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Perishable Agricultural Commodities Act

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The Perishable Agricultural Commodities Act, or “PACA,” was enacted in 1930 to regulate the marketing of perishable agricultural commodities in interstate and foreign commerce. The primary purposes of the PACA are to prevent unfair and fraudulent conduct in the marketing and selling of perishable agricultural commodities and to facilitate the orderly flow of perishable agricultural commodities in interstate and foreign commerce. It also provides important protections to sellers of “perishable agricultural commodities” that are relevant to many specialty crop producers.

PACA is administered and regulated by the Agricultural Marketing Service (AMS), an agency within the United States Department of Agriculture. AMS provides further information on PACA on its website, <http://www.ams.usda.gov>, as well as the National Agricultural Law Center at <http://www.nationalaglawcenter.org/readingrooms/perishablecommodities/>.

PACA is important for many specialty crop producers because it governs important aspects of transactions between sellers and buyers of fresh and frozen fruits and vegetables. In particular, the unfair conduct and the statutory trust provisions are particularly significant.

Key Definitions

PACA applies to “dealers”, “commission merchants”, and “brokers.” In general, a “dealer” is “any person engaged in the business of buying or selling in wholesale or jobbing quantities . . . any perishable agricultural commodity” that has an invoice value in any calendar year in excess of \$230,000.00. There are some exceptions to this definition that could become applicable under certain situations, but the general definition provided here is very instructive. A “commission merchant” is “any person engaged in the business of receiving . . . any perishable agricultural commodity for sale, on commission, or for or on behalf of another.” Finally, a “broker” is a person engaged in the business of negotiating sales and purchases of perishable agricultural commodities either for or on behalf of the seller or buyer. A person who is “an independent agent negotiating sales for or on behalf of the vendor” is not considered to be a broker, however, if “sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of \$230,000.00 in any calendar year.”

Unfair Conduct

As noted, PACA prohibits certain types of conduct on the part of buyers and sellers, though issues arising in this arena commonly focus on the alleged conduct of commission merchants, dealers, and brokers. For example, it is unlawful for a commission merchant, dealer, or broker “to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled” It is also unlawful for a commission merchant, dealer, or broker to do any of the following:

- "to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity";
- "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction"; and
- "to fail or refuse truly and correctly to account and make full payment promptly" with respect to any transaction.

PACA provides that a commission merchant, dealer, or broker that violates any of the unfair conduct provisions “shall be liable to the person or persons injured thereby for the full amount of damages . . . sustained in consequence of such violation.” The injured person or persons may enforce such liability by bringing an action in federal district court or by filing a reparations proceeding against the commission merchant, dealer, or broker.

Licensing

The PACA requires that all commission merchants, dealers, and brokers obtain a valid and effective license from the USDA Secretary. PACA does not require growers who sell perishable agricultural commodities that they have grown to obtain a license, though sellers commonly choose to apply for a PACA license. From the grower’s perspective, the license demonstrates that the buyer is a legitimate business person or business entity who can be trusted to honor contractual terms and PACA requirements.

The requirement of a PACA license by a commission merchant, dealer, or broker is akin to the requirement of a driver obtaining a driver’s license. A commission merchant, dealer, or broker that fails to obtain a valid and effective license shall be subject to monetary penalties, though some leniency may be provided if the failure to obtain the license was not willful. Importantly, if a commission merchant, dealer, or broker has violated any of the unfair conduct provisions, that person’s PACA license may be suspended or possibly revoked, which effectively negates their ability to engage in the fruit and vegetable industry. A person who knowingly operates without a PACA license may be fined up to \$1,200 for each violation and up to \$350 for each day the violation continues.

Statutory Trust

For specialty crop producers, the statutory trust is a very important aspect of PACA since it is specifically designed to protect sellers of perishable agricultural commodities in the event a

buyer becomes insolvent or otherwise refuses to pay for produce. The statutory trust provision under PACA specifically provides the following (emphasis added):

[p]erishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables 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 the sums owing in connection with such transactions has been received** by such unpaid suppliers, sellers, or agents.

In other words, the buyer is required to maintain a statutory trust relative to fruits and vegetables received but not yet paid for. If a buyer becomes insolvent or declares bankruptcy, the statutory trust provides priority status to the unpaid seller against all other creditors in the world.

Consequently, the PACA statutory trust is often referred to as a “floating trust.” Thus, a PACA trust beneficiary is not obligated to trace the assets to which the beneficiary's trust applies. 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. The PACA beneficiary only has the burden of proving the amount of its claim and that a floating pool of assets exists into which the produce-related assets have been commingled.

If a buyer files for bankruptcy, the trust assets do not become "property of the estate" because the buyer-debtor does not have an equitable interest in the trust assets. Rather, the buyer holds those assets for the benefit of the seller. Thus, a beneficiary of the PACA trust has priority over all other creditors with respect to the assets of the PACA trust.

However, the seller must take certain steps in order to protect his or her rights in the statutory trust. One method of preserving rights to the statutory trust is by simply including the following exact language on the face of the invoice:

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.

It should be noted that this method is available only to those sellers who are licensed under PACA. Hence, many sellers will elect to be licensed so that they can preserve their statutory trust rights in this manner. Unlicensed sellers (or licensed sellers who do not want to include the foregoing language on their invoices) may preserve their statutory trust rights through a different method. This method requires that the seller provide written notice that specifies it is a “notice of intent to preserve trust benefits”. In addition, the written notice must include the name(s) and address(es) of the seller, commission merchant, or agent, and the debtor as well as the date of the transaction. The written notice must also identify the commodity at issue, the invoice price, payment terms, and the amount owed.

This written notice must be given within thirty calendar days

- after expiration of the time prescribed by which payment must be made, as set forth in the regulations issued by the Secretary;
- 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
- after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored.

If the payment terms extend beyond thirty days, the seller will lose his or her rights to the statutory trust. PACA 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. But, as noted, if this agreement extends the time for payment for more than thirty days, however, the seller cannot qualify for coverage under the trust.

Prompt Payment

PACA also requires produce buyers to make full payment promptly, and the regulations implementing PACA expound on PACA. While there are additional rules embedded in the regulations, the most common payment requirement is that payment be made 10 days from date of acceptance of the goods for purchase.

For more information, please refer to the National Agricultural Law Center’s Reading Room on PACA, available at: <http://www.nationalaglawcenter.org/readingrooms/perishablecommodities/>, or contact the National Agricultural Law Center.