

The National Agricultural
Law Center



University of Arkansas
NatAgLaw@uark.edu • (479) 575-7646

An Agricultural Law Research Article

**Third Party Recipients of PACA Trust Assets:
Are They Strictly Liable or Bona Fide
Purchasers?**

by

Danton Asher Berube

Originally published in the ARKANSAS LAW REVIEW
45 ARK. L. REV. 377 (1992)

www.NationalAgLawCenter.org

Third Party Recipients of PACA Trust Assets: Are They Strictly Liable or Bona Fide Purchasers?

Danton Asher Berube*

I. INTRODUCTION

Himmelberg and Stabbe's recent article, *The 1984 PACA Amendments after Six Years: Producing Sellers' Trust and Lenders' Disgust*,¹ is aptly titled. Indeed, lenders and other third parties are disgusted by the strict liability model of agricultural trusts advocated by Himmelberg and Stabbe. This response rejects the application of strict liability to trusts created under the Perishable Agricultural Commodities Act (PACA)² and instead proposes the use of traditional trust-law analysis.

Section II of this response briefly reviews PACA's trust provisions. Section III examines the effect and scope of the PACA trust. Section IV outlines the strict liability model developed by Himmelberg and Stabbe and suggests that it creates a dichotomy in PACA precedent. Section V proposes a trust paradigm of PACA and reinterprets existing precedent in light of this approach. Section VI concludes that the application of traditional trust analysis to PACA is more consistent with congressional intent than is the imposition of strict liability.

* Danton Asher Berube is a graduate of the University of Tennessee (B.A. 1988) and Vanderbilt University School of Law (J.D. 1991). He is currently a law clerk for the Honorable Emmett R. Cox of the United States Court of Appeals for the Eleventh Circuit. The views expressed in this response, however, are solely those of the author and do not necessarily reflect the views of any judge or court.

The author would like to dedicate this response to his grandparents, Mr. and Mrs. W. A. Whitley, in appreciation of their constant support and encouragement throughout his legal education. He also acknowledges the generous assistance of James R. Beattie, Ph.D., Judson T. Tucker, and his wife, Tracy Michelle Berube.

1. John M. Himmelberg & Mitchell H. Stabbe, *The 1984 PACA Amendments after Six Years: Producing Sellers' Trust and Lenders' Disgust*, 43 ARK. L. REV. 523 (1990).

2. 7 U.S.C. § 499a-s (1988 & Supp. II 1990).

II. AN OVERVIEW OF PACA'S TRUST PROVISIONS

Federal agricultural trusts originated in the meat packing industry. Between 1958 and 1975, 167 meat packers declared bankruptcy, leaving livestock producers unpaid for more than \$43 million in sales.³ By far the largest failure was that of American Beef Packers in January, 1975. American Beef Packers had financed its operations by granting General Electric Acceptance Corporation a security interest in its inventory. This security interest included livestock for which American Beef Packers had not yet paid.⁴ When American Beef Packers went bankrupt, General Electric Acceptance Corporation was repaid before the unsecured livestock producers. As a result, producers in thirteen states lost more than \$20 million.⁵ Congress responded the following year by amending the Packers and Stockyards Act (P&SA) to include a statutory trust for the protection of unpaid livestock producers.⁶

In 1984 and 1987, Congress amended PACA and the P&SA to create statutory trusts for sellers of perishable agricultural commodities⁷ and poultry producers.⁸ All three agri-

3. S. REP. NO. 932, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2267, 2271.

4. *Id.* at 5, *reprinted in* 1976 U.S.C.C.A.N. at 2271.

5. *Id.*

6. 7 U.S.C. § 196 (1988). The Senate Report stated:

Section 8 of the bill adds a new section 206 to title II of the Packers and Stockyards Act which applies to any packer whose average annual purchases exceed \$500,000. The new section requires that all livestock purchased by a packer in cash sales, and all inventories of, or receivables or proceeds from, meat, meat food products, or livestock products derived therefrom, be held by such packers in trust for the benefit of all unpaid cash sellers of such livestock until full payment has been received by such unpaid sellers.

S. REP. NO. 932, *supra* note 3, at 8, *reprinted in* 1976 U.S.C.C.A.N. at 2274. "This [trust] provision . . . should avoid the recurrence of the effects of the American Beef Packers bankruptcy." *Id.* at 13, *reprinted in* 1976 U.S.C.C.A.N. at 2279.

7. 7 U.S.C. § 499e(c) (1988); *see* H.R. REP. NO. 543, 98th Cong., 2d Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 405; *see also* Dale Bratton, Note, *The California Agricultural Producer's Lien, Processing Company Insolvencies, and Federal Bankruptcy Law: An Evaluation and Alternative Methods of Protecting Farmers*, 36 HASTINGS L.J. 609 (1985). "Perishable agricultural commodities" includes fresh and frozen fruits and vegetables, 7 U.S.C. § 499a(4)(A) (1988), and cherries in brine, *id.* § 499a(4)(B).

8. 7 U.S.C. § 197 (1988); *see* H.R. REP. NO. 397, 100th Cong., 1st Sess. (1987), *reprinted in* 1987 U.S.C.C.A.N. 855.

cultural trusts are quite similar.⁹ Indeed, P&SA trust precedent is relied upon in interpreting PACA's trust provisions.¹⁰ Accordingly, a discussion of perishable agricultural commodities trusts is equally applicable to livestock and poultry trusts. Nevertheless, because Himmelberg and Stabbe focused on the trust provisions of PACA, this response will do so as well.

This response will not attempt to duplicate Himmelberg and Stabbe's exhaustive review of PACA's trust provisions.¹¹ Readers are referred to their article for a discussion of such issues as the constitutionality of PACA's trust provisions,¹² PACA's pre-emption of state law,¹³ the availability of injunctive relief,¹⁴ and the distribution of assets among trust beneficiaries.¹⁵ A brief look at the statutory scheme underlying the trust, however, may be helpful.¹⁶

Section 499e(c)(1) of PACA states Congress's conclusion

9. Compare 7 U.S.C. § 499e(c) (1988) and *id.* § 197 with *id.* § 196.

10. See, e.g., *In re Fresh Approach, Inc.*, 48 B.R. 926, 931 (Bankr. N.D. Tex. 1985); see also H.R. REP. NO. 543, *supra* note 7, at 12, reprinted in 1984 U.S.C.C.A.N. at 415; Himmelberg & Stabbe, *supra* note 1, at 527 n.17.

11. See Himmelberg & Stabbe, *supra* note 1, at 523-55.

12. *Id.* at 527-28.

13. *Id.* at 528-30.

14. *Id.* at 544-50.

15. *Id.* at 550-55.

16. PACA's trust provisions provide:

(1) 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.

(2) Perishable 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. Payment shall not be considered to have been made if the supplier, seller, or agent receives a payment instrument which is dishonored. The provisions of

that granting lenders a security interest in perishable agricultural commodities before payment has been made for those commodities creates a burden on commerce and is contrary to the public interest.¹⁷ Section 499e(c)(2) requires the purchasers of perishable agricultural commodities to hold those commodities, as well as the inventories, receivables, and proceeds from such commodities, in trust for the benefit of the unpaid sellers of those commodities.¹⁸ Section 499e(c)(3) provides that unpaid sellers will lose the benefits of their statutory trust if they do not file a written notice of intent to preserve those benefits with both the purchaser of the commodities and the Secretary of Agriculture.¹⁹ Finally, section 499e(c)(4) gives United States district courts jurisdiction over enforcement actions by trust beneficiaries and the Secretary of Agriculture.²⁰

this subsection shall not apply to transactions between a cooperative association (as defined in section 1141j(a) of title 12[]) and its members.

(3) The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker and has filed such notice with the Secretary within 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, (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. When the parties 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 shall be disclosed on invoices, accountings, and other documents relating to the transaction.

(4) The several district courts of the United States are vested with jurisdiction specifically to entertain (i) actions by trust beneficiaries to enforce payment from the trust, and (ii) actions by the Secretary to prevent and restrain dissipation of the trust.

7 U.S.C. § 499e(c) (1988) (footnote omitted).

17. *Id.* § 499e(c)(1); see also H.R. REP. NO. 543, *supra* note 7, at 4-5, *reprinted in* 1984 U.S.C.C.A.N. at 408.

18. 7 U.S.C. § 499e(c)(2) (1988); see also H.R. REP. NO. 543, *supra* note 7, at 5-6, *reprinted in* 1984 U.S.C.C.A.N. at 408-09. PACA further provides that it shall be unlawful "to fail to maintain the trust as required under section 499e(c) of this title." 7 U.S.C. § 499b(4) (1988). Violations of § 499b(4) can result in liability to persons injured, *id.* § 499e(a), reparation orders from the Secretary of Agriculture, *id.* § 499g, and suspension or revocation of one's PACA license, *id.* § 499h.

19. 7 U.S.C. § 499e(c)(3) (1988); see also H.R. REP. NO. 543, *supra* note 7, at 6-7, *reprinted in* 1984 U.S.C.C.A.N. at 409-10; Himmelberg & Stabbe, *supra* note 1, at 536-43 (discussing perfection of trust claims).

20. 7 U.S.C. § 499e(c)(4) (1988); see also H.R. REP. NO. 543, *supra* note 7, at 7, *reprinted in* 1984 U.S.C.C.A.N. at 410-11; Himmelberg & Stabbe, *supra* note 1, at 530-

III. THE EFFECT AND SCOPE OF THE PACA TRUST

A. Priming the Secured Lender

The primary purpose of PACA's trust provisions is to prevent the tremendous losses suffered by producers of perishable agricultural commodities when the purchasers of those commodities declare bankruptcy before having paid for them.²¹ Prior to the trust amendment, bankruptcy courts treated unpaid sellers of commodities as unsecured creditors. Lenders, on the other hand, often had a blanket security interest in all of the buyer's assets including perishable agricultural commodities. These secured lenders were paid out of the proceeds of those assets before the unpaid sellers.²² With the enactment of the PACA amendments, unpaid sellers of perishable agricultural commodities are now beneficiaries of a statutory trust and paid before any other secured or unsecured creditor.²³ In fact, until all sellers have been fully paid, PACA trust assets are not even considered to be part of the buyer's bankruptcy estate.²⁴

36 (reviewing PACA jurisdiction of bankruptcy and district courts and comparing enforcement actions by trust beneficiaries and the Secretary of Agriculture).

21. H.R. REP. NO. 543, *supra* note 7, at 3-4, *reprinted in* 1984 U.S.C.C.A.N. at 407; *see also* 49 Fed. Reg. 45,735 (1984); Himmelberg & Stabbe, *supra* note 1, at 526-27, 564-65.

22. Witnesses from grower associations who testified before Congress stated: [I]n slow pay or insolvency situations sellers of perishable commodities are generally unsecured and, therefore, the last to receive payment. Buyers of such commodities generally use the commodities as collateral in financing their business operations, and should they experience cash flow problems or over-extension of credit, their remaining funds and assets go first to their secured creditors. The seller of the perishable commodities, as the unsecured lender[,] may then receive compensation dependent upon any remaining equity in the buyer's firm.

H.R. REP. NO. 543, *supra* note 7, at 9, *reprinted in* 1984 U.S.C.C.A.N. at 413.

23. *See, e.g.,* First State Bank of Miami v. Gotham Provision Co. (*In re* Gotham Provision Co.), 669 F.2d 1000, 1009-10 (5th Cir. Unit B), *cert. denied*, 459 U.S. 858 (1982). "While the regulations do not prohibit a buyer or receiver from granting a secured interest in trust assets, they make it clear that the secured interest is secondary and specifically voidable in order to satisfy debts to unpaid suppliers, sellers, or agents in perishable agricultural commodity transactions." 49 Fed. Reg. 45,735, 45,738 (1984). *Contra* William M. Burke, *Secured Transactions*, 32 BUS. LAW. 1133, 1152-54 (1977) (discussing federal agricultural trusts and concluding that "members [of the subcommittee on secured transactions] view this development with grave concern and recommend that in the future such legislation be opposed").

24. *See, e.g.,* East Coast Potato Distribrs. v. Grant (*In re* Super Spud, Inc.), 77 B.R. 930, 931-32 (Bankr. M.D. Fla. 1987).

Secured lenders are deemed to have constructive notice of the PACA beneficiaries' priority interest in trust assets.²⁵ In reality, however, lenders have no way of determining whether their security interests include assets which are subject to a trust.²⁶ As a result, banks may be much more reluctant to lend money to buyers of perishable agricultural

If a buyer or receiver declares bankruptcy, makes an assignment for the benefit of creditors, declares its intention to sell under the bulk sales law, or otherwise terminates its business, trust assets are not to be considered part of the estate to be distributed to other creditors or sold unless all trust beneficiaries have been paid.

49 Fed. Reg. 45,735, 45,738 (1984).

25. See, e.g., *In re Gotham Provision Co.*, 669 F.2d at 1011; see also H.R. REP. NO. 543, *supra* note 7, at 4, reprinted in 1984 U.S.C.C.A.N. at 407. "The Committee believes that the statutory trust requirements will not be a burden to the lending institutions. They will be known to and considered by prospective lenders in extending credit." *Id.*

26. Notices of intent to preserve trust benefits, see 7 U.S.C. § 499e(c)(3) (1988), are not publicly recorded in the same manner as security interests and other liens. "The Department of Agriculture . . . has taken the position that copies of trust notices may be released only to the filing party or the buyer." Himmelberg & Stabbe, *supra* note 1, at 568-69. Nevertheless, Himmelberg and Stabbe attempt to analogize these notices to recorded security interests and federal registries for liens on ships and aircraft. *Id.*; see generally Burke, *supra* note 23, at 1139-40 (discussing national recording system for security interests in aircraft under the FAA).

Himmelberg and Stabbe's recommendation that lenders obtain written consents from borrowers to have notices of intent to preserve trust benefits released is specious. There is no evidence that the Department of Agriculture would be willing to provide this information to third parties or that it has the personnel resources to do so. Himmelberg and Stabbe themselves concede that the Department has faced "an onslaught of PACA trust claims." Himmelberg & Stabbe, *supra* note 1, at 533. Some 75,000 notices of intent to preserve trust benefits were filed in 1989 alone, *id.* at 533 n.45, and that number is expected to increase, 56 Fed. Reg. 8683 (1991). The Department of Agriculture is already overburdened by its current PACA obligations and seems unlikely to create a federal registry of trust notices for the benefit of secured lenders.

The administration of the trust statute has increased the workload under the program along with related travel expenses. As a by-product of the Trust amendment, there has also been an increase in disciplinary complaint filings and investigations that require extensive in-depth personal audits. The U.S. Department of Agriculture anticipates that the workload and travel requirements will continue to increase as more growers, shippers, and distributors seek to utilize the benefits and protection of the Trust statute.

Id.

Furthermore, assuming notices of intent to preserve trust benefits were available for public inspection, secured lenders would still be unable to protect themselves fully. Even trust claims which do not arise until *after* the lender has been given a blanket security interest are given priority over the secured lender. See Himmelberg & Stabbe, *supra* note 1, at 569. Himmelberg and Stabbe's suggestion that secured lenders lobby Congress for more protection gives cold comfort indeed. *Id.* at 570-72.

commodities.²⁷ This lack of credit may ultimately hurt the producers of these commodities by shrinking the market for their goods. Otherwise solvent buyers could be forced out of business for want of working capital if lenders refuse to accept a security interest which is secondary to the claims of trust beneficiaries.²⁸

B. How Far Does it Go?

Beyond requiring that buyers of perishable agricultural commodities hold the commodities in "trust" for the benefit of the unpaid sellers, Congress provided little guidance as to how those trusts should operate. Buyers and sellers of perishable agricultural commodities were left with numerous questions: What assets are subject to the PACA trust? When may trust assets be transferred without breaching the trust? When must third parties return trust assets which were transferred to them in breach of trust?

The first question has been answered. The PACA trust extends to *all* perishable agricultural commodities, any inventories derived from such commodities, and any receivables or proceeds from the sale of those commodities or derived inventory, regardless of whether the commodities were obtained through a cash or credit sale and regardless of whether payment had already been made for those commodities.²⁹ Trust beneficiaries are not required to trace their commodities to

27. Himmelberg & Stabbe, *supra* note 1, at 569-70. *Contra* H.R. REP. NO. 543, *supra* note 7, at 4, reprinted in 1984 U.S.C.C.A.N. at 407.

The assurance the trust provision gives that raw products will be paid for promptly and that there is a monitoring system provided for under the Act will protect the interests of the borrower, the money lender, and the fruit and vegetable industry. Prompt payment should generate trade confidence and new business which yields increased cash and receivables, the prime security factors to the money lender.

Id.

28. Himmelberg and Stabbe somewhat naively suggest that this credit squeeze will only hurt insolvent buyers. "[B]ecause working capital loans may become less available due to lending institutions' apprehensions about buyers' credit worthiness, the pinch of the statute will be felt where it was intended to be, by the delinquent produce buyer." Himmelberg & Stabbe, *supra* note 1, at 572.

29. See 7 U.S.C. § 499e(c)(2) (1988); H.R. REP. NO. 543, *supra* note 7, at 4, reprinted in 1984 U.S.C.C.A.N. at 407. "The trust impression [sic] by section 5(c)(2) of this Act is made up of a firm's commodity related liquid assets, and is a nonsegregated 'floating trust', which permits the commingling of trust assets." *Id.*

particular inventories, accounts receivable, or cash proceeds. Rather, all beneficiaries hold a pro rata interest in the entire "floating trust" of commodities, inventories, receivables, and proceeds.³⁰

Assuming a firm deals exclusively in perishable agricultural commodities, the expansive scope of the PACA trust raises the second question—"When may trust assets be transferred without breaching the trust?"³¹ If assets could never be transferred out of the trust, then commodities buyers, unable to resell their produce, would go out of business.³² Clearly, Congress could not have intended such an absurd result. In fact, PACA itself suggests at least one situation in which the transfer of trust assets is not a breach. Because the statutory trust includes not only perishable agricultural commodities but also inventories and receivables or proceeds from the sale of commodities, Congress has specifically authorized the conversion of trust assets from one form to another.³³ Commodities buyers, for example, may resell their produce inventory

30. See, e.g., *In re Fresh Approach, Inc.*, 51 B.R. 412, 422 (Bankr. N.D. Tex. 1985); see also S. REP. NO. 932, *supra* note 3, at 13, *reprinted in* 1976 U.S.C.C.A.N. at 2279 (stating that "[e]ach cash seller would be entitled to a pro rata share in settlement of his account").

31. Assume, for example, that the sole business of PACA, Inc. is the buying and selling of perishable agricultural commodities. PACA, Inc. purchases \$10,000 of perishable agricultural commodities every Monday. Given the time needed for delivering and inspecting the produce, as well as processing the invoice, the sellers of those commodities do not receive payment until two weeks after the "sale." See H.R. REP. NO. 543, *supra* note 7, at 11, *reprinted in* 1984 U.S.C.C.A.N. at 414 (noting that members of the Western Growers Association "expect prompt payment within 10 days, and as a practical and general matter, receive payment generally within 30 days after receipt of the product"). Under this periodic delivery schedule, PACA, Inc. will always have produce suppliers who have not yet been paid. Those unpaid suppliers are the beneficiaries of a trust which includes not just their own commodities but also the commodities for which PACA, Inc. has already paid. The question, therefore, is under what circumstances may PACA, Inc. sell or otherwise transfer *any* of its commodities without breaching the statutory trust?

32. See, e.g., *First State Bank of Miami v. Gotham Provision Co.* (*In re Gotham Provision Co.*), 669 F.2d 1000, 1009-10 (5th Cir. Unit B), *cert. denied*, 459 U.S. 858 (1982). "We hold that so long as cash sellers remain unpaid for their livestock sold to a packer subject to § 206, that packer must *hold* his inventories, accounts receivable and proceeds derived from cash sales for the benefit of the cash sellers until such time as they are fully paid." *Id.* (emphasis added). Taken literally, the purchaser would never be able to resell its inventory if a single supplier had not yet been paid. A firm like PACA, Inc., see *supra* note 31, which always has some unpaid suppliers, would quickly be forced out of business.

33. 7 U.S.C. § 499e(c)(2) (1988).

for cash. Although one trust asset—"commodities"—has been exchanged for another—"proceeds"—the trust itself remains unaffected.

Another equally necessary, although less clearly established, form of transferring trust assets without breaching the trust is withdrawal.³⁴ After converting some perishable agricultural commodities into cash, the buyer must be permitted to withdraw surplus trust assets to cover its expenses and provide a profit.³⁵ Surplus assets are those trust assets whose value exceeds the outstanding claims of the unpaid trust beneficiaries. As with the right of conversion, produce buyers would be unable to operate their businesses without the right of withdrawal.³⁶ Having identified those transfers which are not in breach of the PACA trust, one may easily conclude

34. The trustee's right to withdraw trust funds without breaching the PACA trust does not appear to have been explicitly recognized in any reported decisions. This is most likely due to the fact that most PACA cases are bankruptcy proceedings. *C.H. Robinson Co. v. B.H. Produce Co.*, 723 F. Supp. 785, 793 (N.D. Ga. 1989), *aff'd on other grounds sub nom. C.H. Robinson Co. v. Trust Co. Bank*, 952 F.2d 1311 (11th Cir. 1992); *see also Himmelberg & Stabbe, supra* note 1, at 530. Because the trustee is bankrupt, the trustee's breach of the trust has already been established. The issue before the court, therefore, is not whether a breach has occurred but rather how to remedy that breach for the protection of the trust beneficiaries. *Id.* at 530 n.30.

35. Congress at least implicitly recognized the right of the buyer-trustee to withdraw trust assets. "The trust consists of the commingling of the firm's liquid assets of the type described in the bill in an amount necessary to satisfy the trust." H.R. REP. NO. 543, *supra* note 7, at 12, *reprinted in* 1984 U.S.C.C.A.N. at 415 (emphasis added). "When payment is received for individual produce shipments the amount of the trust will be reduced accordingly." *Id.* at 5, *reprinted in* 1984 U.S.C.C.A.N. at 409.

The Department of Agriculture's discussion of its regulations implementing the PACA trust provisions also supports the buyer's right to withdraw surplus trust assets.

Trust assets are available for other uses by the buyer or receiver. For example, trust assets may be used to pay other creditors. It is the buyer's or receiver's responsibility as trustee to insure that it has sufficient assets to assure prompt payment for produce and that any beneficiary under the trust will receive full payment, including sufficient assets to cover the value of disputed shipments.

49 Fed. Reg. 45,735, 45,738 (1984); *see also Himmelberg & Stabbe, supra* note 1, at 544 (noting that "[t]he buyer-trustee . . . is charged with the responsibility of maintaining sufficient funds to satisfy obligations to produce sellers") (emphasis added).

36. Assume, for example, that after one year in business PACA, Inc., *see supra* note 31, has accumulated \$50,000 in proceeds, holds \$20,000 of commodities in inventory, and owes \$20,000 to unpaid sellers. Those unpaid sellers are the beneficiaries of a trust whose assets total \$70,000, which is far more than necessary to pay their outstanding claims. If PACA, Inc. were not permitted to withdraw at least some of those trust assets to pay for its utilities, payroll, and other expenses, it would be forced out of business.

which transfers are in breach of trust. Any transfer which reduces the value of the trust's assets to an amount less than that required to pay the outstanding trust beneficiaries constitutes a breach of the trust.³⁷

The third question—"When must third parties return trust assets which were transferred to them in breach of trust?"³⁸—is the subject of the remainder of this response.

37. PACA, Inc., *see supra* note 36, would be free to withdraw up to \$50,000 of the trust assets to pay its expenses and provide the owner with a profit. Any transfer beyond that amount would leave the trust insolvent (unable to repay the outstanding trust beneficiaries) and, therefore, be a breach of the PACA trust. It should be noted, however, that a good faith conversion of trust assets can never breach the trust. Assuming PACA, Inc. had withdrawn all \$50,000 in proceeds *and* half of its produce inventory, it clearly would have breached the trust because its remaining asset of \$10,000 in produce inventory is insufficient to repay the \$20,000 in outstanding claims. Nevertheless, PACA, Inc. would still be free to convert that produce inventory by selling it for \$10,000 in cash. The conversion transfer would not be a breach because the amount of the trust's assets would not be reduced. Indeed, the trust beneficiaries might well be better off after the conversion if PACA, Inc. were able to resell the produce for more than it had paid.

38. This response assumes that third parties who received trust assets through conversion or withdrawal (i.e. not in breach of the trust) could not be forced to return those assets. *See* RESTATEMENT (SECOND) OF TRUSTS § 283 (1959); 4 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 283 (4th ed. 1989).

If the trustee transfers trust property to a third person or creates a legal or equitable interest in the subject matter of the trust in a third person, and the trustee in making the transfer or in creating the interest does not commit a breach of trust, the third person holds the interest so transferred or created free of the trust, and is under no liability to the beneficiary.

RESTATEMENT (SECOND) OF TRUSTS § 283 (1959); *see also* U.C.C. § 9-307(1) (1977) (stating that a buyer in the ordinary course of business takes goods free of any security interest).

There are, however, two disturbing comments in the Department of Agriculture's discussion of its proposed regulations implementing the PACA trust provisions.

One commentator questioned whether accounts receivable sold by a principal to a third party are subject to the trust provision and asked whether a buyer of receivables could file a claim against the trust to collect the receivables. The purchaser of accounts receivable is not a trust beneficiary and buys at its own risk since these trust assets are subject to recall for payment to unpaid produce sellers. . . .

One commentator submitted language which it suggested be added to this section that would provide that a buyer of trust assets would receive them free of any trust interest. This language cannot be accepted since the legislation states that all trust assets shall be available in trust until full payment is made to the sellers. A purchaser of trust assets could only hold a secondary interest since the assets would be subject to recall.

49 Fed. Reg. 45,735, 45,735-36 (1984) (proposed regulations now codified at 7 C.F.R. § 46.46). These comments are clearly contrary to the well-established principle of trust law noted above. They suggest that buyers of trust property take the property subject to

IV. A STRICT LIABILITY MODEL OF PACA

A. Himmelberg and Stabbe's Approach to Third Party Liability

Initially, Himmelberg and Stabbe suggest that only some, not all, third party recipients of PACA trust assets which were transferred in breach of trust should be forced to return those assets.³⁹ Their test for determining third party liability is whether the trust assets were received "in the ordinary course of business."⁴⁰ If they were, then the third party may

the trust. If true, this would clearly disrupt commerce in perishable agricultural commodities. Every purchaser down the food chain, including the consumer, would face the possibility that the goods they purchased could be reclaimed to satisfy unpaid trust beneficiaries. This risk of double liability is the reason behind the "clear title" provisions of the U.C.C. and the Food Security Act of 1985. See Himmelberg & Stabbe, *supra* note 1, at 565-68. Fortunately, there do not appear to be any reported decisions which have forced third parties to return trust assets transferred to them when the transfer was not in breach of trust.

39. In the introduction to their discussion of third party liability, Himmelberg and Stabbe state:

PACA trust beneficiaries can seek to recover trust assets in the hands of certain third parties to whom produce buyers have dissipated PACA trust funds. Congress did not intend, however, to give PACA trust beneficiaries an *independent* cause of action against third party payees "like the corner grocery store, the telephone company, or the United States as payee of income taxes," who received trust assets from a PACA trustee in the ordinary course of business. Should the produce buyer-trustee breach his fiduciary duty by dissipating trust assets, the seller's *first remedy* is against the produce buyer-trustee.

Himmelberg & Stabbe, *supra* note 1, at 555 (footnote omitted) (emphasis added). At first glance, this passage suggests that some third parties should not be held liable for the return of trust assets which were transferred to them in breach of trust. Upon closer inspection, however, it becomes apparent that Himmelberg and Stabbe qualified their assertion by limiting it to "an independent cause of action against third party payees" and stating that the seller's "first remedy" is against the buyer. *Id.* This implies that trust beneficiaries might well have a secondary cause of action against *all* third party payees, and in fact, this is exactly what Himmelberg and Stabbe subsequently advocate. See *infra* note 42 and accompanying text.

40. Himmelberg and Stabbe define the ordinary course of business as "payment of antecedent debts for goods or services." Himmelberg & Stabbe, *supra* note 1, at 556 (quoting *Forestwood Farm, Inc. v. Tanner (In re Tanner)*, 77 B.R. 897, 901 n.9 (Bankr. N.D. Ala. 1987)). They claim additional support for this position in the Department of Agriculture's implementing regulations.

Some . . . deductions are contemplated in the regulations. Ordinary operating expenses, e.g., electricity, are to be paid before a PACA trust beneficiary may claim trust assets: "The amount claimable against the trust by a beneficiary or grower will be the net amount due after allowable deductions of contemplated expenses or advances made in connection with the transaction by the commission merchant, dealer, or broker."

Id. at 550 n.122 (quoting 7 C.F.R. § 46.46(f)(4) (1990)) This regulation, however, was

retain the trust property. Under this approach, only donees and lenders would be forced to return PACA assets.⁴¹ Later, however, Himmelberg and Stabbe contradict their earlier statement and argue that *anyone* who receives trust property in breach of trust should be strictly liable for its return to the trust beneficiaries. They maintain that the imposition of strict liability is necessary to adequately protect the unpaid sellers of perishable agricultural commodities.⁴²

Himmelberg and Stabbe particularly favor holding lenders with a blanket security interest in trust assets strictly liable for the return of trust property. They argue that the very nature of the loan's collateral—accounts receivable generated by the sale of perishable agricultural commodities—puts the secured lender on notice that the assets are subject to the PACA trust.⁴³ This, of course, is contrary to their earlier statement

never intended to reduce the claims of trust beneficiaries to cover the trustee's operating expenses. See 7 C.F.R. § 46.46(f)(4) (1991). The purpose of § 46.46(f)(4) is to reduce trust claims only by that amount which the seller has already been paid.

Many contracts between agents and their principals involve advances of funds by the agent for seed, equipment, or payment of contemplated expenses. Section 46.46(f)(4) of the regulations makes it clear that money advances or allowable expenses paid are not a part of the trust, and that the amount claimable by the supplier, seller or grower is the net amount due after allowable deductions for advances and all allowable expenses paid by the agent.

49 Fed. Reg. 45,735, 45,739 (1984).

41. Obviously donees cannot claim that they received assets in payment of an antecedent debt for services or goods because, by definition, the transfer was a gift. Although regular loan payments to lenders would appear to be in the ordinary course of business, Himmelberg and Stabbe specifically exclude lenders from their definition. See Himmelberg & Stabbe, *supra* note 1, at 563-64.

42. After reviewing the two possible approaches to third party liability under PACA, Himmelberg and Stabbe conclude:

A court may analyze the issue of who is a reachable third party under one of the above approaches. In other words a court could either require knowledge of the character of the funds before disgorgement from a third party is permitted or not require any knowledge of the character of the funds because it is their character and not the knowledge thereof which effectively implements the PACA trust provisions. Thus, depending upon the analysis undertaken, PACA cases with similar fact patterns may produce inconsistent results as to the third party payees from which recovery may be obtained. The latter would seem to represent the better view as it would materially further Congress's primary intent in enacting the 1984 PACA amendments to aid unpaid sellers.

Id. at 563.

43. *Id.* at 564; see *C.H. Robinson Co. v. Trust Co. Bank*, 952 F.2d 1311, 1315 n.4 (11th Cir. 1992) (distinguishing between constructive notice of PACA trust for purpose of security interest and constructive notice of breach of trust): *cf. supra* notes 25-26 and

that lenders are generally unaware of PACA's trust provisions.⁴⁴

B. A Split of Authority

Himmelberg and Stabbe divide the cases discussing third party liability under federal agricultural trusts into two categories: those which predicate the third party's liability on knowledge of the breach (the trust approach) and those which do not (the strict liability approach).⁴⁵ The cases which apply trust analysis include *In re Tanner*⁴⁶ and *In re Harmon*.⁴⁷ Himmelberg and Stabbe complain that, by permitting third parties to retain trust funds, these decisions permit buyers to ignore PACA's trust provisions and leave the sellers of perishable agricultural commodities unpaid.⁴⁸

accompanying text (discussing "constructive" knowledge of PACA for the purpose of giving trust beneficiaries priority over secured creditors).

44. In the introduction to *The 1984 PACA Amendments after Six Years: Producing Sellers' Trust and Lenders' Disgust*, Himmelberg and Stabbe state:

Using [PACA], sellers have sought to recover any asset subject to the trust, including assets which have been conveyed by the buyer to third party payees. These third parties are often lending institutions which believed themselves to be fully secured, but were unaware of the statute and its implications when they approved a loan for the buyer.

Himmelberg & Stabbe, *supra* note 1, at 523-24.

45. On a more fundamental level, this response suggests that the apparent dichotomy in PACA precedent is actually a product of Himmelberg and Stabbe's strict liability perspective. By attempting to impose a tort-based model on an inherently equitable device, Himmelberg and Stabbe create the appearance of a division in legal authority where one does not actually exist. Under a trust paradigm, the decisions discussed by Himmelberg and Stabbe are consistent with one another. See *infra* notes 78-86 and accompanying text.

46. *Forestwood Farm, Inc. v. Tanner (In re Tanner)*, 77 B.R. 897 (Bankr. N.D. Ala. 1987); see Himmelberg & Stabbe, *supra* note 1, at 556, 560.

47. *McLean Cattle Co. v. Culton, Morgan, Britain & White (Matter of Harmon)*, 11 B.R. 162 (Bankr. N.D. Tex. 1980); see Himmelberg & Stabbe, *supra* note 1, at 556-57.

48. This approach . . . may limit the protection given to produce sellers under PACA. For example, if a buyer of produce is able to dissipate trust assets freely to third party payees who do not have the requisite degree of knowledge of the character of the funds to subject the transferred funds to a trust obligation, he could pay monies to satisfy debts to his creditors, including lending institutions, until he became insolvent.

Himmelberg & Stabbe, *supra* note 1, at 562. Himmelberg and Stabbe's reasoning on this issue is fundamentally flawed. PACA trustees remain free to disregard their fiduciary duties and transfer trust assets in breach of trust, regardless of whether the third party recipients of those assets are held to be strictly liable or bona fide purchasers. While a trust paradigm of PACA may mean that some trust beneficiaries will not be

In *Tanner*, an unpaid seller of perishable agricultural commodities sued to recover trust proceeds which were used by the trustee to pay other creditors.⁴⁹ The bankruptcy court held that PACA did not authorize trust beneficiaries to retrieve trust assets paid to third parties like the telephone company or the corner grocery in the ordinary course of business.⁵⁰ The court stated that when a PACA trustee breaches its fiduciary duty, the trust beneficiary's remedy is against the trustee, not third-party bona fide purchasers.⁵¹

In *Harmon*, the beneficiary of a P&SA trust sought to reclaim a \$25,000 retainer which had been paid to the trustee's attorney with trust proceeds.⁵² Although he was not initially aware of the fact, the attorney subsequently discovered during the course of his representation that the trustee had unpaid trust beneficiaries.⁵³ The bankruptcy court held that the attorney lost his bona fide purchaser status after he learned of the unpaid sellers and required him to return that portion of his retainer which had not yet been earned.⁵⁴

The cases cited by Himmelberg and Stabbe in support of strict liability are *In re Gotham Provision Co.*,⁵⁵ *In re G & L Packing Co.*,⁵⁶ and *C.H. Robinson Co. v. B.H. Produce Co.*⁵⁷ Himmelberg and Stabbe praise these decisions for providing maximum protection to the unpaid sellers of perishable agricultural commodities.⁵⁸ Under this approach, PACA benefi-

able to recover trust assets from third parties, this approach certainly does not authorize the trustee to commit the breach.

49. *In re Tanner*, 77 B.R. at 898-99.

50. *Id.* at 900-01.

51. *Id.* at 901 n.9.

52. *McLean Cattle Co. v. Culton, Morgan, Britain & White (Matter of Harmon)*, 11 B.R. 162, 164-65 (Bankr. N.D. Tex. 1980). The bankruptcy court subsequently determined that only \$7,499.72 of the retainer came from trust proceeds. *Id.* at 166.

53. *Id.* at 166-67.

54. *Id.* at 167.

55. *First State Bank of Miami v. Gotham Provision Co. (In re Gotham Provision Co.)*, 1 B.R. 255 (Bankr. S.D. Fla. 1979), *aff'd*, 669 F.2d 1000 (5th Cir. Unit B), *cert. denied*, 459 U.S. 858 (1982); see Himmelberg & Stabbe, *supra* note 1, at 557, 560 n.172.

56. *Bast v. Orange Meat Packing Co. (In re G & L Packing Co.)*, 41 B.R. 903 (N.D.N.Y. 1984); see Himmelberg & Stabbe, *supra* note 1, at 557-58, 560.

57. *C.H. Robinson Co. v. B.H. Produce Co.*, 723 F. Supp. 785 (N.D. Ga. 1989), *aff'd on other grounds sub nom. C.H. Robinson Co. v. Trust Co. Bank*, 952 F.2d 1311 (11th Cir. 1992); see Himmelberg & Stabbe, *supra* note 1, at 558-60.

58. Himmelberg & Stabbe, *supra* note 1, at 561. "Such an interpretation, as ap-

ciaries with properly perfected trust claims will automatically recover from third party recipients of trust assets, regardless of whether the third party was a bona fide purchaser.⁵⁹

In *Gotham*, a secured lender sought to have its security interest in the bankrupt trustee's property declared superior to the claims of unpaid trust beneficiaries.⁶⁰ The bankruptcy court not only rejected this claim but also forced the bank to refund the trustee's accounts receivable which the bank had collected.⁶¹ The court held that the bank had at least constructive notice of the trust since it was created by a federal statute.⁶²

In *G & L Packing*, unpaid P&SA trust beneficiaries sued to reclaim trust assets from a lender which held a blanket security interest in all the trustee's property.⁶³ The bank had been collecting the trustee's accounts receivable from the sale of trust assets and applying them towards the trustee's line of credit.⁶⁴ Citing *Gotham*, the district court ordered that the bank return sufficient trust assets to ensure that all trust beneficiaries were paid in full.⁶⁵

Finally, in *Robinson*, the unpaid sellers of perishable agricultural commodities sought to recover trust proceeds which had been used by the trustee to repay a number of loans.⁶⁶ Applying traditional trust analysis, the district court concluded that the defendant banks were bona fide purchasers and entitled to retain the payments for all but one of the

plied to the PACA trust provisions, would provide the most protection possible to sellers." *Id.* (footnote omitted).

59. *Id.*

60. *In re Gotham Provision Co.*, 1 B.R. at 256.

61. *Id.* at 261.

62. *Id.* The use of the term "constructive notice" suggests that the court was actually applying trust analysis. Constructive notice, however, in this context is a legal fiction. See *supra* note 43 and *infra* note 75. The lender is automatically disqualified from being a bona fide purchaser and, therefore, essentially subject to strict liability. See *Himmelberg & Stabbe*, *supra* note 1, at 560-61.

63. *Bast v. Orange Meat Packing Co.* (*In re G & L Packing Co.*), 41 B.R. 903, 906 (N.D.N.Y. 1984).

64. *Id.* at 907.

65. *Id.* at 915.

66. *C.H. Robinson Co. v. B.H. Produce Co.*, 723 F. Supp. 785 (N.D. Ga. 1989), *aff'd on other grounds sub nom. C.H. Robinson Co. v. Trust Co. Bank*, 952 F.2d 1311 (11th Cir. 1992).

loans.⁶⁷ With regard to the final loan which had been secured by a blanket security interest in the trustee's property, the court held that the bank was strictly liable to the trust beneficiaries for the return of any trust assets it received.⁶⁸

V. A TRUST PARADIGM OF PACA

A. Third Party Liability Under Traditional Trust Law Analysis

Under well-established principles of trust law, a bona fide purchaser of trust property takes that property free of the trust, notwithstanding the fact that the trustee transferred the property in breach of trust. To qualify as a bona fide purchaser, a third party must 1) pay value for the trust property and 2) receive it without notice that the transfer is in breach of trust.⁶⁹

The "value" paid for trust property may consist of money, goods, or services.⁷⁰ Generally, the extinguishment of a pre-existing debt owed by the trustee does not constitute value.⁷¹ There is, however, an exception to this rule. If the trustee transfers money or negotiable instruments belonging to the trust in exchange for the extinguishment of a pre-existing debt, the transfer is held to be for value.⁷²

67. *Id.* at 793-94.

68. *Id.* at 794-95.

69. RESTATEMENT (SECOND) OF TRUSTS § 284 (1959); SCOTT & FRATCHER, *supra* note 38, § 284.

70. RESTATEMENT (SECOND) OF TRUSTS § 298 (1959); SCOTT & FRATCHER, *supra* note 38, § 298. "If money is paid or other property is transferred or services are rendered as consideration for the transfer of trust property, the transfer is for value." RESTATEMENT (SECOND) OF TRUSTS § 298 (1959). A purchase of trust property is "for value" even if the amount paid is less than the market value of the property sold. "Where the difference in value is great, however, this is some indication that the purchaser knew or suspected that the transferor was committing a breach of trust or other wrong in making the transfer." SCOTT & FRATCHER, *supra* note 38, § 298.4.

71. The recipient of trust property in exchange for the extinguishment of a pre-existing debt generally takes the property subject to the trust. RESTATEMENT (SECOND) OF TRUSTS § 304(1) (1959); SCOTT & FRATCHER, *supra* note 38, § 304.

72. RESTATEMENT (SECOND) OF TRUSTS § 304(2)(a) (1959); SCOTT & FRATCHER, *supra* note 38, § 304.1. The rationale underlying this exception was explained by New York's Court of Appeals more than a century ago.

It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no ear-mark. . . . [I]t is generally impracticable to trace the source from which the possessor of money has derived it. It

Recipients of trust property are charged with notice of breach of trust if they either know or should know of the breach.⁷³ Notice of breach of trust will not be imputed simply because recipients have notice of the existence of the trust.⁷⁴ Recipients of trust property may still qualify as bona fide purchasers despite knowledge of the trust if they did not know or have reason to know that the transfer of trust property by the trustee breached the terms of the trust.⁷⁵

A brief example will demonstrate the application of this trust paradigm to third party recipients of PACA trust property. Assume that the only assets of PACA, Inc.⁷⁶ are \$5,000 in accounts receivable and \$10,000 in proceeds from the sale of perishable agricultural commodities. Because PACA, Inc. owes \$15,000 to the unpaid sellers of those commodities, all of its assets are subject to the trust. Nevertheless, PACA, Inc. makes three transfers of those assets in breach of trust. Employee A, who knows that PACA, Inc. is breaching the trust, receives a paycheck for \$5,000. Lender B, which is unaware of the breach, receives the \$5,000 in accounts receivable in satisfaction of a \$5,000 loan. Secured Lender C, which holds a blanket security interest in all of PACA, Inc.'s assets and is

would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud.

Id. (quoting *Stephens v. Board of Educ.*, 79 N.Y. 183, 187 (1879)).

73. RESTATEMENT (SECOND) OF TRUSTS § 297(a) (1959); SCOTT & FRATCHER, *supra* note 38, § 297.

74. RESTATEMENT (SECOND) OF TRUSTS § 296 (1959); SCOTT & FRATCHER, *supra* note 38, § 296.

75. Himmelberg and Stabbe suggest that secured lenders should automatically be held liable for the return of trust assets even under a trust paradigm because the nature of their collateral puts them on notice that the assets are subject to the trust. Himmelberg & Stabbe, *supra* note 1, at 564. Assuming, *arguendo*, that holding a security interest in perishable agricultural commodities puts a lender on notice of the existence of PACA's trust provisions, the lender is not necessarily on notice that payments it received on that loan were made in breach of the trust. *See supra* text accompanying note 74. Loan payments might just as easily have been made with surplus proceeds which were properly withdrawn from the trust (i.e., not in breach). *See supra* note 35 and accompanying text. Moreover, the nature of the payment (money or a negotiable instrument) relieves the lender of an obligation to ascertain its source. *See supra* note 72 and accompanying text.

76. *See supra* note 31.

also unaware of the breach, receives a check for \$5,000 towards an outstanding line of credit.

Under traditional trust law analysis, only Secured Lender C would be permitted to retain the trust property transferred to it in breach of the trust.⁷⁷ Employee A does not qualify as a bona fide purchaser because he had notice that the transfer was in breach of the PACA trust. Lender B, on the other hand, had no such notice. Nevertheless, Lender B fails to meet the definition of a bona fide purchaser under the general rule that the transfer of trust property in satisfaction of an antecedent debt is not for value. Like Lender B, Secured Lender C also received trust property in satisfaction of an antecedent debt without notice of the breach. Lender C, however, falls within the negotiable instrument exception to the "not for value" rule, thereby qualifying as a bona fide purchaser.

B. PACA Precedent Revisited

An examination of the cases discussed by Himmelberg and Stabbe reveals that they are *all* compatible with a trust paradigm of PACA. *Tanner* and *Harmon*, of course, applied traditional trust law analysis directly.⁷⁸ Upon closer examination, however, it becomes apparent that the holdings of *Gotham* and *G & L Packing* are also consistent with the trust law approach.⁷⁹ In both *Gotham* and *G & L Packing*, the secured lenders exercised their security agreements to force the trustees to transfer trust property (accounts receivable) in satisfaction of antecedent debts.⁸⁰ These transfers fall within the general rule that the exchange of trust property in return for extinguishment of a pre-existing debt is not for value.⁸¹ Accordingly, the lenders in both cases failed to satisfy the definition of a bona fide purchaser.⁸² The banks, therefore, were

77. Under Himmelberg and Stabbe's strict liability approach, Employee A, Lender B, and Secured Lender C would *all* be required to return the trust assets to the unpaid trust beneficiaries. See Himmelberg & Stabbe, *supra* note 1, at 563.

78. See *supra* notes 46-47 and accompanying text.

79. See *supra* notes 55-56 and accompanying text.

80. See *supra* notes 60-65 and accompanying text.

81. See *supra* note 71 and accompanying text.

82. See *supra* note 69 and accompanying text.

properly forced to return the trust assets to the trust beneficiaries.

The United States Court of Appeals for the Eleventh Circuit recently adopted this same interpretation of *Gotham* and *G & L Packing* in *C.H. Robinson Co. v. Trust Co. Bank*.⁸³ The court rejected Himmelberg and Stabbe's strict liability model and instead applied a trust paradigm of PACA.⁸⁴ It criticized the district court for ignoring well-settled trust law principles and holding a secured lender strictly liable for the return of cash proceeds which it received without notice of the trustee's breach.⁸⁵ Ironically, however, the court of appeals was forced to affirm the district court's judgment against the secured lender, despite completely disagreeing with its reasoning, because the bank had failed to appeal.⁸⁶

VI. CONCLUSION

Himmelberg and Stabbe attempt to invoke "congressional intent" in support of their strict liability model, albeit with mixed results. At first, they state that Congress did not intend for PACA trust beneficiaries to recover from third parties who received trust assets in the ordinary course of business.⁸⁷ Later, however, they argue that third parties must be held strictly liable for the return of trust property in order to further Congress's intention that sellers of perishable agricultural commodities be paid.⁸⁸

Himmelberg and Stabbe's analysis of congressional intent is woefully incomplete. They fail to recognize that the primary purpose of the PACA trust amendments was to grant unpaid sellers of perishable agricultural commodities an inter-

83. 952 F.2d 1311 (11th Cir. 1992).

84. *Id.* at 1313-16.

85. The court of appeals noted that the district court's "hybrid" ruling which imposed strict liability on the secured lender but not on the unsecured lender had the paradoxical effect of making the "secured" lender significantly less secure than the unsecured lender. *Id.* at 1316.

86. *Id.* The appeal was filed by the PACA trust beneficiaries who argued that the banks should be strictly liable for the return of any trust property they might have received. Disregard Himmelberg & Stabbe, *supra* note 1, at 563 n.188 (stating that "[b]oth sides have noted appeals from the *C.H. Robinson* decision").

87. Himmelberg & Stabbe, *supra* note 1, at 555; see also *supra* notes 40-41 and accompanying text.

88. Himmelberg & Stabbe, *supra* note 1, at 563.

est which is superior to that of secured lenders under bankruptcy law.⁸⁹ Congress has achieved this objective.⁹⁰ This additional protection, however, has its price.⁹¹ Congress carefully balanced the competing interests of buyers, sellers, lenders, and other third parties, as well as the impact on interstate commerce, before acting.

Himmelberg and Stabbe latch on to Congress's general desire to protect unpaid sellers without examining the *means* Congress selected to achieve that *end*. They advocate judicial imposition of strict liability where the legislature has not done so. Congress gave sellers a trust—nothing more and nothing less—with all the benefits and burdens which accompany it. Congress did not make lenders and other third parties the absolute guarantors of payment for these trust beneficiaries.⁹²

The fundamental premise of this response is that, by enacting a statutory trust, Congress necessarily intended that it be governed by the well-established principles of trust law. This view is supported by both the text of PACA and its legislative history.⁹³ Furthermore, this paradigm is more consistent with the cases which have interpreted PACA's trust provisions.⁹⁴ By applying traditional trust analysis, rather than strict liability, to transfers of trust property, the unpaid sellers of perishable agricultural commodities receive the full degree of protection to which they are entitled without imposing an excessive burden on innocent bona fide purchasers.

89. See *supra* note 21 and accompanying text.

90. See *supra* note 21-24 and accompanying text.

91. See *supra* notes 25-28 and accompanying text.

92. C.H. Robinson Co. v. Trust Co. Bank, 952 F.2d 1311, 1316 (11th Cir. 1992).

93. See 7 U.S.C. § 499e(c); H.R. REP. NO. 543, *supra* note 7, reprinted in 1984 U.S.C.C.A.N. 405.

94. See *supra* notes 78-86 and accompanying text.