Farm-Wey* was "that a contrary ruling would likely result in imposition of individual liability for 'practically anyone associated with [a dealer corporation].'" *Id.* (quoting *Farm-Wey*, 973 F.Supp. at 782). In distinguishing *Farm-Wey* the court stated, "[t]his concern seems to be overstated. All relevant decisions reviewed by this court imposing individual liability have done so only as to those individuals who are in positions to control PACA trust assets. For the reasons set forth above, this court is not persuaded by the reasoning in *Farm-Wey*." *Id.*

Raisin Producer Barred from USDA Inspection Services Due to Non-Willful Misrepresentation

In an action brought by a raisin producer challenging a USDA decision to bar the producer from USDA inspection services for one year, the United States District Court for the Eastern District of California affirmed the USDA's ecision and ruled that the applicable debarment regulation did not require that the producer's misrepresentation be willful or intentional. *American Raisin Packers v. United States Dep't of Agric.,* 221 F.Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 2003 WL 21259771 (E.D. Cal. May 29, 2003).

American Raisin Packers, Inc. ("American Raisin"), was a processor of California raisins. *See id.* at 1211. In June, 1998, the USDA solicited bids for Thompson Seedless Raisins in conjunction with certain domestic feeding programs. *See id.* at 1211-12. Pursuant to this solicitation, American Raisin sold raisins to the USDA. *See id.* The shipment that American Raisin delivered to the USDA contained both Thompson Seedless Raisins and Golden Raisins. *See id.* at 1212.

On December 3, 1998, the Agricultural Marketing Service ("AMS"), an agency of the USDA, filed a complaint with the Secretary of Agriculture alleging that American Raisin violated 7 C.F.R. § 52.54 by misrepresenting Golden Raisins as Thompson Seedless Raisins. *See id.* 7 C.F.R. § 52.54 provides that "[t]he AMS may disbar a company from inspection services for '[a]ny misrepresentation or deceptive or fraudulent practice or act found to be made or committed in connection with . . . the submission of samples for inspection.'" *Id.* at 1217 (quoting 7 C.F.R. § 52.54(a)(1)).

On May 24, 2000, a USDA Administrative Law Judge ruled that American Raisin's "failure to provide 100% Thompson Seedless Raisins to the USDA for sampling constituted a misrepresentation and a violation of 7 C.F.R. § 52.54" and barred American Raisin from receiving USDA inspection services for one year. *Id.* at 1212. American Raisin appealed the Administrative Law Judge's decision to the USDA Judicial Officer, arguing that it should not have been disbarred because there was not a finding that it had willfully violated 7 C.F.R. § 52.54. *See id.* The Judicial Officer also determined that American Raisin had not willfully violated 7 C.F.R. § 52.54 and affirmed the Administrative Law Judge's decision to debar American Raisin for one year. *See id.*

On May 18, 2001, American Raisin sought judicial review of the Judicial Officer's decision pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 702-706. *See id.* It alleged that the decision should be set aside because "the decision and order . . . [was] arbitrary, capricious, an abuse of discretion, not in accordance with the law, and in excess of statutory jurisdiction and authority." *Id.* (citing 7 U.S.C. § 706). It subsequently filed a motion for summary judgment, arguing that 7 C.F.R. § 52.54 "allows debarment for only intentional acts of fraud, misrepresentation, or deceptive practices" and because the Administrative Law Judge and Judicial Officer "both found that there was no willfulness or deceptive or fraudulent acts or practices . . . section 52.54 does not apply." *Id.* On December 17, 2001, the USDA filed a motion for summary judgment, contending that American Raisin's actions, although not intentional or willful, constituted a violation of 7 C.F.R. § 52.54. *See id.* at 1213.

The court first ruled that because the plaintiff did not contend that the USDA's findings were incorrect, there is "substantial evidence to support the administrative decision and it was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* at 1217. Noting that

American Raisin did not argue that "the factual findings made by the USDA were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" or "that there was not substantial evidence," the court concluded that the USDA's "request for summary judgment on this issue is granted because Plaintiff does not contend the factual findings were incorrect." *Id.* at 1218.

Next, the court considered whether it was necessary to have a willful or intentional misrepresentation to establish that American Raisin violated 7 C.F.R. § 52.54. *See id.* American Raisin argued that it cannot be debarred under 7 C.F.R. § 52.54 because the Administrative Law Judge and the Judicial Officer determined that its actions "were not willful or intentional and debarment requires willful or intentional misrepresentation." *Id.* The USDA argued on the other hand that American Raisin's actions did not have to be willful or intentional in order to establish a violation of 7 C.F.R. § 52.54. *See id.*

The court explained that it "must defer to the agency's interpretation of its own regulations unless an alternative reading is compelled by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation." *Id.* at 1219 (citations omitted). Turning to the plain language of 7 C.F.R. § 52.54, the court stated that

> [t]here is no indication [that] Plaintiff's reading of section 52.54 is compelled by section 52.54's plain language. Plaintiff was found to have violated section 52.54(a)(1)(ii), which provides for debarment for "[a]ny misrepresentation or deceptive or fraudulent practice or act found to be made or committed in connection with . . . [t]he submission of samples for inspection." As found by the [Judicial Officer], the word "or" implies that the misrepresentation does not have to be deceptive or fraudulent because these words describe different conduct which can violate section 52.54(a)(1) . . . . [B]ecause the word "or" is used between fraud and misrepresentation, the plain reading of this title does not require the misrepresentation to also be committed with fraud. Thus, the plain reading of section 52.54(a)(1) provides that misrepresentation without deceptive or fraudulent conduct violates section 52.54(a)(1).

Id.

The court also stated that the word "willful" is not found in 7 C.F.R. § 52.54(a)(1). *See id.* It explained that the term "willful" is found in 7 C.F.R. § 52.54(a)(2), "which allows for debarment for a '[w]illful violation of the regulations in the subpart' and for a '[w]illful violation of the provisions of this part of the Act.'" *Id.* at 1219-20. It added that

> Plaintiff was not found to have violated section 52.54(a)(2). Section 52.54(a) begins "[T]he following acts or practices . . . may be deemed sufficient cause for the debarment . . . ." This sentence clearly implies that section 52.54(a)(1), section 52.54(a)(2), and section 54.54(a)(3) are each separate acts that can result in debarment. As such, section 52.54(a)(2)'s willful requirement deals only with section 52.54(a)(2) and the plain reading of section 52.54(a) does not provide for the word willful to be read into section 52.54(a)(1). Thus, the plain reading of section 52.54(a)(1) does not require that the misrepresentation be willful.

Id. at 1220.

In addition, the court stated that the term "intentional" is not included in 7 C.F.R. § 52.54. *See id.* "Thus," the court explained, "the plain reading of section 52.54(a)(1) does not require that the misrepresentation be intentional." *Id.* It added that "[r]eviewing the plain reading of section 52.54(a)(1), the term 'misrepresentation' stands alone. The plain reading of section 52.54(a)(1) does not require the words 'deceptive,' 'fraudulent,' or 'willful,' from the other provisions of section 52.54(a) nor any other word, such as ‘intentional,’” to be read into 7 C.F.R. § 52.54(a)(1) in order to modify the term “misrepresentation.” *Id.* The court therefore concluded that it “must defer to the agency’s interpretation of its own regulations because the plain language of the statute does not compel a different reading.” *Id.* (citation omitted).

Produce Sellers Fail to Adequately Preserve Rights in Statutory Trust

In *King v. Hartford Packing Co., Inc.*, 189 F.Supp.2d 917 (N.D. Ind. 2002), plaintiffs Allen King, Marilyn King, and Luellen Farms, Inc. (“Luellen Farms”), brought an action against defendants Hartford Packing Company (“Hartford”), Norwest Bank Minnesota, N.A. (“Norwest”), and Wells Fargo Business Credit, Inc. (“Wells Fargo”), seeking to recover the balance due on tomatoes delivered to Hartford. *King*, 189 F.Supp.2d at 925-27. The United States District Court for the Northern District of Indiana held that plaintiffs could not recover the balance due for the tomato shipments under PACA because they did not comply with the requisite PACA procedures to properly preserve their rights in the PACA statutory trust. *See id.* The court also held, however, that the plaintiffs may be able to recover the balance due under either agency or joint venture theories. *See id.*

Hartford was a family-owned company that purchased tomatoes from local farmers and processed them into a variety of products. *See id.* at 920. Allen and Marilyn King were farmers who produced several types of crops, including tomatoes. *See id.* Luellen Farms was a closely held family-owned corporation that also raised tomatoes. *See id.* Norwest was one of Hartford’s creditors and was dismissed as a party in this action by the district court after the parties stipulated that Norwest be dismissed. *See id.* at 923.

The Kings made their first deliveries of tomatoes to Hartford in either 1994 or 1995. *See id.* at 920. Luellen Farms made its first deliveries of tomatoes to Hartford in the early 1970s. *See id.* John Jackson, who was President of Hartford from 1976 through 2000, would usually contact the Kings in February or March of each year and inform them of the number of acres of tomatoes they should plant for Hartford. *See id.* The Kings and Hartford would typically enter into an oral agreement “each year whereby the Kings delivered their tomatoes to Hartford in the fall and received payment in the first quarter of the following calendar year, as Hartford sold its inventory.” *Id.*

Luellen Farm’s arrangement with Hartford “developed in a way that Hartford expected approximately 1100 to 1700 tons of tomatoes from Luellen each fall.” *Id.* Luellen Farms typically entered into an oral agreement with Hartford “whereby Luellen usually received some payment in the calendar year in which the tomatoes were delivered and then received the remaining balance in the first quarter or first half of the following calendar year." *Id.*

The Kings delivered approximately 3,000 tons of tomatoes to Hartford in the fall of 1999. *See id.* Hartford orally agreed to purchase this shipment for $237,013.15. *See id.* On July 22, 1999, John Jackson mailed a letter to the Kings “reflecting their oral agreement that the Kings would be paid between October 25, 1999 and August 1, 2000 for tomatoes delivered during August, September, and October of 1999.” *Id.* Hartford paid the Kings $162,087.56 for the tomatoes, leaving a balance due of $74,925.59. *See id.* Luellen Farms delivered approximately 2,000 tons of tomatoes to Hartford in the fall of 1999. *See id.* One of Hartford’s representatives “agreed to pay Luellen $170,491.75 on or before June 1, 2000.” *Id.* Hartford failed to make any payments to Luellen Farms. *See id.*

John Jackson and Bob Downs, a certified public accountant hired by Hartford, contacted Wells Fargo about obtaining an operating loan for Hartford. *See id.* at 921. Jackson and Downs consulted with Lynn Gruber, the Assistant Vice President of Wells Fargo, about obtaining a loan. *See id.* Eventually, Wells Fargo agreed to loan Hartford $6,100,000.00, subject to several conditions. *See id.*

Jackson executed a "Credit and Security agreement defining the terms and conditions of the loan and giving Wells Fargo a first position security interest in the personal property of Hartford, including equipment, inventory, receivables, and proceeds thereof." *Id.* Wells Fargo also "took a subordinate position real estate mortgage in certain real estate . . . upon which Hartford operated." *Id.* Wells Fargo required Jackson to contribute $500,000.00 of his own money to Hartford. *See id.* It also had Hartford enter into another agreement that required Hartford to "(1) forward all of its receivables directly to Wells Fargo, or (2) direct all persons obligated to make payments to Hartford and send those payments directly to Wells Fargo." *Id.* Finally, Wells Fargo required "Jackson to waive his own PACA rights with respect to tomatoes Jackson's family-owned farm had supplied to Hartford." *Id.* at 921-22.

Hartford subsequently defaulted on the loan it obtained from Wells Fargo. *See id.* at 922. On May 9, 2000, Wells Fargo foreclosed on the loan. *See id.*

On June 13, 2000, the Kings mailed a letter to Jackson and Wells Fargo stating that they "sought to preserve their trust benefits under PACA." *Id.* On June 21, 2000, Luellen Farms also sent a letter to Hartford stating its intent to preserve its benefits in the statutory trust. *See id.*

The plaintiffs argued that "when Wells Fargo liquidated Hartford's assets, it wrongfully converted . . . [their] PACA trust benefits to its own use." *Id.* The plaintiffs further argued that "Wells Fargo should have paid them on the amounts Hartford owed them out of Hartford's liquidated assets." *Id.* Wells Fargo argued that the plaintiffs did not have a right in any of Hartford's liquidated assets because they failed to properly preserve their rights in a PACA statutory trust. *See id.*

The court explained that for a supplier to preserve its rights in a PACA statutory trust, it "must send notice of the supplier's intent to preserve its PACA trust benefits to the buyer within 30 days of a payment default." *Id.* In the alternative, "a supplier can give notice of its intent to preserve its trust benefits by including a statement referencing the trust on its invoices." *Id.* (citing 7 U.S.C. § 499e(c)(3); 7 C.F.R. § 46.46(c) & (f)). The court also explained that under PACA, "payment is due within 10 days after delivery unless the parties have, by written agreement, extended the time for payment." *Id.* (citing *Hull Co. v. Hauser's Foods, Inc.*, 924 F.2d 777, 781 (8th Cir. 1991). It added that "[a] written extension of time for the payment is limited to 30 days. An unpaid supplier loses its right to participate in the PACA trust if it agrees, in writing, to extend the payment beyond 30 days." *Id.* (citing *Hull*, 924 F.2d at 781; 7 C.F.R. § 46.46(e)(2)).

Determining that plaintiffs failed to preserve their trust benefits, the court stated that

> [h]ere, it is undisputed that both the Kings and Luellen [Farms] agreed to extend the time for payment more than 30 days, from October of 1999 until at least June 1, 2000. Moreover, it is undisputed that they did so orally, rather than in writing. Finally, the Kings and Luellen [Farms] did not send notice of their intent to preserve their PACA trust benefits until June 13, 2000 and June 21, 2000, respectively– clearly more than 30 days after payment was due under PACA. Accordingly, it appears that Plaintiffs failed to adequately preserve their trust benefits.

Id.

The plaintiffs also argued that Wells Fargo exercised unauthorized control over their trust benefits in violation of Indiana's criminal conversion statute, Ind. Code § 35-43-4-3. *See id.* at 927. The court rejected this argument, ruling that because the plaintiffs did not have trust rights under PACA, they could not recover under their conversion claim. *See id.*

Finally, the plaintiffs argued that "Wells Fargo may be liable for Hartford's unpaid obligations under either an agency theory of liability or a joint venture theory of liability." *Id.* The court noted that the plaintiffs submitted "substantial evidence that Wells Fargo exerted a good deal of control over Hartford," and Wells Fargo denied that it exercised the degree of control that the plaintiffs argued that it exercised. *Id.* at 928-29. Thus, the court concluded that "a genuine issue of material fact exists as to whether an agency relationship existed between Wells Fargo and Hartford. Summary judgment on that theory will be denied." *Id.* at 929.

With respect to the plaintiffs' joint venture theory under Indiana law, the court explained that "a joint venture is an association of two or more persons formed to carry out a single business enterprise for profit, through the combination of their property and services." *Id.* (citation omitted). It also explained that "[a] joint venture exists when an express or implied contract provides for joint control or management over an enterprise" and when "the parties have (1) a community of interests, and (2) joint or mutual control, that is, an equal right to govern the undertaking." *Id.* (citations omitted).

The court concluded that

> [h]ere, Plaintiffs have submitted evidence that Wells Fargo, at the very least, shared in the control of Hartford's operations . . . . Moreover, Plaintiffs have submitted evidence that Hartford was required to deposit all of its income directly into an account held jointly with Wells Fargo . . . . In this case . . . the provision that Hartford deposit all of its income in an account held jointly with Wells Fargo appears to go beyond usual loan repayment arrangements. Accordingly, the Court is satisfied that the Plaintiffs have submitted enough evidence that a joint venture relationship existed to survive summary judgment and summary judgment on the joint venture theory will be denied.

Id. at 929-30.

District Court Denies Bankruptcy Trustee's Motion to Compromise PACA Claims

In *In re Churchfield*, 277 B.R. 769 (Bankr. E.D. Cal. 2002), the United States Bankruptcy Court for the Eastern District of California denied a bankruptcy trustee's motion to compromise the claims made by two claimants to the proceeds that resulted from settlement agreements reached in the course of three adversary proceedings. *Churchfield*, 277 B.R. at 772. The court denied the motion to compromise because the bankruptcy trustee failed to make the necessary prima facie showing of a real and substantial factual or legal controversy. *See id.* at 777. It ruled that the proceeds collected by the bankruptcy trustee were not part of the debtors' PACA trust, but instead were property of the estate under § 541(a)(3) of the Bankruptcy Code. *See id.* at 775.

Debtors, Charles and Jamie Churchfield, filed a Chapter 7 bankruptcy petition on January 14, 1998. *See id.* at 772. They owned and operated a sole proprietorship through which they purchased perishable agricultural commodities. *See id.* The debtors were subject therefore to the PACA regulations and licensing requirements, including the PACA's statutory trust provisions. *See id.*

The court explained that the PACA trust "applies to all of the debtors' produce-related inventory and proceeds thereof, regardless of which produce supplier was the source of the inventory." *Id.* Moreover, "[n]o specific tracing of inventory or proceeds is required; and it is the debtor, or the trustee opposing the PACA trust, who must determine which assets, if any, are subject to the trust." *Id.* (citing *In re Fresh Approach, Inc.*, 51 B.R. 412, 422 (Bankr. N.D. Tex. 1985)).

The debtors made several preferential transfers in September and October of 1997 to third parties that had previously supplied goods and services to the debtors. *See id.* The trustee filed four adversary proceedings to recover the value of these preferential transfers. *See id.* Three of the adversary proceedings resulted in settlement agreements that were approved by the court as compromises of controversies. *See id.* The trustee collected approximately $16,000.00 as a result of these settlements. *See id.*

Lamb-Weston, Inc., and J.R. Simplot Company ("PACA claimants") asserted rights against the proceeds derived from the settlement agreements. *See id.* These PACA claimants contended that they were entitled to the settlement proceeds because they were beneficiaries of a PACA trust held by the debtors. *See id.*

After reviewing the PACA claimants' demands and the relevant case law, the trustee conceded that the PACA trust extended to the settlement recovery proceeds. *See id.* at 773. After negotiating a compromise with the PACA claimants that after offsetting the trustee's costs, $13,801.37 in settlement proceeds would be provided to the PACA claimants, the trustee then filed a motion with the bankruptcy court to compromise the claims asserted by the PACA claimants. *See id.* at 772-73.

The court recognized that a bankruptcy trustee has "express authority to compromise a controversy or settle a dispute affecting the administration of the estate, subject to court approval." *Id.* at 773 (citing Fed. Rule of Bankr. P. 9019). It also noted that a bankruptcy court "has a duty to make an informed, independent judgment as to the reasonableness of the proposed compromise." *Id.* at 773-74 (citation omitted). A bankruptcy court examining the "fairness, reasonableness, and adequacy of a proposed settlement must consider . . . (a) the probability of success in the litigation, (b) the difficulties, if any, in the matter of collection; (c) the complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views." *Id.* at 774 (citing *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986)). The court stated that "[i]mplicit in the A & C Properties test is the foundational requirement that the trustee must make a prima facia showing of a real and substantial controversy over the facts and/or the application of the law." *Id.* It added that "'[t]he bankruptcy court must carefully weigh the value of the settled claim against the value to the estate by the settlement.'" *Id.* (quoting *In re Hermitage Inn, Inc.*, 66 B.R. 71, 72 (Bankr. D. Colo. 1986)).

The fundamental question for the court was "whether the funds recovered through the trustee's avoiding powers are subject to the PACA trust or whether they are property of the bankruptcy estate." *Id.* at 773. The court explained that "[e]ven though there may be a real controversy over the trustee's right of offset, that issue is not reached unless the [settlement proceeds are] actually subject to the PACA trust, or unless the court can also find that there is a real and substantial controversy on the PACA trust issue." *Id.*

Bankruptcy Code § 541(a)(3) states that property of the estate includes "[a]ny interest in property that the trustee recovers under section . . . 550 . . . of this title." *Id.* Bankruptcy Code § 550(a) states that "'to the extent that a transfer is avoided under section . . . 547. . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property . . . .'" *Id.* The four adversary proceedings in this case were initiated by the trustee pursuant to Bankruptcy Code § 547. *See id.*

Based on its interpretation of PACA § 499e(c)(2) and Bankruptcy Code §§ 550 and 541(a)(3), the court held that the settlement recovery was property of the bankruptcy estate and was not part of the PACA trust. *See id.* at 775. After examining the language of § 499e(c)(2), the court stated that the settlement recovery was not a "perishable agricultural commodity," that it was not "an inventory of food or other product derived from an agricultural commodity," and that it was not "a receivable or proceed from the sale of such commodities or products." *Id.* It stated that "[b]y settling the adversary proceedings, the trustee did not recover PACA trust assets; he recovered a negotiated amount based upon the estimated 'value' of the avoidable transfers to the estate." *Id.* (citing 11 U.S.C. § 550(a)). The court added that it was "implausible to assume that the funds paid to settle the adversary proceedings over two years later were traceable to the same proceeds." *Id.*

The bankruptcy court noted that it made its decision despite the fact that other courts examining the language of Bankruptcy Code § 541(d) "have universally recognized that any property held by a debtor in a statutory PACA trust is excluded from the bankruptcy estate." *Id.* at 776 (citing *In re Milton Poulos, Inc.,* 107 B.R. at 718 (9th Cir. BAP 1989) and *In re Fresh Approach*, 51 B.R. at 419) (observing that the proposition that PACA trust assets are not property of the estate is "'so widely accepted as to be beyond dispute'")).

Bankruptcy Code § 541(d) provides that

> [p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) and (a)(2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of an equitable interest in such property that the debtor does not hold.

Id. (quoting 11 U.S.C. § 541(d)).

Bankruptcy Code § 541(a) provides that property of the estate

> is comprised of all the following property, wherever located and by whomever held: (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case. (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case . . . .

Id. at 774 (quoting 11 U.S.C. § 541(a)).

The bankruptcy court stated that it would not follow the proposition "universally recognized" by other courts because § 541(d) only qualified the assets defined in subsections (a)(1) and (a)(2), and the settlement proceeds involved in this action were "deemed to be property of the estate under Sec. 541(a)(3), not subsections (a)(1) and (a)(2)." *Id.* The court also stated that the trustee's right to avoid preferential transfers and the right to recover the value of an avoided transfer both "uniquely vest in the trustee and do not come into existence until after the bankruptcy case is commenced," and that the settlement funds involved in this action "did not come into existence until the Trustee settled the adversary proceedings with the preference defendants, over a year after the case commenced." *Id.*

The court also rejected the bankruptcy trustee's argument that an offset was necessary and appropriate in order to preserve some assets for the estate. *See id.* at 777. The trustee relied on *In re Southland + Keystone*, 132 B.R. 632 (9th Cir. BAP 1991), for the proposition that "PACA trust assets . . . collected by a third party and disgorged to the PACA trust beneficiaries, may be subject to offset to compensate the disgorging party for its hard collection costs." *Id.* at 773. The court stated that the facts in *Southland + Keystone* were distinguishable because in that case the debtor's prepetition accounts receivable fell within both the statutory definition of a PACA trust under § 499e(c)(2) and the trust exclusion under § 541(d), whereas the settlement funds at issue in the present case do not fall within either criteria. *See id.* at 777. Therefore, the court determined that the *Southland + Keystone* ruling was "not applicable to establish that there is a real and substantial controversy between the trustee and the PACA claimants, or that the proposed compromise of controversy over the offset issue is fair and equitable." *Id.*

The court concluded that there was not "a real and substantial factual or legal dispute sufficient to warrant the surrender of 83% of the estate to the two PACA claimants." *Id.* It added that "[w]eighing the cost of the proposed compromise against the value to the estate, the court cannot conclude that the compromise is reasonable or in the best interest of the estate." *Id.*

Produce Supplier Allowed to Reach Some, But Not All, of Produce Broker's Assets

In *In re Bear Kodiak Produce, Inc.*, 283 B.R. 577 (Bank. D. Ariz. 2002), a produce supplier brought an action seeking a declaration that its claims to the assets of a statutory trust held by a produce broker were superior to all claims held by the broker, the bankruptcy trustee, and the broker's lender in the same assets because the supplier believed that it was a beneficiary of a PACA statutory trust. The United States Bankruptcy Court for the District of Arizona ruled that some, but not all, of the debtor's assets were reachable by the supplier, thereby giving the supplier superior claims in those assets that were reachable. *Bear Kodiak*, 283 B.R. at 581-88.

Debtor, Bear Kodiak Produce, Inc. ("Kodiak"), was a produce broker that had been in business since December, 1989. *See id.* at 580. Until August, 1998, Kodiak used a factoring company to finance its operation. *See id.* The factoring company collected all of Kodiak's accounts receivable and paid all of Kodiak's accounts payable, which included its produce suppliers. *See id.* Joan Baumann, Kodiak's principal, and her husband worked for Kodiak. *See id.* Joan's husband used part of his salary to pay premiums on a life insurance policy. *See id.*

After her husband died in February, 1998, Mrs. Baumann used the proceeds of his life insurance policy to purchase mutual funds. *See id.* She also obtained a loan from the Bank of Tucson ("Bank") for $500,000.00. *See id.* In connection with this loan, Kodiak "executed a commercial security agreement with the Bank and granted the Bank a security interest in substantially all of its assets, including its accounts receivables, equipment, and certain vehicles." *Id.* The vehicles and equipment were obtained by Kodiak after it opened for business. *See id.*

Kodiak used over $400,000.00 of the loan to pay off a debt it owed to the factoring company, "which included reimbursing the [company] for payment of all of the obligations to its produce suppliers, as of the Loan's July 7, 1998 closing date . . . ." *Id.* Joan pledged the mutual funds as collateral for the Bank's loan in September, 1998. *See id.* Callaway Produce Co., LLC ("Callaway"), a produce supplier, delivered produce to Kodiak on April 18, 2001. *See id.* Callaway's invoices stated its intention to preserve its rights in the assets of a statutory trust held by Kodiak. *See id.*

Kodiak stopped conducting business in January, 2002, and filed a Chapter 7 bankruptcy petition on February 7, 2002. *See id.* Joan Baumann also filed a Chapter 7 bankruptcy petition on February 7, 2002. *See id.* The United States District Court for the District of Arizona entered a preliminary injunction that enjoined Kodiak from dissipating the assets of the PACA statutory trust. *See id.* The preliminary injunction applied to both the assets of Kodiak and Mrs. Baumann. *See id.*

Callaway brought an adversary proceeding on March 8, 2002, "seeking, among other things, a declaration that its claims, as a purported beneficiary of the trust created under PACA, were superior to all claims of the Debtor, the Chapter 7 Trustee or the Bank to the Debtor's assets." *Id.* The Bank filed a motion to dismiss Callaway's request "on the grounds that certain vehicles and equipment owned by the Debtor . . ., and the Mutual Funds pledged to the Bank for the Loan by Mrs. Baumann were not part of the PACA trust." *Id.* Callaway objected to the Bank's motion. *See id.*

On June 4, 2002, the court conducted an evidentiary hearing to determine whether the equipment and mutual funds were part of the PACA trust assets. *See id.* at 581. Mrs. Baumann testified that Kodiak acquired the equipment "during a period of time when all perishable agricultural commodities . . . suppliers were being timely paid" by the factoring company and that the mutual funds were purchased with proceeds from her husband's life insurance policy. *Id.* In addition, she testified that it was likely that some of the premiums for the insurance policy derived from her husband's salary that was paid by Kodiak. *See id.* Mrs. Baumann also testified that locating Kodiak's business records and her late husband's personal records "to determine if any of the premiums for the [p]olicy were paid for by [Kodiak] or from her husband's salary would take months and might prove to be impossible." *Id.* The Bank relied on this testimony to demonstrate that the equipment and mutual funds were not included in the assets of the statutory trust. *See id.*

Callaway argued that Mrs. Baumann's testimony "was insufficient to meet the Bank's burden of proving that the Equipment and Mutual Funds were not part of the PACA trust because it was not the 'best evidence.'" *Id.* It also argued that only Kodiak's records "demonstrating that there were no outstanding invoices from any produce supplier on the date the Equipment and Mutual Funds were acquired and/or pledged to [the] Bank would be sufficient to meet the Bank's burden of proof." *Id.* Callaway requested that the court provide additional time for it to produce records that would rebut Mrs. Baumann's testimony that Kodiak timely paid its suppliers between December, 1989, and July, 1998. *See id.* The court denied this request and ordered the parties to file supplemental briefs on "the scope and duration of the PACA trust" and "whether the scope of the PACA trust extended" to Mrs. Baumann's assets. *Id.*

The Bank argued that the equipment was not an asset included in the PACA trust because "such assets do not fall within the definition of § 499e(c)(2) as inventory, receivables, or proceeds derived from the sale of commodity products." *Id.* The court rejected this argument, stating that it found no case law supporting the position that certain types of assets are exempt from a PACA trust simply because of the character of the asset, i.e, vehicles, equipment, etc." *Id.*

The Bank also asserted that under *Six L's Packing Co. v. Des Moines State Bank*, 967 F.2d 256 (8th Cir. 1992), neither the equipment nor mutual funds were assets of the PACA statutory trust because, as *Six L's* held, "a PACA trust does not include property acquired before the PACA beneficiary first enters into a PACA qualified transaction with the produce broker." *Id.* (citing *Six L's*, 967 F.2d at 259). Callaway asserted that under *Tom Lange Co., Inc. v. Kornblum & Company, Inc.,* 81 F.3d 280 (2d Cir. 1996), both the equipment and mutual funds were part of the PACA trust. *See id.* In *Kornblum*, the Second Circuit held that

> a party opposing a claim that a particular asset of a PACA buyer is part of a PACA trust, must demonstrate that: (1) no PACA trust existed when the asset in question was purchased; or (2) even though a PACA trust existed when the asset was purchased, the asset was not purchased with PACA trust assets; or (3) although a PACA trust existed when the asset was purchased, and the asset was purchased with trust assets, thereafter all produce sellers were paid in full, thereby terminating the trust.

Id. (citing *Kornblum*, 81 F.3d at 287). Noting that the Ninth Circuit had not directly addressed the issue of what assets in a PACA trust can be reached by a "'late'" supplier such as Callaway, the bankruptcy court adopted, "to the extent it is applicable, . . . the holding in *Kornblum* . . . ." *Id.* at 582, 583.

The Bank also argued that the equipment was not part of the PACA trust because Kodiak purchased it "at a time when all PACA suppliers were being paid, and . . . upon receipt of the proceeds of the Loan in 1998, . . . [Kodiak] paid . . . [the factoring company] in full, who in-turn paid all outstanding invoices from PACA suppliers, thus extinguishing any PACA trust then in existence." *Id.* at 583-84. The court noted that the Bank relied entirely on Mrs. Baumann's testimony to support both of its arguments. *See id.* at 584. It added that although Mrs. Baumann's testimony

> [was] essentially uncontroverted by Callaway, Mrs. Baumann's . . . testimony . . . was insufficient to meet the Bank's burden under § 499e(c)(2). Even though Mrs. Baumann, as the principal of the Debtor, was competent to testify about the Debtor's business practices with respect to how the Debtor paid its produce suppliers and the circumstances surrounding the Loan, such testimony in the absence of any documentary support is simply inadequate to carry the Bank's burden . . . . Therefore, the Bank has failed to meets its evidentiary burden under § 499e(c)(2) and consequently, the court finds that the Equipment is part of a PACA trust.

Id.

The court next examined whether the mutual funds were considered assets of the statutory trust. *See id.* Callaway argued that the mutual funds were included in the assets of the statutory trust because they were traceable to the salaries Kodiak paid to the Baumanns in the ordinary course of Kodiak's business while a PACA trust was presumably in place and "because such monies were, at least in part, comprised of PACA trust assets, the Mutual Funds, as the proceeds of such monies, are subject to the trust." *Id.* at 585-86.

The court explained that in *Boulder Fruit Exp. & Heger Organic Farm Sales v. Transportation Factoring, Inc.*, 251 F.3d 1268 (9th Cir. 2001), the Ninth Circuit ruled that "third-party transferees of PACA trust assets are not guarantors of the PACA trust, and are liable only if they had some role in causing a breach of a trustee's fiduciary duty or dissipation of the trust." *Id.* at 585 (citing *Boulder Fruit*, 251 F.3d at 1272). The Ninth Circuit held that a factor who had obtained trust assets through a financing agreement it had with a produce buyer was not required to disgorge the assets it had obtained absent a showing that the factor received the assets in breach of trust. *Id.* n.11 (citing *Boulder Fruit*, 251 F.3d at 1272). "Thus," the court stated, "for Callaway to prevail under *Boulder Fruit*, the court must find that a PACA buyer's payment of salaries, in the ordinary course of business, constitutes a breach of a PACA trust." *Id.* at 585.

The court noted that there was a split of authority among the courts that had considered whether the payment of salaries and other ordinary business expenses constituted a breach of trust. *See id.* (citing *C.H. Robinson Co. v. Alanco Corp.,* 239 F.3d 483, 488 (2d Cir. 2001); *Red's Market v. Cape Canaveral Cruise Line, Inc.,* 181 F.Supp.2d 1339, 1344 (M.D.Fla. 2002)*; Farm-Wey Produce, Inc. v. Wayne L. Bowman Co., Inc.,* 973 F.Supp. 778, 783 (E.D. Tenn. 1997); *Morris Okun v. Harry Zimmerman,* *Inc.,* 814 F.Supp. 346 (S.D.N.Y. 1993)). The court stated that it concurred with the holding in *Farm-Wey*, in which the court held "that minimal salaries and expenses paid in the ordinary course of a PACA buyer's business do not constitute a breach of trust." *Id.*

The court stated that

> [i]t could not have been Congress' intent in enacting § 499e(c)(2) to allow a PACA supplier to reach into the pockets of innocent employees and third parties to satisfy a debt owed by a dealer. In addition, Congress did not intend to fashion a scheme which would impose strict secondary liability of a PACA buyer's officers and shareholders for authorizing ordinary course business payments to employees and other creditors–there must be some outward limit on a suppliers's ability to collect its debts . . . . Consequently, the court finds that payments made in the ordinary course of a produce buyer's business, including minimal salaries and expenses, do not constitute a breach of a PACA trust.

Id. at 587.

The court noted that the evidence only indicated that at the time the Baumanns' received their salaries, Kodiak "was maintaining a sufficient reserve to satisfy all of its outstanding debts and all suppliers were being timely paid. Thus, Callaway has failed to demonstrate that the Baumanns received their salaries in breach of a PACA trust." *Id.* It added, "[c]onsequently, even assuming that the salaries included PACA trust assets, and such assets are traceable into the Mutual Funds, those assets are not reachable by Callaway." *Id.*

Produce Wholesaler's Rights to Assets of Statutory Trust Nullified by Its Post-Default Dealings with Dealer

In an action brought by a produce wholesaler against a produce dealer and the dealer's owner seeking to enforce its rights in a PACA statutory trust, *Patterson Frozen Foods, Inc. v. Crown Foods, Int'l*, 307 F.3d 666 (7th Cir. 2002), the United States Court of Appeals for the Seventh Circuit ruled that the wholesaler's post-default dealings with the dealer were sufficient to nullify the wholesaler's rights in the PACA trust. *Patterson Frozen Foods,* 307 F.3d at 667. The court also ruled that the right to enforce a PACA trust is lost whenever the parties enter into a written agreement that satisfies the generally applicable Statute of Frauds. *See id.* at 671-72.

Under PACA, "'the maximum time for payment for a shipment to which [parties] can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance.'" *Id.* at 669 (quoting 7 C.F.R. § 46.46(e)(2)). In the event that "a produce supplier enters into a written post-default agreement with a dealer that extends the dealer's time for payment beyond 30 days, the supplier becomes ineligible to assert its trust rights." *Id.* (citing *Greg Orchards*, 180 F.3d 888, 892 and *In re Lombardo,* 12 F.3d at 809). However, "an oral agreement for an extension or a course of dealing allowing more than 30 days for payment will not abrogate a PACA trust." *Id.* (citing *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 205 (3d Cir. 1998) and *Hull,* 924 F.2d at 781-82).

Patterson Frozen Foods, Inc. ("Patterson"), a produce wholesaler, delivered $58,600.00 worth of frozen peas to Crown Foodservice Group in May and June, 1998. *See id.* at 667. Crown Foodservice Group was a predecessor to defendant Crown Foods International ("Crown"). *See id.* Crown was owned by defendant Philip H. Eckert. *See id.*

Patterson's Vice-President of Finance, Neil Morosa, and Eckert's son, Jason Eckert, attempted to negotiate an acceptable settlement of the matter. *See id.* On January 8, 1999, Jason proposed that the amount due be paid in "eight monthly payments of $8,356.46 plus 8.5% interest . . . with the first payment due February 8." *Id.* Morosa sent a reply containing his signature on the same day "in which he moved the payment dates to the twentieth of each month beginning January 20 and adjusted the interest accordingly." *Id.* On January 11, 2000, as required by the PACA, Morosa informed the USDA of this development. *See id.*

He presented to the USDA a payment schedule identical to the one he mailed to Jason Eckert and wrote, "'[w]e are agreeable to this providing PACA will still be in force in case the respondent defaults on its plan.'" *Id.* On the next day, Morosa sent Jason Eckert a copy of the correspondence he had sent to the USDA. *See id.* Crown made the first payment but sent only $2,000.00 when the second payment was due. *See id.* Three days later Morosa notified the USDA that Patterson "'did enter into the proposed agreement with respondent to pay the outstanding invoices,' but that, as Crown had failed to make its second payment, Patterson now considered the agreement void." *Id.*

On April 29, 1999, the USDA "issued a reparation order in favor of Patterson for the amount due plus 10% interest." *Id.* Patterson subsequently brought an action in federal district court "seeking enforcement of the reparation order against Crown under 7 U.S.C. § 499g(b) . . ., alleging breach of contract . . . and failure to account for assets under § 499b(4) . . . against Crown, and alleging that Eckert breached his fiduciary duties as trustee of a statutory trust under § 499e(c)." *Id.* The parties stipulated to a judgment against Crown with respect to enforcing the reparation order and the breach of contract claim. *See id.*

With respect to the remaining claims, the district court ruled in favor of Patterson, "entering judgment against both Crown and Eckert in the amount of $55,995.00." *Id.* at 668-69. The district court also awarded $45,410.00 in attorneys' fees to Patterson. *See id.* In making its rulings, the district court stated that "'[a]lthough several payment proposals were exchanged between the parties, no written agreement was executed to extend payment terms . . . .'" Crown appealed the district court's decision to the Seventh Circuit. *See id.*

The Seventh Circuit stated that "[t]he principal dispute in this action is whether the post-default dealings between the parties nullified Patterson's PACA trust rights." *Id.* It reversed the district court's decision and remanded the matter for an entry of judgment in favor of the defendants and a recalculation of the award of attorneys' fees. *See id.* at 670-72.

In *Greg Orchards & Produce, Inc. v. Roncone*, 180 F.3d 888 (7th Cir. 1999), the court explained, a produce dealer had failed to pay three of its suppliers. *See id.* at 670. Two of the suppliers entered into written agreements that established weekly payment schedules, while the remaining supplier sent the dealer an amortization schedule fixing monthly payments. *See id.* The dealer made payments under these two plans for approximately fourteen months before defaulting to each supplier. *See id.* (citation omitted). The suppliers brought an action against the dealer seeking to enforce their rights in the PACA trust assets. *See id.*

With respect to the two suppliers who entered into written agreements establishing weekly payment schedules, the Seventh Circuit ruled that the suppliers "indisputably entered into written post-default agreements extending time for payment beyond 30 days, precluding them from recovering." *Id.* (citation omitted). The court remanded the remaining supplier's claim to the district court to determine "whether its amortization schedule was an enforceable written agreement." *Id.* (citation omitted).

In the present case, the court stated that Patterson's claim was "nearly identical" to that of the supplier in *Greg Orchard* whose claim was remanded. *See id.* The court noted that there was no "formal executed contract" between Patterson and the defendants, but that there was "a written payment schedule which Morosa sent to both Crown and the USDA." *Id.* It also noted that both the January 11, 2000, letter to the USDA and the January 12, 2000, letter to Crown stated that Patterson was "'agreeable'" to the payment schedule and instructed Crown to send payment to a specific bank account. *See id.*

Patterson asserted that "only a signed and executed 'formal written contract' can abrogate a created PACA trust." *Id.* The court noted that no other decision, including *Greg Orchards*, had determined what was necessary to constitute a "'written agreement' for purposes of the PACA." *Id.* It added that

> [N]o court has had to resolve whether a written agreement means merely a writing sufficient to satisfy the Statute of Frauds or an actual executed agreement signed by both parties and integrating all relevant terms. If all that is required for an agreement to be "written" for purposes of abrogating PACA rights is a document satisfying the Statute of Frauds, then Patterson is out of luck.

Id. at 670-71.

The court noted that the letters Morosa sent to Crown and the USDA "reasonably identify the contract's subject matter and demonstrate agreement on payment terms of $8,356.46 per month for eight months." *Id.* at 671. It also noted that the letters indicated "with reasonable certainty the unperformed promises in the contract, that Crown will pay on the dates indicated, and that Patterson will forbear from going forward with its PACA reparation action so long as payments are forthcoming." *Id.* (citations omitted). The court concluded that

> PACA rights are lost whenever the parties enter into a written agreement that satisfies the generally applicable Statute of Frauds. Nothing in either PACA itself or the policies that lie behind it justifies the judicial creation of a rule that can be satisfied only by a formally executed document with the word "CONTRACT" typed at the top. Also supporting our position is the fact that a PACA trust can be created through letters, invoices, or anything else reduced to writing with no requirement of formality. We see no reason why modification of the trust should require more than its creation.

Id. (citing 7 C.F.R. § 46.46(f)(1) and *In re Richmond Produce Co.*, 112 B.R. 364, 373 (Bankr. N.D. Cal. 1990)).

Ninth Circuit Rules that Produce Supplier's Contractual Claim for Attorneys' Fees and Interest Was Within the Scope of Its Claim in Trust Assets

In *Middle Mountain Land and Produce Inc. v. Sound*, 307 F.3d 1220 (9th Cir. 2002), the United States Court of Appeals for the Ninth Circuit considered as a matter of first impression for the Ninth Circuit whether § 499e(c)(2) of PACA supported a produce supplier's contractual right to attorneys' fees and interest as part of PACA statutory trust claim. *See Middle Mountain*, 307 F.3d at 1221. The Ninth Circuit ruled that the produce supplier's contractual claim for attorneys' fees and interest was within the scope of its claim to the assets of a statutory trust and allowed the seller to collect attorneys' fees, despite the fact that there were not sufficient funds in the trust to fully satisfy all of the other PACA claimants' claims to the trust assets. *See id*. at 1222-26.

Section 499e(c)(2) of the PACA provides, in relevant part, the following:

> Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions . . . and any receivable or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until *full payment of sums owing in connection with such transactions* has been received by such unpaid suppliers, sellers, or agents . . . .

Id. (quoting 7 U.S.C. § 499e(c)(2)).

J.R. Simplot Company ("Simplot") was one of several suppliers of perishable agricultural commodities that delivered produce to Sound Commodities ("Sound"). *See id.* at 1222. Sound became insolvent and failed to make full payment to all of its suppliers, including Simplot. *See id.* The suppliers filed claims to collect payment from the assets of the statutory trust held by Sound. *See id.* Simplot filed a PACA claim "for amounts due on unpaid invoices, including outstanding attorneys' fees and interest." *Id.* Simplot was the only supplier that requested attorneys' fees and interest. *See id.*

The court-appointed receiver recommended that the district court order a pro rata distribution of the PACA assets to each of the claimants because there were not enough trust assets to fully pay each of the claims filed by the suppliers. *See id.* The receiver also objected to "the portion of Simplot's claim for attorney's fees and prejudgment interest and noted that it would be inequitable to grant Simplot attorneys' fees and interest and thereby reduce the awards of other PACA claimants." *Id.*

The district court agreed with the receiver, concluding that the receiver "had broad authority to grant or deny attorneys' fees and interest to a PACA claimant under . . . § 499e(c)(2), and denied Simplot's claim for attorneys' fees and interest." *Id.* Simplot appealed the district court's decision to the Ninth Circuit. *See id.*

Each of Simplot's invoice statements provided that "'[i]n the event collection action becomes necessary Buyer agrees to pay all costs of collection, including attorneys' fees and amount past due will be subject to a finance charge of 1.5% per month (18% annual rate) until paid in full.'" *Id.* n.2. Simplot asserted that, based on this language, it was entitled to recover attorneys' fees and interest from the trust assets. *See id.*

The Ninth Circuit stated that

> [w]e address whether, if valid, a contractual claim by Simplot for attorneys' fees and interest is within the scope of a PACA trust claim. This issue, one of first impression in our circuit, hinges on the statutory interpretation of the language "full payment of the sums owing *in connection with* perishable agricultural commodities transactions" within 7 U.S.C. § 499e(c)(2).

Id.

The court began by examining the plain language of the PACA, explaining that its task was "'to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.'" *Id.* (citation omitted). It also explained that it must give statutory language its plain meaning, because "'[w]here . . . Congress intentionally and unambiguously drafted a particularly broad definition, it is not our function to undermine that effort.'" *Id.* (citation omitted).

Simplot argued that it had a contractual right to attorneys' fees and interest based on the PACA's plain language. *See id.* Specifically, it argued that "the words 'in connection with' included contractual rights to attorneys' fees and interest because Congress could have narrowly defined the scope of a PACA claim but instead chose to draft the statute broadly to include all sums owing 'in connection with' the perishable agricultural commodities transaction." *Id.*

The Ninth Circuit agreed with Simplot's position, stating that the phrase "'in connection with' encompasses not only the price of the perishable agricultural commodities but also additional related expenses, including contractual rights to attorneys' fees and interest, in a PACA claim." *Id.* at 1222-23. It stated that even in those instances where there are insufficient funds to fully compensate all PACA claimants, "the plain language of the statute does not exclude recovery of contractual rights to attorneys' fees and interest that are due in connection with the transaction that is the subject of their PACA trust claim." *Id.* at 1223.

Although the court determined that the plain language of the PACA allowed Simplot to recover attorneys' fees and interest from PACA trust assets, it also examined the legislative history of the PACA. *See id.* It explained that "[t]here is a strong presumption that the plain language of the statute expresses congressional intent, 'rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed.'" *Id.* (quoting *Ardestani v. I.N.S.*, 502 U.S. 129, 135-36 (1991) and citing *United States v. Ron Pair Enters., Inc*., 489 U.S. 235, 242 (1989)).

The court stated that "it cannot be contended seriously that interpreting PACA claims to include contractual rights to attorneys' fees and interest under the "in connection with" language of the statute is contrary to the statute's purpose, absurd, or 'demonstrably at odds with the intentions of the drafters.'" *Id.* at 1224. It noted that because the PACA as originally enacted was not able to completely protect sellers of perishable agricultural commodities in instances where the buyer became insolvent and did not pay for the delivered produce, Congress amended the PACA in 1984 to protect unpaid perishable agricultural commodities suppliers and sellers from these situations. *Id.* It also noted that this amendment "elevated the claims of unpaid perishable agricultural commodities suppliers over all other creditors of the bankrupt estate with regard to funds in the PACA trust." *Id.* The court concluded that "[i]t is unlikely that Congress, in enacting a statute to provide better insolvency remedies to perishable agricultural commodities sellers, wanted selectively to exclude legitimate portions of a covered contract from the scope of a PACA claim." *Id.* It added that "[t]here is no evidence [in the legislative history] that Congress intended to exclude contractual rights to attorneys' fees and interest as outside the scope of the PACA claim." *Id.*

The court also addressed the concern that it would be inequitable to allow Simplot to recover attorneys' fees and interest because its PACA claim would be disproportionately larger than the other PACA claimants' claims. *See id.* It explained that this concern

> misses the point that PACA protects all that is due and owing in connection with the perishable agricultural commodity transaction. If one particular supplier, here Simplot, gained a contractual right greater than that negotiated by others, then it is not unfair for such a supplier to gain the benefit of its superior foresight or industry.

Id.

The court did not express an opinion as to whether Simplot's asserted contractual claim was valid because that was "an issue not decided by the district court." *Id.* Thus, the court remanded the matter to the district court to determine "if the invoices and related communications created a contractual right to attorneys' fees and interest." *Id.* It stated, however, that "if a contractual right arose from the exchange of contractual communications and Simplot's invoices, then Simplot has a right under PACA to enforce the full scope of its perishable agricultural commodities contract." *Id.* at 1224-25.

With respect to the issue of prejudgment interest, the court stated only the following:

> Second, turning to the question of whether prejudgment interest may be awarded under PACA absent contractual right, courts have uniformly agreed that a district court has broad discretion to award prejudgment interest to PACA claimants under 7 U.S.C. § 499e(c)(2). Though we have not previously expressed a view on this subject, we agree with the district court and conclude that a district court may award reasonable prejudgment interest to PACA claimants if such an award is necessary to protect the interests of PACA claimants, and that such an award absent contract is discretionary.

Id. (citing *Endico Potatoes,* 67 F.3d at 1071-72 (stating that a court has broad discretion in fashioning an award of prejudgment interest to PACA claimants); *Morris Okun,* 814 F.Supp. at 351 (S.D.N.Y. 1993) (awarding prejudgment interest on overdue accounts based on congressional intent in PACA); *Rodgers v. United States*, 332 U.S. 371, 373 (1947) (stating that the failure to mention interest in federal statute permits the courts to fashion such rules in light of congressional purposes)).

Bank Required to Disgorge Funds It Received in Breach of PACA Trust

In *Albee Tomato Co., Inc. v. Korea Commercial Bank of New York*, No. 89 Civ. 01888, 2003 WL 255246 (S.D.N.Y. Feb. 5, 2003), several unpaid produce sellers brought an action against Korea Commercial Bank ("KCB") seeking to have KCB disgorge funds that were deposited at KCB by A.B. Shalom Produce Co. ("Shalom"). *Albee Tomato*, 2003 WL 255246, at *1. Shalom purchased perishable agricultural commodities from the produce sellers and sold the produce to other produce retailers. *See Albee Tomato*, 2003 WL 255246, at *1. In 1998, Shalom breached the statutory trust it held for the benefit of the unpaid sellers when it used trust funds to pay down the overdraft debt it owed to KCB. *See id.*

The plaintiffs asserted that KCB was liable for Shalom's breach of the trust "as a third-party transferee of trust assets" and that KCB owed them $890,249.17, the full amount they claimed Shalom owed to them. *Id.* KCB argued that the plaintiffs forfeited their rights in the statutory trust because they failed to properly perfect their rights in the trust. *See id.* Alternatively, KCB argued that even if the plaintiffs did perfect their rights in the trust, it "did not participate in Shalom's, the trustee's, breach of that trust because it did not know of Shalom's breach nor did it have reason to know of the breach." *Id.* Under either theory, KCB contended that it could not be required to disgorge the trust funds. *See id.* Finally, KCB argued that the plaintiffs' damages were "mitigated by the fact that a great portion of the loaned money was directed to the [p]laintiff suppliers and the fact that [p]laintiffs failed to timely notify . . . [KCB] of its suit to recover trust funds from Shalom." *Id.*

The court explained that although PACA "does not provide explicit remedies against third parties that receive trust assets in breach of a PACA trust," courts have applied "general trust principles in determining whether a party has breached or participated in a breach of a PACA trust." *Id.* (citing *C.H. Robinson Co. v. Trust Co. Bank, N.A.,* 952 F.2d 1311, 1313-14 (11th Cir. 1992); *Endico Potatoes*, 67 F.3d at 1067-68)). Further, "third parties can be held liable under general trust principles for participating in a trustee's breach of trust." *Id.* (*See also Fresh Kist Produce*, 67 F.3d at 1063; *C.H. Robinson*, 952 F.2d at 1311; *Endico Potatoes*, 67 F.3d at 1063). It also explained that the PACA provides that a supplier waives

> its PACA rights unless it gives written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker, and . . . filed such notice with the Secretary . . . with thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, [or] (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering the transaction . . . .

Id. (citing 7 U.S.C. § 499e(c)(3); *Bronia Inc. v. Ho,* 873 F.Supp. 854, 857 (S.D.N.Y. 1995); *In re Marvin Properties, Inc.,* 854 F.2d 1183, 1186 (9th Cir. 1988) (stating that PACA "'clearly requires the seller to give written notice directly to the buyer'")).

A produce buyer must pay a seller within ten days, unless the parties agree otherwise. *See id.* (citing 7 C.F.R. § 46.2(aa)(5); *Bronia,* 873 F.Supp. At 857; *A & J Produce Corp. v. CIT Group/Factoring, Inc.,* 829 F.Supp. 651, 654 (S.D.N.Y. 1993)). The parties may agree to a payment term longer or shorter than ten days, "but if a supplier agrees to a term longer than thirty days, that supplier forfeits its right to PACA trust protection." *Id.* (citing 7 C.F.R. § 46.46(f)(1), (f)(2); *A & J Produce*, 829 F.Supp. at 654).

KCB did not dispute that the plaintiffs provided adequate notice to the Secretary but argued that the plaintiffs failed to provide adequate notice to Shalom. *See id.* at *4. The court noted that fourteen of the plaintiffs presented evidence that they sent notices to the Secretary and to Shalom. *See id.* The court determined that "the fourteen plaintiffs who offered testimony have met their burden of proving that they gave timely notice to Shalom." *Id.*

With respect to one of the plaintiffs, Hunts Point Tomato Co., Inc. ("HPT"), the court noted that KCB provided "affirmative evidence to rebut [p]laintiffs' evidence that it filed timely notice with Shalom." *Id.* at *5. HPT filed its notice of intent with the Secretary on October 7, 1988, but its notice "included deliveries going back more than 40 days to August 18, 1988 through August 22, 1988." *Id.* (citations omitted). HPT's certified mail receipt indicates that Shalom did not receive notice until five days after the Secretary received its notice. *See id.* (citation omitted). The court concluded that "in the case of 'HPT,' KCB rebutted the [p]laintiffs' evidence of timely notification. Accordingly, ... [plaintiffs'] damages are reduced by $6,266, the amount HPT claimed during those five days, to a total of $883,983.17." *Id.*

The court ruled that because nine of the plaintiffs did not provide evidence establishing that they had sent timely notice to Shalom, they failed to establish that they provided timely notice to Shalom. *See id.* The court stated that the certified notices that these plaintiffs sent to the Secretary were "insufficient to show that they met their burden under PACA." *Id.* It added that "[t]he fact that the . . . [Secretary] received notification of intent to preserve PACA benefits, without any evidence that a notice was also sent to the merchant, does not confirm that Shalom received any notice, let alone timely notice." *Id.* It dismissed the claims of these nine plaintiffs, which reduced the amount of the plaintiffs' claimed damages by $222,244.80, to $661,338.37. *See id.*

Next, the court considered whether the plaintiffs could enforce their PACA trust claims against KCB "as a third-party transferee in breach of the trust." *Id.* at *6. KCB argued that it could not be held liable as a third-party transferee because it was a bona fide purchaser. *See id.* A third-party transferee may escape liability as a bona fide purchaser if it "'(i) gave value for the trust property and (ii) had no actual or constructive notice of the breach of trust.'" *Id.* (citations omitted). Moreover,

> [w]here . . . [a] PACA trustee has self-evident cash-flow problems, a lender . . . must make the kind of inquiry as to debts owed by the trustee to PACA beneficiaries that a reasonably

> prudent lender would make as to debts owed by a similar borrower to a prior creditor who had rights superior to those sought by the lender . . . . If KCB knew or should have known of Shalom's difficulty, it should have been cautious– under the prudent lender standard– and ensured that prior creditors were being paid. Thus, the Court must look to whether the facts presented at trial demonstrate that Shalom suffered self-evident cash-flow problems and yet KCB failed to conduct a proper inquiry . . . ."

Id. (citation omitted).

Shalom first obtained an overdraft account with KCB in July, 1986. *See id.* (citation omitted). The court noted, among other things, that Shalom exceeded its overdraft account amount several times in the first year and that in 1988, the year in which the breach occurred, "Shalom's overdraft account was in extreme arrears, offering a clear red flag to KCB that Shalom was having significant difficulty controlling its cash-flow. Indeed, for the six months before the August of 1988 breach, Shalom consistently maintained overdraft balances in the $200,000, $300,000, and $400,000 ranges." *Id.* (citation omitted).

The court stated that KCB's

> own actions toward Shalom demonstrate that it was concerned with Shalom's continual abuse of the overdraft account. Throughout 1987 and 1988, KCB pressed . . . [Shalom] to reduce the overdrafts to within the authorized credit limit. In November of 1987, it was concerned enough to assist [Shalom] in developing a plan to reduce its debt with the bank, which included (a) improving receivable collection procedures by initiating legal proceedings on 108,000 delinquent accounts, (b) urging an additional investment by . . . [Shalom], and (c) acquiring additional financing from another bank. In December of 1987, . . . [KCB] sent . . . [Shalom] a sharply worded letter in which KCB's General Manager noted that . . . [KCB] had repeatedly asked . . . [Shalom] to clear the overdraft "sooner or later" and stated that "unless . . . [Shalom paid] off the overdrawn amount in five business days after" receipt of the letter, Shalom's account would be closed . . . . KCB's efforts show that it was aware of and concerned by Shalom's cash-flow problems.

Id. at *9 (citations omitted).

The court concluded that "a reasonable bank officer looking at the overdraft account numbers should have been concerned that Shalom did not have sufficient funds to cover its operating expenses, its debts to its suppliers, and its debt to the Bank." *Id.* It added that

> [b]ased on the overdrafts account statements, the Court finds that Shalom had self-evident cash-flow problems and the Bank was well aware of them. As such, KCB was on notice of Shalom's financial distress and . . . should have been prompted to investigate whether Shalom was satisfying its obligations to prior creditors, or PACA suppliers, before automatically deducting deposits against Shalom's overdraft to better its own position.

Id.

Next, the court examined whether KCB "took steps that a 'reasonably prudent lender would make as to debts owed by a similar borrower to a prior creditor who had rights superior to those sought by the lender.'" *Id.* at *10 (citation omitted). KCB argued that it satisfied this standard "when it reviewed Shalom's financial information vigorously enough to satisfy itself that Shalom was worthy of renewed and enlarged overdraft protection in both 1998 and 1989." *Id.* The court rejected this argument, noting *inter alia* that

> KCB offered no evidence to show . . . that it inquired into prior creditors' claims to determine whether Shaloms' suppliers were being paid . . . . [I]mportantly, . . . [KCB] responded to Shalom's abuse of its overdraft limit by encouraging Shalom, and, at points, demanding that Shalom increase the rate of collection of account receivables. KCB did this while fully aware that the deposits that Shalom was making to the account were from accounts receivable and that Shalom's ability to reduce its overdraft was dependent on collection of these accounts receivable. As KCB pressured Shalom to reduce its overdraft, it had to have been aware of the likelihood that Shalom was forgoing payments to suppliers in order to reduce its overdraft.

Id. (citations omitted).

The court ruled that KCB "was on notice throughout the breach period . . . of Shalom's financial distress because of Shalom's self-evident cash flow problems." *Id.* It also ruled that KCB "failed to conduct the kind of inquiry that a reasonable lender would make as to prior creditors." *Id.* at *12.

Having made this determination, the court examined "to what degree KCB must disgorge the payments it accepted in breach of the PACA trust." *Id.* The court noted that although the funds that Shalom deposited at KCB were used to reduce the overdraft amount, "most of the payments that Shalom made from its account went back out to its produce suppliers." *Id.* (citation omitted). The court determined that there was no breach of trust with respect to these funds. *See id.* at *13. The court ruled, however, that KCB was liable for the payments made to non-PACA entities, such as the credit card companies, insurance companies, and phone companies. *See id.* The amount paid to non-PACA entities totaled $319,954.94. *See id.*

The court awarded the fourteen remaining plaintiffs $319,954.94, plus prejudgment interest, that was to be dispersed among the remaining plaintiffs pro rata according to the amount of their individual PACA claims. *See id.*

Unpaid Suppliers Seeking Payment Of Amount Owed Awarded Preliminary Injunction

Horizon Marketing v. Kingdom Int'l. Ltd., 244 F.Supp.2d 131 (E.D.N.Y. 2003), involved two unpaid produce sellers who brought an action against a produce buyer, a purported produce buyer, and the purported buyer's principals seeking payment of amounts allegedly owed to the buyers. *Horizon Marketing*, 244 F.Supp.2d at 134. The United States District Court for the Eastern District of New York ruled that the sellers established the irreparable harm that was necessary to issue a preliminary injunction and that they established a likelihood of success on the merits of their claims. *Horizon Marketing v. Kingdom Int'l. Ltd.*, 244 F.Supp.2d 131, 139-40 (E.D.N.Y. 2003). It also ruled that the purported buyer was a trustee of a PACA statutory trust for the purpose of preliminary injunctive relief. *Id.* at 140-45.

Plaintiffs Horizon Marketing ("Horizon") and Venida Marketing Co. ("Venida"), were sellers of perishable agricultural commodities. *See id.* at 134. Defendants Kingdom International Limited ("Kingdom") and Dong Ku Ra Mi Corporation ("Dong"), were two New York companies that allegedly purchased large amounts of perishable agricultural commodities from the plaintiffs. *See id.* Defendant Ko-Yu Mo ("Mo"), owned eighty-five percent of Kingdom and fifty percent of Dong. *See id.* (citation omitted).

The plaintiffs claimed that the defendants owed them $220,091.15 for commodities that were delivered during September and October, 2002. *See id.* at 135. They asserted that "they sold the produce to both Kingdom and Dong, believing that Dong was a 'division or trade name of Kingdom.'" *Id.* (citation omitted). Kingdom argued, however, that only Dong purchased produce and therefore only Dong should be subject to the plaintiffs' request for a preliminary injunction. *See id.*

The court explained that under PACA "buyers of produce are required to hold proceeds from the sale of such produce in trust for the benefit of the sellers" and that the statutory trust is created "at the moment the produce is shipped to the buyer and remains in effect until the seller is paid in full." *Id.* (citing 7 U.S.C. § 499e(c); 7 C.F.R. § 46.46(c)(1); *In re Kornblum & Co.*, 81 F.3d 280, 286 (2d Cir. 1996)). It also explained that under the PACA the produce buyer– "in this case Dong or both Kingdom and Dong–therefore becomes a trustee and 'has a fiduciary obligation under PACA to repay the full amount of the debt owed to the PACA beneficiary.'" *Id.* (citation omitted). It added, "[b]uyers who dissipate or otherwise spend the proceeds of the trust without making full payment to the seller are in breach of their fiduciary duties . . . . The wrinkle in this case is deciding whether Kingdom is also a buyer/trustee, or whether Dong is the only liable corporate party." *Id.*

When the parties' business relationship began in Spring, 2002, Dong did not have a PACA license and was thus unable to buy or sell produce. *See id.* (citation omitted). Mr. Mo claimed that the plaintiffs, as well as other produce suppliers, "agreed to sell produce to Dong, but bill Kingdom because [Kingdom] had a PACA license." *Id.* (citation omitted). Mr. Mo also claimed that Dong's customers "would pay Kingdom, which would deposit the proceeds of Dong's sales into [Kingdom's] account, and then issue its own check to Dong." *Id.* (citation omitted). According to Mr. Mo, the "'parties had agreed that once Dong received it[s] PACA license that it would become the purchaser of the commodities sold by Horizon and Venida." *Id.* (citations omitted). Thus, Kingdom argued that the court should not "disregard the separate corporate identity of each company, and recognize that since Kingdom 'never sold those commodities . . . never took custody of those commodities . . . never received these commodities or received any monies derived from those commodities,' it cannot be deemed a PACA trustee in this action." *Id.* (citation omitted).

The plaintiffs disputed Mr. Mo's testimony, asserting that they only agreed to sell to Kingdom, "relying on 'Kingdom's name, Kingdom's credit references, which were checked out[, and] Kingdom's license from the USDA to transact the produce sales and purchases.'" *Id.* They also asserted that under PACA "the trust follows the produce, and regardless of who paid, Kingdom ordered the produce, accepted delivery of the produce, and received the proceeds of the sale of the produce." *Id.*

The plaintiffs filed a complaint against the defendants on December 11, 2002, along with a request for a temporary restraining order and preliminary injunction. *See id.* The defendants responded on December 17, 2002, filing Mr. Mo's affidavit in opposition and arguing that the plaintiffs' claims against Kingdom should be dismissed. *See id.* Thus, the issues before the court were whether the plaintiffs' motion for preliminary injunctive relief should be granted and whether the claims against Kingdom should be dismissed. *See id.*

To obtain a preliminary injunction, a party must show "'(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.'" *Id.* at 139-40 (citation omitted). The court determined that the plaintiffs demonstrated a presence of irreparable harm and that they were likely to succeed on the merits. *See id.* at 140.

The court found that the irreparable harm in this case was "the risk that a produce buyer will have dissipated the PACA trust without paying the produce seller, thus leaving the produce seller out of luck and out of money." *Id.* It added that if a seller "'cannot realize any returns on the sale of the crop when due, he may not be able to survive.'" *Id.* (citation omitted). The court stated that in this case, "this danger has already materialized in that Dong is no longer in business and is in the process of liquidating its assets, which consist of approximately $80,000 in receivables to be shared between plaintiffs and six other creditors." *Id.* Thus, it concluded that "there is substantial risk of further irreparable harm and that injunctive relief is necessary to preserve the status quo." *Id.*

The court also explained that under PACA a produce seller "loses the benefits of the statutory trust unless it informs the buyer of its intention to preserve its entitlement to the trust proceeds." *Id.* (citing 7 U.S.C. § 499e(c)(3)). The PACA permits a seller to give such notice by "'ordinary and usual billing or invoice statements,' which must include specific language informing the buyer of the seller's intention to preserve its rights to the trust." *Id.* (citing 7 U.S.C. § 499e(c)(3)). The court stated that

> [P]laintiffs have submitted unpaid invoices, all of which bear the exact language required by the statute, thus satisfying the notice requirement and preserving their interest in the trust. Moreover, that plaintiffs are entitled to payment is not in dispute. No one has questioned, for instance, whether the produce that was delivered and accepted conformed to the relevant agreements. Having provided produce as required, and not having been paid as agreed, plaintiffs have established their entitlement to payment under PACA. The only issue in dispute is the identity of the buyer. Thus, the likelihood of plaintiffs' success on the merits, as to at least one–if not both–of the corporate defendants, is practically unquestioned.

Id.

The court rejected Kingdom's argument that it should be dismissed as a defendant, stating that "[t]he documentary evidence offered in this case establishes that Kingdom purchased the produce at issue and is a PACA trustee." *Id.* at 140. It noted that the parties did not dispute the fact that Kingdom was the original buyer, since Dong did not have a PACA license when the plaintiffs began delivering produce. *See id.* at 140-41. "Most importantly," the court added, "the invoices and bills of lading indicate that the produce was sold and delivered to Kingdom." *Id.* at 141.

The court explained that

> The PACA trust is impressed on produce that is "received" by a merchant, dealer or broker. PACA regulations define "received" to mean "the time when the buyer, receiver, or agent gains ownership, control, or possession of the perishable agricultural commodities." Since Kingdom is the cosignee in the bills of lading, it is the presumptive owner and receiver of the produce, and, hence, a PACA trustee . . . . In addition to the bills of lading, the original invoices produced by defendants also indicate that Kingdom was the purchaser of the produce, and is therefore liable to plaintiffs.

Id. (citations omitted).

Finally, the court noted that many courts have ruled that in PACA actions, "individuals who are principals in corporations which bought produce, but failed to pay, are individually liable for breach of their fiduciary duties." *Id.* at 145 (citations omitted). It added that should either Kingdom or Dong "be found to be insolvent, Mr. Mo, as principal of both corporations, may be held liable to plaintiffs. At this point, however, [this court] makes no finding as to any individual liability, nor does the preliminary injunction issued herein affect Mr. Mo's personal assets." *Id.*

Summary Judgment Motions Denied in Breach of Contract Action Involving Perishable Agricultural Commodities

In *Agrexco USA, Ltd. v. Benny's Farm Fresh Distributing Co. Inc.*, No. 01-C-4798, 2003 WL 722232 (N.D. Ill. Mar. 3, 2003) (unreported decision), Agrexco USA, Ltd. ("Agrexco") brought a breach of contract against Benny's Farm Fresh Distributing Co., Inc., and its president, Ronald E. Pomerantz (collectively "Farm Fresh") when Farm Fresh refused to pay for two shipments of red and yellow peppers delivered by Agrexco to Farm Fresh. *See Agrexco*, 2003 WL 722232, at *1-2. Farm Fresh was a distributor of perishable agricultural commodities and purchased the peppers for resale to C.H. Robinson Company ("Robinson"). *See id.* at *1. *Id.* Agrexco was a distributor of perishable agricultural commodities. *See id.*

On March 23, 2001, David Duggan, an agent of Farm Fresh, negotiated a contract with Tina Hoehne, a Robinson sales representative, to sell various quantities of red and yellow peppers. *See id.* Under the contract, Robinson "agreed to purchase 400 red and 300 yellow peppers for shipment on Friday March 23, 2001, and 500 red and 300 yellow peppers for shipment on Sunday March 25, 2001." *Id.* It agreed to purchase both shipments of peppers for $36,550.00. *See id.*

Farm Fresh purchased the peppers from Agrexco, and Agrexco shipped the peppers directly to the Dallas and Atlanta locations of Standard Fruit and Vegetable. *See id.* at *2. On March 27, 2001, Hoehne communicated to Duggan that representatives of Standard Fruit and Vegetable in Dallas and Atlanta had complained to her that the peppers they received were too large. *See id.*

Hoehne claimed that when the sales contract was negotiated, Duggan agreed to provide smaller peppers that were "sized to fit 28 to 30 per box." *Id.* Although Duggan and Hoehne asserted that the size requirement was a term of their contract, the order confirmation did not contain a statement indicating any such requirement. *See id.* Farm Fresh, however, disputed that they reached an agreement concerning pepper size and presented an e-mail dated March 28, 2001, that Duggan sent to a representative at Agrexco. *See id.* The e-mail stated that

> [I] am having a little problem with the weekend shipments of peppers. The customer is complaining that the peppers are too large. The shipment from Sunday which went to Atlanta was inspected, it showed 3% decay in the red peppers & an average count of 21 peppers per case. The yellow peppers showed no decay & an average of 22 peppers per case. I know we can not guarantee number of peppers per case, but Fred had stated the red peppers were running about 28 peppers per case with an occasional case with 22 per case. The peppers which left on Friday were also very large, I do not have a specific count. I was wondering if you can help me in this situation . . . .

Id. (citation omitted).

Duggan claimed that after Hoehne informed him that the peppers were too large, he requested that federal inspections of the shipments be conducted. *See id.* These inspections were conducted, and Hoehne sent two inspection certificates to Duggan. *See id.* One certificate showed the results of an inspection performed on March 27, 2001, of approximately 300 cartons of red and yellow peppers delivered on March 23, 2001, that indicated "some decay on the peppers and, significantly, an average of 21-22 peppers per carton." *Id.* The other certificate detailed the results of an inspection performed on March 27, 2001, on approximately 800 cartons of sweet peppers delivered on March 25, 2001, that indicated “some quality defects and decay and, significantly, an average of 21-22 peppers per carton.” *See id.*

Hoehne asserted that after Duggan examined the two inspection reports, he “agreed that the peppers were too large, and accordingly allowed Robinson's purchaser to sell the peppers that could not be repacked.” *Id.* Robinson asserts that “it was forced to deduct $18,204 from the sale price to its customer because the peppers Farm Fresh provided did not conform to the agreed-upon size requirements." *Id.* To prove its damages, Robinson submitted two letters from Standard Fruit and Vegetable dated May 17, 2001, which stated that on March 26, 2001, Standard Fruit and Vegetable received peppers that did not satisfy the specifications of what was ordered. *See id.* The letters listed a return of $10,500.00 and $11,718.00 on each shipment, respectively. *See id.*

Agrexco initially brought an action against Farm Fresh to recover the balance due on the purchase contract. *See id.* Farm Fresh responded by filing a third-party complaint against Robinson, claiming that Robinson had violated the PACA and had breached their contract. *See id.* Farm Fresh also sought payment for the commodities it ordered from Agrexco and sold to Robinson. *See id.* Agrexco and Farm Fresh settled and dismissed their dispute, but the third-party complaint between Farm Fresh and Robinson continued. *See id.*

Robinson subsequently filed a motion for summary judgment, arguing that it was entitled to deduct the damages it sustained from the full contract amount because Farm Fresh had provided non-conforming goods. *See id.* at *1. Farm Fresh responded by filing a motion for summary judgment, arguing that Robinson had not proved its damages. *See id.* The court denied each of these motions. *See id.*

After Agrexco filed its action against Farm Fresh, Farm Fresh filed a third-party complaint against Robinson, “asserting a violation of PACA and breach of contract, and seeking payment for the commodities it ordered from Agrexco and sold to Robinson.” *Id.* Agrexco and Farm Fresh reached a settlement agreement. Thus, only the third-party complaint between Farm Fresh and Agrexco was before the court. *See id.*

The court stated that “[a]lthough PACA provides the basis for federal question jurisdiction over Farm Fresh’s third-party complaint against Robinson, the crux of this dispute is the state law breach of contract claim. Indeed, Farm Fresh and Robinson each contend that the other party failed to fulfill the terms of their agreement.” *Id.* at *3. Farm Fresh asserted a breach of contract claim as a cause of action, and Robinson asserted breach of contract claim as an affirmative defense. *See id.*

To prevail on a breach of contract claim under Illinois law, “the complaining party must establish (1) the existence of a valid and enforceable contract; (2) its performance of the contract; (3) breach of contract by the other party; and (4) resulting injury.” *Id.* (citation omitted). The court noted that Robinson and Farm Fresh agree that “Robinson's request to purchase, and Farm Fresh's agreement to sell two shipments of red and yellow peppers for $36,550.00 created a valid and enforceable contract. However, the remaining elements of the breach of contract claims are contested by both sides.” *Id.* It also noted that with respect to the second element, Robinson contends “that the appropriate payment was rendered for the peppers Farm Fresh supplied. Whether Robinson has proven as much turns in large part on the Court’s resolution of the third and fourth elements, breach by Farm Fresh, and resulting injury to Robinson, respectively.” *Id.* at *4.

Robinson argued that Farm Fresh breached the parties’ contract by providing peppers that were too large. *Id.* Farm Fresh argued that size of the peppers was not a term specified in the contract, “and thus, a triable issue of fact has been raised that precludes summary judgment in Robinson's favor." *Id.* Robinson submitted affidavits from Duggan and Hoehne that attested "to Hoehne's specific request on behalf of Robinson for peppers that would fit 28 to 30 per box, and Duggan's promise as a representative of Farm Fresh to fulfill that requirement." *Id.* In response, Farm Fresh submitted Duggan's March 28, 2002, e-mail in which Duggan complained about the size of the peppers shipped to Robinson, "but then concede[ed] that 'I know we can not [sic] guarantee number of peppers per case.'" *Id.*

Farm Fresh claimed that Duggan's admission contained in the March 28, 2002 e-mail contradicted "his averment of an agreement with Hoehne concerning pepper size . . . ." *Id.* The court rejected this argument, stating that although the e-mail "certainly shows that Duggan may have been aware that Agrexco could not guarantee the number of peppers per case . . . it says nothing about Duggan's conversations with or promises to Robinson regarding the number of peppers per case." *Id.* "In fact," the court stated, "immediately following his notation that pepper size could not be guaranteed, Duggan writes that he had been told peppers were running 28 per case, with an occasional shipment of 22 per case." *Id.* The court stated that "a reasonable jury would be persuaded that the number of peppers per case was not a term of the parties' contract. *Id.* Thus, it concluded that Farm Fresh "failed to demonstrate a genuine issue of material fact on the question of whether it agreed to supply peppers of a particular size." *Id.*

The court next considered Farm Fresh's argument that Robinson failed to present evidence sufficient to demonstrate the peppers supplied did not conform to the alleged size requirement. *See id.* Robinson relied on the two federal inspection reports to show that the average size of the peppers delivered was twenty-one to twenty-two peppers per box. *See id.* Although the identification number on each inspection report matched the customer number on the corresponding confirmation orders for each shipment of peppers, Farm Fresh asserted that there was "no evidence that the inspectors actually knew or verified that the peppers inspected were indeed the same ones sold by Farm Fresh to Robinson." *Id.*

The court stated that although Farm Fresh characterizes the fact that the identification number on each report matches the customer number on the corresponding confirmation orders as "mere happenstance," it believed that the inspection reports adequately substantiated Robinson's claim that Farm Fresh did not provide peppers that conformed. *See id.* It added that

> Farm Fresh offers nothing more than speculation that the peppers described in the inspection certificates may not have been its goods. However, to avoid summary judgment, Farm Fresh must present specific facts that show a genuine issue of material fact, which is has not done. As such, Farm Fresh has failed to sustain its burden on summary judgment of identifying a genuine issue of material fact as to whether it breached the contract.

Id. (citation omitted).

The court also determined that Robinson was not entitled to summary judgment because there were disputed issues of material fact concerning whether there had been a resulting injury, the fourth element of a breach of contract claim. *See id.* It explained that the party claiming breach of contract has the burden of establishing the amount of damages. *See id.* at *6 (citation omitted). Robinson submitted two damage reports prepared by Standard to establish the amount of damages it had suffered. *See id.* at *5. The court noted that these documents stated only that "Standard received peppers that did not meet the specifications of what was ordered and that Standard's total return on each shipment was $11,718, and $10,500, respectively." *Id.* It stated that these damage reports do not demonstrate "the amount of losses, if any, that Robinson sustained as a result of receiving non-conforming products." *Id.*

The court concluded that

> [i]n light of Robinson's failure to prove that the deduction from the purchase price in the amount of $18,204 was warranted, it also cannot demonstrate performance of its duties under a valid contract requiring payment of $36,550 for the goods purchased. Consequently, triable issues of fact remain that preclude summary judgment in its favor.

Id. (citation omitted).

The court also denied Farm Fresh's motion for summary judgment because it failed to demonstrate "the second element of its own breach of contract claim, performance of its duties under a valid contract to sell red and yellow peppers of a certain size." *Id.* It concluded that

> [I]n Illinois, "the rule is well-settled that a party cannot sue for breach of contract without alleging and proving that he has himself substantially complied with all the material terms of the agreement." The evidence of record establishes that Farm Fresh promised peppers that wold fit 28-30 per box, but, according to the USDA inspection reports, the peppers supplied were too large. Farm Fresh, as a cross-movant for summary judgment, therefore has not met its burden of demonstrating that judgment as a matter of law should be entered in its favor.

Id. (citations omitted).

Conclusion

Although this article focused on reported decisions–with the exception of *Agrexco*-- of precedential value issued between January 1, 2002, and June 1, 2003, one other unreported decision issued during that time frame, *"R" Best Product, Inc. v. 646 Corp.,* 2002 WL 31453909, No. 00 Civ. 8536 (S.D.N.Y. Oct. 31, 2002), deserves mentioning. In *R Best*, a produce supplier brought an action against a supermarket and its principal for violation of PACA. *See id.* at *1. The United States District for the Southern District of New York held, *inter alia*, that the supplier established by a preponderance of the evidence that the defendants were "dealers" under PACA over whom it could exercise jurisdiction and that the principal could be held personally liable for dissipation of assets of the statutory trust. *See "R" Best,* 2002 WL 31453909, at *1-6.

This article demonstrates that PACA is and will continue to be important legislation for those involved in the buying and selling of perishable agricultural commodities. The cases summarized in this article demonstrate that PACA is multi-dimensional, with cases involving issues such as whether a produce seller could enforce its rights in the assets of a statutory trust, whether a lending institution that had received funds from a produce buyer was required to disgorge those funds for the benefit of the produce seller, and whether a PACA claimant was entitled to an award of attorneys' fees and costs.