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An Agricultural Law Research Article

The Perishable Agricultural Commodities Act: The Statutory Trust and Its Application to Restaurants

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The Perishable Agricultural Commodities Act: The Statutory Trust and Its Application to Restaurants

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In 1930, Congress enacted the Perishable Agricultural Commodities Act (“PACA”)¹ “for the purpose of regulating the interstate business of shipping and handling perishable agricultural commodities such as fresh fruit and vegetables.”² The primary purpose of the PACA is to “provide a practical remedy to small farmers and growers who [are] vulnerable to sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities.”³

The PACA applies to “brokers,” “dealers,” and “commission merchants” who purchase perishable agricultural commodities in interstate or foreign commerce.⁴ The PACA defines a “broker” as a person who is engaged in the business of negotiating sales and purchases of perishable agricultural commodities either for or on behalf of the vendor or the purchaser.⁵ A person who is “an independent agent negotiating sales for or on behalf of the vendor” is not considered to be a “broker” if “sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of \$230,000 in any calendar year.”⁶ A “dealer” is “any person

1. 7 U.S.C. §§ 499a-t. For an excellent discussion of the PACA and its provisions, see Jake W. Looney, *Protection for Sellers of Perishable Agricultural Commodities: Reparation Proceedings and the Statutory Trust Under the Perishable Agricultural Commodities Act*, 23 U.C. Davis L. Rev. 675 (1990). Another helpful resource for information concerning the PACA can be found at <http://www.ams.usda.gov/fv/paca.htm>. The regulations implementing the PACA are found at 7 C.F.R. Part 46.

2. *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 990 (2d. Cir. 1974) (citations omitted).

3. *Chidsey v. Geurin*, 443 F.2d 584, 587 (6th Cir. 1971) (citing H.R. Rep. 1041, 71st Cong. 2d Sess. 1930). See also *In re Kornblum & Co., Inc.*, 81 F.3d 280, 283 (2d Cir. 1996) (stating that the PACA was “designed primarily for the protection of the producers of perishable agricultural products—most of whom must entrust their products to a buyer or commission merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing”) (quoting H.R. Rep. No. 1196, at 2 (1955), reprinted in 1956 U.S.C.C.A.N. 3699, 3701); *Consumers Produce Co., Inc. v. Volante Wholesale Produce, Inc.*, 16 F.3d 1374, 1377-78 (3rd Cir. 1994) (same); *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280 (9th Cir. 1997) (same); *In re Lombardo Fruit & Produce Co.*, 12 F.3d 110, 112 (8th Cir. 1993) (same); *Red’s Market v. Cape Canaveral Cruise Line, Inc.*, 181 F.Supp.2d 1339, 1341 (M.D. Fla. 2002) (same)).

4. See 7 U.S.C. § 499a.

5. *Id.* § 499a(7).

6. See *id.*

engaged in the business of buying or selling in wholesale or jobbing quantities” that has an invoice value in any calendar year in excess of \$230,000.00, subject to certain exceptions.⁷ A “commission merchant” is a person engaged in the business of receiving “perishable agricultural commodities for sale, on commission, or for or on behalf of another.”⁸ A “person” can be an individual, a partnership, corporation, or an association.⁹

A transaction is considered to be in interstate or foreign commerce if the commodity is part of that current of commerce usual in the trade in that commodity whereby such commodity and/or the products of such commodity are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where sale is either for shipment to another State, or for processing within the State and the shipment outside the State of the products resulting from such processing.¹⁰

A “perishable agricultural commodity” is any fruit or vegetable, whether or not frozen or packed in ice, including cherries in brine, as defined by the Secretary of the United States Department of Agriculture.¹¹ The Secretary has included within the regulatory definition of fresh fruits and vegetables “all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, . . . [except] those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character.”¹²

To help carry out its purposes, the PACA prohibits certain types of conduct on the part of brokers, dealers, or commission merchants. For example, the PACA makes it unlawful for any person doing business as a dealer, commission merchant, or broker to engage in such business without a valid and effective license.¹³ The PACA also makes it unlawful for a commission merchant, dealer, or broker to participate in various types of unfair conduct.¹⁴ Unfair conduct prohibited by the PACA includes engaging in discriminatory or deceptive practices in connection with the weighing or counting of perishable agricultural commodities and making false or misleading statements for a fraudulent

7. *Id.* § 499a(6).

8. *See id.* § 499a(5).

9. *See id.* § 499a(1).

10. *Id.* § 499a(8). *See Produce Palace v. United States Dep’t of Agriculture*, 91 F.3d 173 (D.C. Cir. 1996) (discussing issue of whether transaction is considered to be in interstate or foreign commerce); *In re Southland + Keystone*, 132 B.R. 632 (B.A.P. 9th Cir. 1991) (same); *United States v. Hawaii, Inc.*, 716 F.Supp. 461 (D.Hawaii 1989) (same); *W.J. Westcott Co. v. Yonk Rubin & Son*, 122 F.Supp. 888 (E.D. Pa. 1954) (same).

11. 7 U.S.C. § 499a(b)(4).

12. 7 C.F.R. § 46.2(u). *See also Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063 (2d Cir. 1995) and *In re L. Natural Foods Corp.*, 199 B.R. 882 (Bankr. E.D. Pa. 1996)).

13. *See* 7 U.S.C. § 499c.

14. *See id.* § 499b.

purpose in connection with a transaction involving perishable agricultural commodities in interstate or foreign commerce.¹⁵

Before 1984 the PACA successfully addressed many of the difficulties faced by sellers and producers of perishable agricultural commodities. However, it proved to be incapable of dealing with the catastrophic situation faced by producers when a dealer, broker, or commission merchant became insolvent before tendering payment for the produce. Congress therefore amended the PACA in 1984 to create a statutory trust for the benefit of unpaid suppliers and sellers of perishable agricultural commodities.¹⁶

The Statutory Trust

The statutory trust provision¹⁷ is one of the most important and effective provisions contained in the PACA.¹⁸ Congress explained its motivations for adding this provision in the amendment's preamble:

It is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, encumber or give lenders a security interest in such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products, and that such arrangements are contrary to the public interest. This subsection is intended to remedy such burden on commerce in perishable agricultural commodities and to protect the public interest.¹⁹

Congress modeled the PACA statutory trust on the statutory trust applicable for sales of livestock to packers under the Packers and Stockyards Act of 1987.²⁰ Consequently, courts will

15. *See id.*

16. *See* Pub. L. No. 98-273, 98 Stat. 165 (1984) (codified as amended at 7 U.S.C. § 499e(c)(2)). *See also* Shepard v. K.B. Fruit & Vegetable, Inc., 868 F.Supp. 703, 705 (E.D. Pa. 1994) (discussing Congress' motivations in amending the PACA to include the statutory trust provisions) and Wanda Borges, *Hidden Liens: Who Is Entitled To What?*, 103 Com. L.J. 284 Fall, 1998).

17. *See* 7 U.S.C. § 499e(c)(2).

18. *See* Bruce H. White & William L. Medford, *PACA Claims and the Bankruptcy Code: Getting Paid Has Never Been So Easy*, 19 Am. Bank. Inst. J. 18 (2000). *See also* Andrew M. Campbell, Annotation, *Statutory Trust Under Perishable Agricultural Commodities Act*, 128 A.L.R. Fed. 303 (1995). The regulations implementing the statutory provisions of the PACA trust are found at 7 C.F.R. § 46.46.

19. 7 U.S.C. § 499e(c)(1).

20. 7 U.S.C. §§ 181-183 (1994). *See also* Looney, *supra* note 1, at 689. *See also* In re W.L. Bradley Co., Inc., 75 B.R. 505, 509 (1987).

sometimes examine decisions involving the Packers and Stockyards Act statutory trust when considering issues involving the PACA statutory trust.²¹

A PACA statutory trust is created for the benefit of all unpaid “suppliers,” “sellers,” or “agents” in transactions involving perishable agricultural commodities when a broker, dealer, or commission merchant receives such commodities in interstate or foreign commerce.²² The trust exists until the supplier, seller, or agent receives full payment of the amount owed in connection with the transaction.²³

The corpus or assets of the trust are created in the perishable agricultural commodities themselves, the food related inventories or other products derived from the produce, and in any of the proceeds derived from the sale of such commodities or products.²⁴ The PACA trust is often referred to as a “floating trust.”²⁵ Thus, a PACA trust beneficiary is not obligated to trace the assets to which the beneficiary’s trust applies.²⁶ When a controversy arises as to which assets are part of the PACA trust, the buyer has the burden of establishing which assets, if any, are not subject to the PACA trust.²⁷ The PACA beneficiary only has the burden of proving the amount of its claim “and the existence of a floating pool of assets into which the produce-related assets have been commingled.”²⁸

If the buyer files for bankruptcy the trust assets do not become “property of the estate” pursuant to Bankruptcy Code § 541 because the buyer-debtor does not have an equitable interest in

21. See *Bradley*, 75 B.R. at 509 (citing *In re Monterey House*, 71 B.R. 244 (Bankr. S.D. Tex. 1986) and *In re Fresh Approach, Inc.*, 51 B.R. 412 (Bankr. N.D. Tex. 1985)).

22. See 7 U.S.C. § 499e.

23. See *id.* See also *Sunkist*, 104 F.3d at 282; *JC Produce, Inc. v. Paragon Steakhouse Restaurants, Inc.*, 70 F.Supp.2d 1119, 1120 (E.D. Cal. 1999); *Frio Ice, S.A. v. Sunfruit, Inc.*, 918 F.2d 154, 156 (11th Cir. 1990); *Hiller Cranberry Products, Inc. v. Koplovsky*, 106 F.Supp.2d 146, 149 (D. Mass. 2000); and *In re Milton Poulos*, 947 F.2d 1351, 1352-53 (9th Cir. 1991).

24. See 7 U.S.C. § 499e(c)(2). See also *In re Churchfield*, 277 B.R. 769, 775 (Bankr. E.D. Cal. 2002); *Endico Potatoes*, 67 F.3d at 1067; *Monterey House*, 71 B.R. at 247; *Fresh Approach*, 51 B.R. at 422; and *Fresh Kist Produce, L.L.C. v. Choi Corp., Inc.*, No. Civ. A. 01-1834, 2002 WL 1803723, *1 (D.D.C. July 31, 2002) (explaining that the PACA “requires produce dealers to maintain proceeds from produce sales in floating trusts so that if the dealer becomes insolvent, the produce sellers can claim a pro rata share of the trust funds before other creditors claim them”).

25. See *Fresh Approach*, 51 B.R. at 422 (stating that the PACA statutory trust “is imbued with an unusual ‘floating characteristic,’ i.e., it applies to *all* of Debtor’s produce related inventory and proceeds thereof” regardless of who the supplier of such inventory was) (emphasis supplied).

26. See Duane M. Geck, *The Perishable Agricultural Commodities Act Trust That Trumps Creditor Claims and Interests*, 21 Cal. Bankr. J. 231, 235 (1993).

27. See *Fresh Approach*, 51 B.R. at 422 and *In re Frost Morn Meats, Inc.*, 7 B.R. 988, 1013 (Bankr. M.D. Tenn. 1980).

28. See Geck, *supra* note 25 at 235. See also *Fresh Approach*, 51 B.R. at 420 (citing *First State Bank of Miami v. Gotham Provision Company, Inc.*, 669 F.2d 1000, 1011 (5th Cir. 1982)). Geck notes in his article that although *Gotham* is a Packers and Stockyards case, it has been cited “extensively” in PACA cases.

the trust assets. This is because the buyer holds those assets for the benefit of the seller.²⁹ Thus, a beneficiary of the PACA trust has priority over all other creditors with respect to the assets of the PACA trust.³⁰

An unpaid supplier, seller, or agent will lose the benefits of the statutory trust, however, if it fails to properly preserve the benefits of the trust pursuant to § 499e(c)(3). An unpaid supplier, seller, or agent may preserve the benefits of the trust by providing a written notice of intent to preserve such benefits to the commission merchant, broker, or dealer.³¹ The written notice must be given to the commission merchant, broker, or dealer

within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in the regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored.³²

Section 499e(c)(3) also provides that if the parties to the transaction “expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment must be disclosed” on the documents relating to the transaction.³³ If this agreement extends the time for payment for more than 30 days, however, the seller cannot qualify for coverage under the trust.³⁴

Section 499e(c)(4) provides an alternative method of preserving the benefits of the statutory trust, in addition to the methods provided in § 499e(c)(3). Under this alternative method, a PACA licensee may provide notice of its intent to preserve the benefits of the trust on the “ordinary and usual billing or invoice statements,” subject to two conditions.³⁵ First, the bill or invoice statement must

29. See *Matter of United Fruit & Produce Co., Inc.*, 86 B.R. 14 (Bankr. D. Conn. 1988) (holding that funds of PACA statutory trust were not included in property of the estate).

30. See *In re Magic Restaurants, Inc.*, 205 F.3d 108 (3d. Cir. 2000) (stating that “[i]n essence PACA’s trust provision gives the unpaid supplier an interest in the trust corpus superior to the interest of any other lien or secured creditor); *In re Ozcelik*, 276 B.R. 485 (Bankr. D. Mass. 2001) (same); *East Coast Potato Distrib. v. Grant*, 77 B.R. 930, 931-32 (Bankr. M.D. Fla. 1987) (same); *In re Long John Silver’s Restaurants*, 230 B.R. 29, 32 (Bankr. D. Del. 1999) (same); *Bradley*, 75 B.R. at 509 (Bankr. E.D. Pa. 1987) (same); *Hull Co. v. Houser’s Foods, Inc.*, 924 F.2d 777, 780 (8th Cir. 1991) (same); *Kornblum*, 81 F.3d at 280; *In re Prange Foods, Corp.*, 63 B.R. 211, 214 (Bankr. W.D. Mich. 1986) (same).

31. See 7 U.S.C. § 499e(c)(3). See also 7 C.F.R. § 46.46(f).

32. 7 U.S.C. § 499e(c)(3).

33. *Id.*

34. See 7 C.F.R. § 46.46(e)(2).

35. 7 U.S.C. § 499e(c)(4).

contain the terms of payment, and each party must maintain a copy of the agreement in its own records.³⁶ Second, the face of the billing or invoice statement must contain the following statement:

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.³⁷

Applicability to Restaurants

Several recent decisions have held that restaurants fall within the scope of the PACA and its statutory trust provisions.³⁸ Until these decisions, the issue of whether the PACA applied to restaurants had not been raised, and the USDA did not enforce the PACA against restaurants. Restaurants were not required to obtain PACA licenses and were not subject to the unfair practice provisions in the PACA, even though restaurants routinely purchased perishable agricultural commodities as part of their daily operations. The PACA's statutory trust provisions also did not apply to restaurants. Thus, if a producer sold fruits and vegetables to a restaurant that not only failed to pay but also became insolvent, that producer would often find himself standing at the end of a long line of creditors.

The traditional notion that restaurants were not subject to the PACA has largely evaporated. The United States Courts of Appeals for the Third, Eighth, and Ninth Circuits, and the Bankruptcy Appellate Panel for the Ninth Circuit have held that restaurants fall within the scope of the PACA.³⁹ More specifically, these courts have held that restaurants that fit the statutory definition of a dealer are subject to the PACA and its statutory trust provisions. The Third Circuit was the first United States Court of Appeals to hold that restaurants could be considered dealers under the PACA.⁴⁰ The Third Circuit stated in *Magic Restaurants* that

36. *See id.*

37. *Id.*

38. *See Are Restaurant Debtors PACA Dealers?*, West's Bankr. Newsl. 2 (West Group), Mar. 22, 2000. *See also* David R. Seligman, *Better Scarf It Down: The Third Circuit Applies PACA to Restaurants*, 19 Am. Bankr. Inst. J. 24 (2000).

39. *See Magic Restaurants, Inc.*, 205 F.3d at 108; *In re Old Fashioned Enterprises, Inc.*, 236 F.3d 422 (8th Cir. 2001); and *Royal Foods Co., Inc. v. RJR Holdings, Inc.*, 252 F.3d 1102 (9th Cir. 2001). The Bankruptcy Appellate Panel for the Ninth Circuit in *In re Country Harvest Buffet Restaurants, Inc.*, 245 B.R. 650 (9th Cir. B.A.P. 2000), has also held that restaurants can be subject to the PACA.

40. The first reported decision to hold that restaurants could be subject to the PACA was *In re Matter of Magic Restaurants, Inc.*, 197 B.R. 455 (Bankr. D. Del. 1996). This decision was eventually appealed to the United States Court of Appeals for the Third Circuit and affirmed.

[i]n more than half-century since the initial enactment of PACA, only three other courts have addressed whether restaurants are “dealers” under it. We appear to be the only United States Court of Appeals to consider the question. Recently, two district courts in California concluded, like the bankruptcy court in this case, that restaurants are “dealers” under the plain language of PACA.⁴¹

Because the Third Circuit’s decision in *Magic Restaurants* was the first case to rule that restaurants could be dealers and its legal analysis describes the arguments on each side of this issue, a detailed discussion of the *Magic Restaurants* decision follows.

In re Magic Restaurants

In April, 1995, Magic Restaurants, Inc., and Magic American Café, Inc. (“Magic Restaurants”) filed a Chapter 11 bankruptcy petition.⁴² Magic Restaurants bought fresh fruits and vegetables from Bowie Produce Co, Inc. (“Bowie”).⁴³ Magic Restaurants processed the fruits and vegetables into food items that were sold in its restaurants.⁴⁴ Magic Restaurants owed Bowie \$98,983.74 at the time it filed its bankruptcy petition.⁴⁵

Bowie argued that it was entitled to recover that amount from Magic Restaurants because the proceeds derived from the produce sold to Magic Restaurants were assets of a statutory trust under § 499e(c) of the PACA.⁴⁶ Magic Restaurants countered that because of its status as a restaurant, it was not a dealer under the PACA and was therefore not subject to the PACA’s statutory trust provision.⁴⁷ The matter came before the Third Circuit after the district court reversed the bankruptcy court’s holding that Magic Restaurants was a dealer under the PACA and was subject to the PACA’s statutory trust provision.⁴⁸

41. *Magic Restaurants*, 205 F.3d at 114 (citations omitted).

42. *See id.* at 110.

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

The district court reasoned that the only possible definition within the PACA that would fit Magic Restaurants was that of “retailers” under 7 C.F.R. § 46.2(m)(2).⁴⁹ Section 46.2(m)(2) states that a “dealer”:

means any person engaged in the business of buying or selling in wholesale or jobbing quantities in commerce and includes . . . [r]etailers, when the invoice cost of all purchases of produce exceeds \$230,000.00 during a calendar year. In computing dollar volume, all purchases of fresh and frozen fruits and vegetables are to be counted, without regard to quantity involved in a transaction or whether the transaction was intrastate, interstate or foreign commerce⁵⁰

The district court reasoned that restaurants such as Magic Restaurants were actually “consumers” and therefore could not be characterized as “retailers.”⁵¹

The district court examined two different sources to support its conclusion.⁵² The first was a statement released by the USDA when it amended the regulatory definition of “fresh fruits and vegetables” in 1996.⁵³ That amendment changed the regulatory definition of “fresh fruits and vegetables” to include a provision stating that the “oil-blanching” of fruits and vegetables did not transform those commodities into “a food of a different kind or character.”⁵⁴

While in the process of making this amendment, the USDA received a comment from a representative of a large restaurant chain expressing his concern that the USDA’s amendment “‘might bring restaurants under the jurisdiction of the PACA.’”⁵⁵ The USDA’s response to the representative’s concern was that

[r]estaurants traditionally have not been considered subject to the PACA by [the] USDA or Congress unless the buying arm of the restaurant is a separate legal entity, and is buying for and/or reselling the product to another entity. Since restaurants are not subject to the PACA, this change in the regulation will not impact restaurants.⁵⁶

49. See *id.* at 113.

50. 7 C.F.R. § 46.2(m)(2). See also 7 C.F.R. § 46.2(j) (defining “retailer” as a “dealer engaged in the business of selling any perishable agricultural commodities at retail; Provided, That occasional sales at wholesale shall not be deemed to remove a dealer from the category of a retailer if less than 5 percent of annual gross sales is derived from wholesale transactions.”)

51. See *Magic Restaurants*, 205 F.3d at 113.

52. See *id.*

53. See *id.*

54. See *id.* (citing 7 C.F.R. § 46.2(u)). See also § 499a(b)(4).

55. See *Magic Restaurants*, 205 F.3d at 113 (quoting Regulations (Other Than Rules of Practice) Under the Perishable Agricultural Commodities Act, 1930, 61 Fed. Reg. 13385, 13386 (March 27, 1996) (to be codified at 7 C.F.R. Part 46)).

56. See *id.* at 113 (quoting Regulations (Other Than Rules of Practice) Under the Perishable Agricultural Commodities Act, 1930, 61 Fed. Reg. 13385, 13386 (March 27, 1996) (to be codified at 7 C.F.R.

The other source relied upon by the district court was a comment contained in the legislative history that accompanied a 1995 amendment to the PACA's statutory language.⁵⁷ This amendment did not pertain to who was subject to the PACA, including restaurants.⁵⁸ In explaining these amendments, however, the House Committee on Agriculture stated as follows:

Section 3 phases out license fees for retailers and grocery wholesalers. It defines the term "retailer" as a person who is a dealer engaged in the business of selling any perishable commodity at retail. Approximately 4,000 retailers are currently estimated to be licensed under PACA. Those businesses such as grocery stores and other like businesses that predominantly serve those consumers purchasing food for consumption at home or off the premises of the retail establishment are considered to be included in the definition of "retailer." It is not the intent of the Committee that the definition of retailer be construed to include foodservice establishments such as restaurants, or schools, hospitals and other institutional cafeterias.⁵⁹

The Third Circuit rejected the district court's reasoning. It stated that to determine whether Magic Restaurants was a dealer under the PACA, it had to first decide whether the language of the PACA was unambiguous.⁶⁰ The court explained that if the statutory language is determined to be unambiguous, then "there is generally no need to look to administrative interpretations or to legislative history."⁶¹ The court also explained that if a statute is "'silent or ambiguous as to the specific issue,' and an administrative agency charged with administering the statute has devised its own regulatory interpretation of the statute, the court must then ask 'whether the agency's answer is based on a permissible construction of the statute.'"⁶²

The court first examined the statutory definition of a dealer under the PACA.⁶³ As discussed above, the PACA defines a "dealer" as "any person engaged in the business of buying or selling in wholesale or jobbing quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce," subject to certain exceptions.⁶⁴ The court noted that Magic Restaurants was a "person" under the PACA because "'the term 'person' includes individuals,

Part 46)).

57. See *id.* n.5.

58. See *id.* at 113.

59. *Id.* (quoting H.R. Rep. No. 104-207, at 7 (1995), reprinted in 1995 U.S.S.C.A.N. 453, 454).

60. See *id.* at 114 (citing *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d. Cir. 1998)).

61. See *id.* (citing *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994); *Idahoan Fresh*, 157 F.3d at 202; and *West v. Sullivan*, 973 F.2d 179, 185 (3d. Cir. 1992)).

62. See *id.* (citing *West*, 973 F.2d at 185) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 567 U.S. 837, 842-43 (1984)).

63. See *id.*

64. See *supra* note 7 and the accompanying text.

partnerships, corporations, and associations.”⁶⁵ The court also noted that there was no dispute as to whether Magic Restaurants purchased “wholesale or jobbing quantities” of fruits and vegetables and that Magic Restaurants did not argue that it fell within any of the statutory exceptions to the PACA’s definition of dealer. ⁶⁶ The Third Circuit concluded, therefore, that there was “nothing ambiguous about the application of this statutory definition to the facts of this case.”⁶⁷

The court explained, however, that if a statute’s express language “appears unambiguous, a court must look beyond that plain language where a literal interpretation of this language would thwart the purpose of the overall statutory scheme, would lead to an absurd result or would otherwise produce a result ‘demonstrably at odds with the intentions of the drafters.’”⁶⁸ The court stated that “it cannot be seriously contended that holding that restaurants purchasing perishable agricultural commodities in wholesale or jobbing quantities . . . are ‘dealers’ under PACA is contrary to the statute’s purpose, absurd, or ‘demonstrably at odds with the intentions of the drafters.’”⁶⁹

The court added that “[t]here is no clear evidence of legislative intent regarding treatment of such restaurants at the time the definition of ‘dealer’ was originally enacted in 1930.”⁷⁰ It noted that the only evidence of legislative intent was contained in the 1995 House Agriculture Committee report where the Committee stated that it did not intend for restaurants to be considered dealers under the PACA.⁷¹ The court explained that that particular statement was confined to the 1995 amendment of the PACA.⁷² The court stated that the 1995 committee report “was issued more than 30 years after the last time Congress modified the definition of ‘dealer’ in any substantial way, and dealt with issues wholly different from this definition.”⁷³ The court also stated that “[t]his report language is not something ‘upon which other legislators might have relied in voting for or against’ the statutory definition of ‘dealer,’ and cannot constitute evidence of the legislative intent behind that definition.”⁷⁴ The Third Circuit added that “[a]s the Supreme Court has observed, ‘the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.’”⁷⁵

65. *Magic Restaurants*, 205 F.3d at 115.

66. *See id.* (citing 7 U.S.C. § 499a(b)(6)(A) - (C)). *See also* 7 C.F.R. § 46.2(x) (defining “wholesale or jobbing quantities” of produce as “aggregate quantities of all types of produce totaling one ton (2,000 pounds) or more in weight in any day shipped, received, or contracted to be shipped or received”).

67. *Magic Restaurants*, 205 F.3d at 115.

68. *Id.* at 116 (citations omitted).

69. *Id.* (citations omitted).

70. *Id.*

71. *See id.*

72. *See id.*

73. *Id.*

74. *Id.* (citing *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995)).

75. *Id.* (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

The court also determined that allowing restaurants to be considered dealers under the PACA furthered the goals of the PACA as amended in 1984.⁷⁶ The court stated that “[h]olding restaurant-purchasers responsible to produce sellers such as Bowie provides protection of produce suppliers up through the distribution chain and therefore furthers the purposes of the trust provision.”⁷⁷

The Third Circuit concluded by stating:

We recognize that the USDA has refused to exercise jurisdiction over restaurants pursuant to PACA for approximately seven decades. It is this benign neglect that is responsible for much of the confusion in this area. Nevertheless, we are constrained by PACA’s unambiguous statutory language to hold that a restaurant such as Magic, which purchases produce in wholesale or jobbing quantities (and in excess of \$230,000 per year), is a ‘dealer’ under 7 U.S.C. § 499a(b)(6), and administrative interpretations contrary to this plain language are therefore not persuasive.⁷⁸

The dissent concluded that the PACA definition of dealer was ambiguous because it found the phrase “engaged in the business of buying or selling” capable of having a different meaning than that given by the majority.⁷⁹ The dissent explained that “[r]estaurants are engaged in the business of preparing and selling meals to customers. Not only is buying and selling perishables in large quantities not their primary business, it is *not their business at all*.”⁸⁰ The dissent reasoned that if Congress intended for the PACA to apply to restaurants it should have employed the phrase “any business that buys or sells . . .” instead of “engaged in the business of buying or selling.”⁸¹ The dissent added that the PACA “confines the concept of ‘dealer’ to those who do this as their bread and butter, so to speak. The majority reading would make most prisons ‘dealers,’ yet prisons are not engaged in the perishable commodity-buying business.”⁸²

The dissent stated that “[o]nce we have found an ambiguity in the statutory language, our resort to legislative history would confirm that PACA is not intended to cover restaurants and food service institutions.”⁸³ The dissent concluded that

[i]n discussing the definition of “retailer” (which relied in part on the definition of dealer), the House Report made clear that food service establishments such as restaurants or schools, hospitals, and other institutional cafeterias are not required to be licensed. The agency’s construction of PACA is consistent with this position. In short, dealers

76. *See id.*

77. *Id.*

78. *Id.* at 117.

79. *Id.*

80. *Id.* (emphasis supplied).

81. *See id.*

82. *Id.* at 117-18.

83. *Id.* at 118.

and brokers are those whose business is in dealing in, or brokering, these items. They should be licensed and are subject to the Act. Magic is engaged in a very different business, and is not in my view subject to regulation as a “dealer” under PACA.⁸⁴

In re Old Fashioned Enterprises, Inc.

Magic Restaurants was followed by *In re Old Fashioned Enterprises*.⁸⁵ Demma Fruit Company, Ltd. (“Demma”) delivered perishable agricultural commodities to Old Fashioned Enterprises, Inc. (“Old Fashioned”), a restaurant chain.⁸⁶ Old Fashioned became insolvent and filed a Chapter 11 bankruptcy petition, owing Demma \$130,161.21.⁸⁷ Demma brought an adversary proceeding against Old Fashioned, claiming that Old Fashioned was a dealer under the PACA and therefore subject to the PACA’s statutory trust provisions.⁸⁸ Old Fashioned’s primary secured creditor, Norwest Bank Nebraska, intervened, claiming that Old Fashioned was not a dealer subject to the PACA trust provisions.⁸⁹

The bankruptcy court concluded that Old Fashioned was not a dealer based “on the seventy-year practice of the United States Department of Agriculture (USDA) of excluding restaurants from PACA’s coverage and a 1995 comment by the Secretary that a restaurant was not a dealer unless its buying arm was a separate legal entity.”⁹⁰ The district court affirmed the bankruptcy court’s decision, holding that the PACA “was ambiguous because Congress did not define the term ‘wholesale or jobbing quantities’ and thus deference to the agency’s interpretation was appropriate.”⁹¹ Demma appealed the district court’s decision to the Eighth Circuit, arguing that the agency interpretation was not entitled to deference because the plain language of the PACA was not ambiguous.⁹² The Eighth Circuit reversed the district court, holding that Old Fashioned was a dealer as defined by the PACA.⁹³

The Eighth Circuit ruled that the PACA’s definition of dealer was not ambiguous.⁹⁴ The court stated:

84. *Id.*

85. *In re Old Fashioned Enterprises*, 236 F.3d at 422.

86. *See id.* at 422.

87. *See id.*

88. *See id.*

89. *See id.*

90. *Id.* at 425.

91. *Id.* (citations omitted).

92. *See id.*

93. *See id.*

94. *See id.* at 426.

In [*Magic Restaurants*] . . . , the Third Circuit, the only appellate court that has addressed the issue, was “constrained by PACA’s unambiguous statutory language to hold that a restaurant . . . [that] purchases produce in wholesale or jobbing quantities (and in excess of \$230,000 per year), is a ‘dealer’ under 7 U.S.C. § 499a(b)(6).” We find the court’s reasoning persuasive and adopt it.⁹⁵

The Eighth Circuit briefly discussed the dissent in *Magic Restaurants*.⁹⁶ The court noted that “the dissent believed that the phrase ‘engaged in the business of’ was ambiguous, reasoning that restaurants were not engaged in the business of buying or selling produce.”⁹⁷ The Eighth Circuit stated that “we agree with the majority that the dissent’s reasoning was flawed because it read the word ‘primarily’ into the statute,”⁹⁸ adding that

[n]othing about the ordinary meaning of the words ‘engaged’ or ‘business’ indicates that the statutory definition should be understood to apply only to those engaged *primarily* in this business. Moreover, as the Ninth Circuit bankruptcy appellate panel pointed out, “Congress has demonstrated its ability to insert the term ‘primarily’ when it chooses to so restrict a definition.”⁹⁹

The Eighth Circuit stated that “[w]e agree with the Third Circuit that holding restaurants that purchased sufficient quantities [of fruits and vegetables] ‘responsible to produce sellers . . . provides protection of produce suppliers up through the distribution chain and therefore furthers the purposes of the trust provision.’”¹⁰⁰ The court concluded:

In addition, as Demma points out, “the trust provisions at issue here apply not only to produce, but also to products derived therefrom, and to the revenue derived from sales of produce and produce and produce-derived products, which plainly encompasses menu items, such as those sold in [Old Fashioned Enterprises] restaurants, and revenues derived therefrom.” In sum, we hold that [Old Fashioned Enterprises] was a “dealer” under the plain language of 7 U.S.C. § 499a(b)(6). Accordingly, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.¹⁰¹

Royal Foods Co., Inc.

95. *Id.* (citations omitted).

96. *See id.*

97. *Id.* (citing *Magic Restaurants*, 205 F.3d at 117-18).

98. *Id.*

99. *Id.* at 426-27 (quoting *Magic Restaurants*, 205 F.3d at 115) (emphasis supplied).

100. *Id.* at 427 (quoting *Magic Restaurants*, 205 F.3d at 116).

101. *Id.* (quoting *JC Produce*, 70 F.Supp.2d at 1121).

In re Old Fashioned Enterprises was followed by the Ninth Circuit's *Royal Foods Co., Inc.*, decision.¹⁰² RJR Holdings, Inc. ("RJR") was a Delaware corporation that owned and operated several TGI Friday restaurants in California.¹⁰³ RJR purchased large amounts of perishable agricultural commodities from Royal Foods Co., Inc. ("Royal"), a supplier of perishable agricultural commodities.¹⁰⁴ After RJR failed to pay Royal for over \$154,216.94 of delivered perishable agricultural commodities, Royal brought an action in federal district court to recover the unpaid amount under the PACA's statutory trust provisions.¹⁰⁵ RJR subsequently filed for bankruptcy.¹⁰⁶ RJR argued that it was not subject to the PACA "because it was not a 'dealer' as defined by PACA—it [wa]s not 'in the business of buying or selling' wholesale quantities of perishable commodities, but rather in the business of selling meals to customers."¹⁰⁷

The district court agreed with RJR, "holding as a matter of law that a restaurant cannot be a 'dealer' under PACA."¹⁰⁸ The Ninth Circuit reversed the district court, stating that "[w]e join two other circuits that have considered this question in holding that it *is*—a restaurant that *buys* in the requisite quantities falls within the definition of a 'dealer' even though it does not also *sell* the commodities in unchanged form."¹⁰⁹

RJR argued that the PACA cannot apply to a restaurant because a restaurant "does not buy *and* sell such commodities, it only buys such commodities and then turns them into meals."¹¹⁰ The Ninth Circuit rejected this argument, stating that it "flies in the face" of the PACA's plain language.¹¹¹ The court also stated that "[b]uying or selling means that one only needs to buy *or* sell, not buy *and* sell."¹¹² The court added that

[w]e must give statutory language its plain meaning and "[w]here Congress has, as here, intentionally and unambiguously drafted a particularly broad definition, it is not our function to undermine that effort." Indeed, PACA recognizes that a 'dealer' could include a processor—a person who buys perishable agricultural items, but does not sell them. Congress explicitly excluded from the definition of "dealer" a certain type of processor—those that purchase perishable agricultural commodities, process them in

102. *Royal Foods*, 252 F.3d at 1102.

103. *See id.* at 1104.

104. *See id.*

105. *See id.* (citation omitted).

106. *See id.* at 1105.

107. *Id.* at 1106.

108. *Id.* at 1105.

109. *Id.* (emphasis supplied).

110. *Id.* at 1106 (emphasis supplied).

111. *See id.*

112. *Id.* (citation omitted) (emphasis supplied).

the same state, and sell items that are not perishable agricultural commodities. It did *not* exclude restaurants. Like processors, restaurants buy perishable agricultural commodities, alter them, and sell items, *i.e.*, meals, that are no longer perishable agricultural commodities. Congress could have excluded restaurants but did not.¹¹³

RJR also argued, as did the restaurant-dealer in *Old Fashioned Enterprises*, that the phrase “engaged in the business of,” is ambiguous and does not plainly encompass restaurants because restaurants are not ‘primarily’ engaged in the business of buying perishable agricultural commodities.”¹¹⁴ The Ninth Circuit, as did the Eighth Circuit in *Old Fashioned Enterprises*, rejected this argument because it was not supported by the PACA’s plain language, stating that the PACA “does not require that an entity be engaged *primarily* in the business of buying or selling.”¹¹⁵

The Ninth Circuit also rejected RJR’s argument that notwithstanding the PACA’s statutory language, the legislative history of the PACA suggests that Congress did not intend for the PACA to apply to restaurants.¹¹⁶ The court explained that “[t]here is a strong presumption that the plain language of the statute expresses congressional intent, which is ‘rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed.’”¹¹⁷ The court concluded that RJR had failed to establish that this was one of those “rare and exceptional circumstances,” stating that “[w]e cannot improve upon the Third Circuit’s answer to this argument.”¹¹⁸

The court further concluded by stating that

[w]e join the Third and Eighth Circuits in concluding that by virtue of the plain language of the statute, a restaurant that buys the requisite quantities of perishable agricultural commodities as part of its business is a “dealer” even if the commodities are used only in the commercial preparation of meals instead of being resold in unprocessed form Accordingly, we reverse the district court and remand for further proceedings consistent with this opinion.¹¹⁹

The dissenting opinion in *Royal Foods* mirrored the dissenting opinion in *Magic Restaurants*. The dissent agreed with and accepted the comment made by the Secretary in the preamble of the amendment to the 1996 regulation.¹²⁰ In that preamble the Secretary stated that “[r]estaurants

113. *Id.* at 1106-07 (citations omitted) (emphasis supplied).

114. *Id.* at 1107.

115. *Id.* (emphasis supplied).

116. *See id.* at 1108.

117. *Id.* (citations omitted).

118. *Id.* The Ninth Circuit simply quoted the portion of the Third Circuit’s decision in *Magic Restaurants* discussing the dealer-restaurant’s argument that the PACA’s legislative history indicated that Congress did not intend for restaurants to be dealers under the PACA.

119. *Id.* at 1107-08 (citations omitted).

120. *See id.* at 1109.

traditionally have not been considered subject to the PACA by USDA or Congress unless the buying arm of the restaurant is a separate legal entity, and is buying for and/or reselling the product to another entity.”¹²¹ The dissent stated that “[b]ecause the Secretary and the United States Department of Agriculture administer this statute, I think it appropriate to consider seriously what the Secretary says, not wave it off.”¹²² The dissent also relied on the 1995 House Report relating to the 1995 amendment to the PACA’s definition of retailer.¹²³

In addition, the dissent reasoned that restaurants should not be considered dealers under the PACA because the PACA “goes to great lengths to exclude from its reach perishable fruits and vegetables which have been manufactured into articles of food.”¹²⁴ The dissent stated that “[t]he activity of a restaurant in this regard seems clearly to be beyond this careful line of demarcation. Bluntly put, restaurants do not buy agriculture commodities for resale, but rather use them to create a wholly new and distinct product—meals.”¹²⁵

The dissent concluded as follows:

In summary, I conclude as did dissenting Judge Rendell in *In re Magic Restaurants, Inc.*, 205 F.3d 108, 117-18 (3d Cir. 2000), that as internally seductive as the majority’s well written opinion is, it simply comes up with the wrong answer. I believe on this record that the controlling statute is silent as to restaurants—it neither expressly includes nor excludes them—because Congress never contemplated that such eating establishments could be regarded for this purpose as jobbers, distributors, dealers, or wholesalers. “Restaurants are engaged in the business of preparing and selling meals to customers. Not only is buying and selling perishables in large quantities not their primary business, *it is not their business at all.*” Whatever the technical and interpretative ways are that we can find to discount the Secretary of Agriculture’s longstanding practice and persuasive opinion on this subject, the Secretary appears to be correct.¹²⁶

In re Country Harvest Buffet Restaurants, Inc.

The Bankruptcy Appellate Panel for the Ninth Circuit also ruled, in *In re Country Harvest Buffet Restaurants, Inc.*,¹²⁷ that restaurants could be dealers under the PACA. Country Harvest Buffet

121. *Id.* at 1109-10 (citing 61 Fed. Reg. 13,385, 13,386 (Mar. 27, 1996)).

122. *Id.* at 1110.

123. *See id.*

124. *Id.* (citing 7 C.F.R. § 46.2(u) (stating that “[f]resh fruits and fresh vegetables include all produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but do not include those vegetables which have been manufactured into articles of food of different kind or character.”))

125. *Id.* at 1111.

126. *Id.* (citing *Magic Restaurants*, 205 F.3d at 117-18) (Rendell, J., dissenting) (emphasis supplied).

127. *In re Country Harvest*, 245 B.R. at 650.

Restaurants, Inc. (“Country Harvest”) was a restaurant chain that purchased wholesale quantities of perishable agricultural commodities from SYSCO Food Services of Seattle, Los Angeles, San Francisco, and Montana (collectively “SYSCO”).¹²⁸ Country Harvest used the perishable agricultural commodities to prepare meals it sold to its customers.¹²⁹ On January 28, 1998, Country Harvest filed for bankruptcy, leaving SYSCO unpaid for approximately \$28,000.00 worth of delivered fruits and vegetables.¹³⁰

SYSCO filed a claim in the bankruptcy court seeking full payment pursuant to the PACA’s statutory trust provisions.¹³¹ Country Harvest objected to SYSCO’s claim, and the bankruptcy court sustained Country Harvest’s objection.¹³² The bankruptcy court ruled that SYSCO, as a restaurant chain, could not be considered a dealer under the PACA and therefore was not subject to the PACA’s statutory trust provisions.¹³³ The bankruptcy court determined that Country Harvest “was not ‘in the business of’ buying perishable agricultural commodities and thus was not a ‘dealer’ as defined under PACA.”¹³⁴ SYSCO appealed the bankruptcy court’s decision to the Bankruptcy Appellate Panel for the Ninth Circuit.¹³⁵

The appellate panel reversed the bankruptcy court’s decision with reasoning that mirrored the majority opinions in *Magic Restaurants*, *Royal Foods*, and *Old Fashioned Enterprises*. The panel stated that

[u]nder the Debtor’s argument only those entities whose *primary* business was buying or selling perishable agricultural commodities would be included as dealers under PACA. In essence, then, the Debtor reads into § 499a(b)(6) a requirement that a dealer must be ‘primarily’ in the business of buying or selling. The Debtor objects to this characterization of its position—it never uses the term *primary* or *primarily*, but there is no other way to state the Debtor’s ultimate argument. Under the Debtor’s reading of the statute, any entity which could make the argument that they had a primary business *other than* buying or selling commodities could avoid application of the PACA provisions. Necessarily, then, the only entities which could not make that argument would be those primarily in the business of buying or selling commodities. The Panel sees at least two problems with this approach.¹³⁶

128. *See id.* at 652.

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.*

134. *Id.*

135. *See id.*

136. *Id.* at 654 (emphasis supplied).

The first problem was that Country Harvest’s interpretation would “render superfluous the term ‘or’ in the statute.”¹³⁷ The panel noted that the only entities that would be covered under this interpretation would be those that were in the business of buying and selling perishable agricultural commodities.¹³⁸ The panel rejected Country Harvest’s argument, stating that under Country Harvest’s argument

any entity which purchases perishable agricultural commodities for a purpose other than buying *and* selling such commodities would be excluded from the PACA because such an entity could argue . . . that its primary business is not the buying but rather the preparation and resale of the commodities in a form which does not meet the definition of perishable agricultural commodities.¹³⁹

Second, the panel noted that Congress “has demonstrated its ability to insert the term ‘primarily’ when it chooses to so restrict a definition.”¹⁴⁰ The panel explained that Congress defined “grocery wholesaler” as “a person that is a dealer *primarily* engaged in the full-line wholesale distribution and resale of grocery and related nonfood items . . . to retailers.”¹⁴¹ Thus, the panel determined that Congress could have included the term “primarily” in its definition of “dealer” had it intended to do so.¹⁴² In addition, the panel noted that Congress drafted a broad definition of the term dealer “and found it necessary to exclude from it certain types of dealers who would otherwise have been clearly covered by the definition.”¹⁴³ The panel stated that “[t]raditional canons of statutory construction establish that those [types of dealers] not expressly excluded are included within the definition of ‘dealer.’ If Congress wants to exclude some or all restaurant chains from the term ‘dealer,’ Congress should amend § 499a(b)(6).”¹⁴⁴

Conclusion

Producers and sellers of fruits and vegetables are confronted with many unique challenges. For example, they are often required to enter into a contract with a buyer whom they have never met and who may live or do business hundreds of miles away from the seller’s location. A supplier or seller must sometimes ship his or her produce to a buyer without first receiving compensation for the produce—a buyer that could become insolvent before payment is made. For nearly seven decades, the PACA has dealt with these challenges and has had a significant impact on the entities and individuals involved in the buying and selling of perishable agricultural commodities. The PACA and its

137. *Id.*

138. *See id.*

139. *Id.* (emphasis supplied).

140. *Id.*

141. *Id.* (citing 7 U.S.C. § 499a(b)(12) (emphasis supplied)).

142. *See id.*

143. *Id.* at 655.

144. *Id.*

statutory trust provisions will undoubtedly continue to play an integral part in transactions involving the sales of perishable agricultural commodities.

As originally enacted, however, the PACA did not protect sellers and producers when the buyer did not pay for the delivered produce and became insolvent. As discussed earlier, these sellers and producers frequently found themselves at the end of a long line of creditors, often receiving little or no compensation for their produce. The 1984 amendment to the PACA, creating a statutory trust for the benefit of unpaid sellers and producers, has had a significant impact in dealing with this particular concern.

The *Magic Restaurants*, *Royal Foods*, *Old Fashioned Enterprises*, and *Country Harvest* decisions represent a dramatic shift in PACA jurisprudence. Only a few years ago it was widely accepted that restaurants were not subject to the PACA. In light of these decisions, the majority rule is that restaurants are subject to the PACA, if they fit within the definition of a dealer.

One must assume, however, that the possibility remains that another court could hold otherwise, perhaps adopting the dissents' logic in *Magic Restaurants* and *Royal Foods*. Of the courts that have held that restaurants cannot be considered dealers under the PACA, only one appears to be left standing: *In re Italian Oven, Inc.*¹⁴⁵ There is no federal circuit court opinion holding that restaurants cannot be dealers under the PACA.

In addition to altering the way that restaurants are viewed with respect to the PACA's statutory trust provisions, the *Magic Restaurants*, *Royal Foods*, *Old Fashioned Enterprises*, and *Country Harvest* decisions have created new issues and concerns for restaurants, restaurant chains, and for those who sell fruits and vegetables to restaurants. Presumably, restaurants that are dealers are potentially subject to *all* of the PACA's provisions, not only its statutory trust provisions. Thus, one could expect that restaurants are required to obtain a PACA license, are subject to the unfair conduct provisions, and all other portions of the PACA and its implementing regulations. However, the Agricultural Marketing Service recently stated that

historically, USDA has not considered restaurants as entities operating subject to the PACA. Given the recent court decisions holding that restaurants are subject to the PACA trust provisions, however, we have begun to accept reparation complaints against restaurants. At this time we do not require restaurants to obtain a PACA license.¹⁴⁶

One way to resolve this issue would be for Congress to amend the PACA to either specifically include or exclude restaurants from its scope of coverage. Another way of resolving this debate would be for the Agricultural Marketing Service to promulgate a regulation stating whether it considers restaurants to be subject to the PACA. However, this method would likely not provide an immediate final resolution because that regulation would probably be challenged, whatever form that regulation would take. Finally, the Supreme Court could resolve the issue by affirming or reversing the holdings in either *Magic Restaurants*, *Royal Foods*, or *Old Fashioned Enterprises*. This seems unlikely, at

145. 207 B.R. 839 (Bankr. W.D. Pa. 1997).

146. Letter from James R. Frazier, Chief, PACA Branch, Fruit & Vegetable Programs, to Harrison M. Pittman, Staff Attorney, National Center For Agricultural Law Research and Information (Dec. 17, 2002).

least until another circuit court determines that restaurants are not subject to the PACA.¹⁴⁷ Until such time, however, parties involved in purchasing and selling perishable agricultural commodities should be aware of the recent shift in case precedent holding that restaurants and restaurant chains can be subject to the PACA, provided the restaurant is considered a dealer under the PACA.

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147. The Third Circuit's *Magic Restaurants* decision was appealed to the Supreme Court, but the Court denied certiorari. See *Magic Restaurants, Inc., v. Bowie Produce Co., Inc.*, 531 U.S. 818 (2000).