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An Agricultural Law Research Article

Agricultural Lending in a Troubled Economy

by

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Agricultural Lending in a Troubled Economy

by Michael J. Guyerson and Keith Block



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The agricultural crisis which has swept across the country has prompted the federal government, as well as many state governments, to enact "remedial" legislation designed to assist farmers and ranchers. Most of this remedial legislation has drastically and unilaterally altered the relationship between the agricultural lender and its borrower. For example, new homestead exemptions have been created for farmers and ranchers, the right to reclaim and sell machinery and equipment has been significantly altered, and a new Chapter 12 bankruptcy chapter was recently created.¹ At the time this remedial legislation was being enacted, critical amendments were made to the state and federal statutes governing the creation, perfection and enforcement of security interests in farm and ranch products.

All agricultural lenders and their counsel should be aware of these new rules since failure to comply can result in a secured lender becoming unperfected and unsecured. In addition, existing legislation is frequently ignored or improperly complied with, resulting in devastating losses for lenders. This article intends to assist counsel in dealing with the ever-changing maze of state and federal legislation affecting agricultural lending.

FOOD SECURITY ACT OF 1985

The Food Security Act of 1985 ("FSA") was signed into law by President Reagan on December 23, 1985, and became effective one year later on December 24, 1986.² This new legislation contains certain federally mandated filing requirements which drastically alter the "farm products exception" of the Colorado Uniform Commercial Code ("UCC").³ The bill preempts all state statutes pertaining to the perfection or creation of a lien in farm products.⁴ Accordingly, it is mandatory that the federal statute be complied with; mere reliance on the Colorado UCC will be insufficient.

It has long been the statutory rule in the state of Colorado that a buyer in the ordinary course of business generally takes free and clear of all security interests created in the goods by its seller *unless* the goods in question are "farm products." A buyer of farm products generally was subject to the security interest, and the lender could enforce its security interest against the purchasers of those products.⁵

Exceptions were made for lenders who waived the lien and authorized the sale either through direct waiver or implied

waiver, such as "course dealing" or "usage and trade."⁶ The FSA removes this farm product exception from the UCC and allows a buyer in the ordinary course of business to take free and clear of all lenders' security interests. The only way that a lender can assure that its security interests will be effective against the purchasers of the farm products is to comply with the FSA provisions.

The FSA mandates that each Secretary of State throughout the country will be responsible for the creation and administration of a "certified central filing system" covering all farm products.⁷ Each lender will be required to file a separate UCC financing statement in this system. The central filing system is intended to give sellers, purchasers and lenders immediate access to borrower information. It should accomplish the following tasks:

- 1) Organize financing statements according to farm products;
- 2) For each category of farm products, maintain an alphabetical listing by debtor's last name;
- 3) Maintain a numerical index according to the social security number of each debtor;
- 4) Maintain UCC filings geographically by county;

- 5) Maintain UCC filings by crop year;
- 6) Maintain a cross-index of all buyers of farm products, including agents and commissioned brokers; and
- 7) Regularly distribute to each buyer, agent or commissioned broker a copy of the master list of all UCC filings for the farm product or commodity in which that broker deals.⁸

If there is a central filing system in existence and the lender has not made a central filing in that system, the lender has no valid lien that can be enforced against the purchaser. To the extent that a central filing system is not in operation as of the effective date of the statute, December 24, 1986, the only option the secured party has is to give direct prenotification to each and every potential purchaser of the farm products annually. Prenotification requires notifying the potential buyer or broker of: (1) the name and address of secured party; (2) name and address of the debtor; (3) social security number of the debtor; and (4) a description of the farm product, location of collateral, and crop year, if applicable.

At this time, the Colorado Secretary of State does not have a central filing system as mandated by the FSA. In fact, because of the complex nature of the filing system, many states have not implemented a certified central filing system. In Colorado, lack of funding and inadequate computer capability appear to be the problem. Thus, the only option that secured lenders in Colorado now have is to directly notify each and every potential purchaser of farm products as to the existence of the lender's lien in those products. Unless the secured party has directly notified each potential purchaser of the products, it has no lien in those products which can be enforced against the ultimate purchaser.

It should be noted that the FSA does not alter the enforceability of a security agreement by a lender directly against a borrower. Improper sale of collateral by a debtor still provides a basis for a breach of contract or conversion claim by the lender. The federal statute only alters the lender's right to pursue the ultimate buyer of the farm products. Lenders should revise present loan documents to strengthen their rights against the borrower by including the following new clauses and covenants:

1. The borrower is required to list, and regularly update, all purchasers of the farm products of the borrower.
2. The borrower expressly allows the lender to notify directly any and all purchasers of farm products as to the lender's claim of a security interest in those products.

Revised UCC-1 financing statements should be utilized so that when the central filing system is created, the lender can comply immediately (suggested forms have been developed by the Colorado Banker's Association). As a matter of business operations, the lender should compile a list of all purchasers of farm products in its area. This may include grain elevators and livestock auction houses in other states, since farm products can easily be transported for sale across state lines. Direct prenotification to all known purchasers or brokers of farm products should be a first priority in the administration of agricultural loans.

The changes made by the FSA should not be looked upon lightly. The lender frequently is able to recover on an agricultural loan simply because there was a "deep pocket" in the form of a grain elevator or livestock auction house against whom the security interest could be enforced. The lender will not have this ability unless compliance with the FSA has been accomplished.

HOUSE BILL 1284

The enactment of Colorado House Bill ("H.B.") 1284, which was signed into law by former Governor Lamm on April 18, 1986, has been one of the most controversial pieces of state legislation in the agricultural community in quite some time. In fact, substantial revisions and amendments were recently adopted and set forth in Senate Bill ("S.B.") 123, which was signed into law by Governor Romer on July 1, 1987.⁹ S.B. 123 repeals some, but not all of the provisions of H.B. 1284. Moreover, H.B. 1284 still applies to those real estate foreclosures, UCC court actions, and Forcible Entry and Detainer ("FED") court actions initiated prior to July 1, 1987.¹⁰ Accordingly, a working knowledge of H.B. 1284 is still important.¹¹ A basic review and update follows.

As presently structured, H.B. 1284 (as well as S.B. 123) amends Article 9 of the Colorado UCC, the Colorado Real Property Foreclosure and Redemption statutes, and the Colorado FED statute.¹² H.B. 1284 has a sunset date of January 31, 1990.

Amendments to the UCC— Secured Transactions

No Right to Possession upon Default without Court Order:

Section 2 of H.B. 1284 amends CRS § 4-9-503, which deals with a secured party's right to take possession of farm

and ranch collateral after default. Prior to this amendment, a secured party, unless otherwise agreed to by the parties, had the right upon default to take possession of the collateral without judicial process if no breach of the peace would result from such action. H.B. 1284 changes this rule with respect to collateral which is farm or ranch machinery or equipment, livestock, or feed or inventory held for livestock and used by a debtor farmer or rancher ("Protected Property") The bill provides the general rule that a secured party may only take possession of Protected Property pursuant to a court order.¹³ There are three exceptions to this new rule:

1. If there exists *clear and convincing* evidence that the debtor has vacated or abandoned the Protected Property, a court order is not required.
2. If the debtor voluntarily surrenders the Protected Property to the secured property and waives the provisions of CRS § 4-9-504(6) and (7) (dealing with notice requirements and requirements of sale or contractual disposition of the Protected Property), no court order is required.
3. If the secured party is relieved from obtaining a court order pursuant to the provisions of CRS §§ 4-9-504(7) and 4-9-506(2)(b) or (2)(c), no court order is required. These sections deal with debtor's failure to pay for the Protected Property pursuant to a court-approved plan to cure default (discussed below), evidence of debtor's bad faith, or evidence of debtor's intent to abuse the proceedings provided under H.B. 1284.¹⁴

Debtor's Right to 20-Day Notice And Right to Cure Default:

H.B. 1284 amends CRS § 4-9-504, dealing with the secured party's right to dispose of collateral after default. As amended, a debtor¹⁵ must receive at least twenty days' notice of the sale or proposed contractual disposition of the Protected Property. This minimum twenty-day notice requirement may not be waived prior to default.

Provisions concerning the debtor's right to redeem Protected Property were also amended.¹⁶ The term "redemption" is really a misnomer for the right to cure, which is the right actually created. S.B. 123 corrects this misnomer by clarifying that the right to cure the default is what is intended.¹⁷ H.B. 1284 provides that the debtor may tender to the court, at any time before the secured party has disposed of collateral or entered into a contract of its disposition or before the obligation has

been discharged, either a current lump sum payment or a payment agreement. If the debtor tenders the former, the amount tendered must be equal to an amount which will cure the past due payment(s), exclusive of any acceleration of indebtedness, with interest from the date of default at the default rate specified in the original instrument. If not specified, the amount tendered should include interest at the original rate specified in the original instrument plus reasonable costs of the secured party and attorneys' fees approved by the court.

If a payment agreement is tendered, the agreement must contain a plan to pay during the then-current crop year, the sum described above for a lump sum payment plus the regular rate of interest provided in the loan document to the date of payment. However, the debtor must show that such payment will be made from the proceeds of crops of livestock presently growing or raised, or to be grown or raised in the future on the debtor's farm or ranch, and the court finds said agreement with the accompanying plan to be reasonably feasible, fair and equitable.

The secured party has the right to present its own evidence on the feasibility of the payment agreement. If the court finds the agreement to be reasonably feasible, fair and equitable, the agreement with performance thereof shall be sufficient tender of redemption. In the event the debtor breaches the agreement, upon motion of the secured party after a hearing, the secured party may proceed to dispose of the Protected Property without further notice, court order or right of redemption. On the other hand, if the court finds the plan not feasible, fair, or equitable, the tender shall be insufficient to redeem.

It should be noted that if the secured party fails to object to the tender, the tender shall be deemed accepted by the secured party subject to performance. H.B. 1284 requires that the debtor act in good faith and without an intent to abuse the provisions of law, and, in the event the debtor is found to be acting in bad faith or with the requisite abusive intent, the secured party may proceed to dispose of the Protected Property without further notice, court order or right to redemption.

Debtor's Right to Submit Payment Plan to Purchase Collateral at Sale:

The debtor has the right to submit a payment plan (for the purpose of purchasing the collateral) to the court, provided the plan is served upon the secured party not less than ten days prior to the sale or proposed contractual disposition of the

Protected Property. The debtor's plan constitutes an offer by the debtor to purchase the Protected Property from the secured party under the terms as set forth in the debtor's plan. The secured party must accept the debtor's offer, provided the secured party intends to proceed with the disposition of the Protected Property. Moreover, the debtor's offer as embodied in the debtor's plan must be the "most favorable" offer or must be equal to the most favorable third-party offer.¹⁸

In determining which is "most favorable," H.B. 1284 provides that time value of money concepts (*i.e.*, discounting) will be utilized. Whether discounting is the exclusive consideration to be employed in determining which offer is "most favorable" is unclear.¹⁹ If discounting is the exclusive consideration, a future payment by the debtor (equal after applying time value of money concepts to an up-front or present-day payment by a third party) will be always be the most favorable. However, the most favorable offer, practically speaking, would be that offer which brings monies into the secured party's hands prior in time, thus enhancing the secured party's cash flow. With such cash flow consideration in mind, a lump sum payment in the future by the debtor would not be as favorable as a present-day payment or annuity, regardless of discounting equality. It is possible to read H.B. 1284 in such a way as to disregard cash flow considerations and to use time value of money concepts as the exclusive inquiry in determining whether the debtor's offer is "more favorable" or equal to the best third-party offer.

Once the debtor has timely submitted its payment plan, the secured party may accept the plan or contest its validity and feasibility. If the secured party decides to contest the plan, the secured party must petition a court of competent jurisdiction to determine the validity or feasibility of the plan. If the court finds the plan feasible, the court will enter an order declaring the amount which the debtor is able to pay during the prescribed crop year and fix the present discounted value thereof. However, if the court finds the plan is not feasible, the debtor will be deemed unable to render payment as required by law, and the secured party may dispose of any or all of the Protected Property of the debtor without further proceedings and without further notice or court order.

Under H.B. 1284, the secured party is not required to sell the Protected Property to the debtor, and thereby not required to petition a court, if the offer, sale or other disposition is not commercially reasonable.²⁰ In fact, a secured party can elect

not to sell the property at all. However, if the property is to be sold, the statute provides that it is not commercially reasonable for a secured party to sell, lease or otherwise dispose of any or all of the Protected Property for less than the amount which the debtor is able to pay during the then-current crop year. This determination as to commercial reasonableness is to be made by the secured party subject to those portions of the statute which provide that, if the secured party intends to proceed with the disposition of the Protected Property, it must sell it to the debtor if the debtor's offer is the most favorable or equal to the most favorable third-party offer.²¹

Any court proceedings provided for under H.B. 1284 are to be given priority by the court and will be heard over all other matters. The statute's provisions amending the UCC—Secured Transactions are to be repealed effective January 31, 1990.²²

Amendments to Colorado's Forcible Entry and Detainer Statute

Qualified Farm Owner-Tenant:

H.B. 1284 amends CRS § 13-40-101 *et seq.*, Colorado's Forcible Entry and Detainer statute, by granting certain rights of continued possession and purchase to persons who meet the definition of a "Qualified Farm Owner-Tenant" ("Tenant").²³

There has not been a great deal of litigation concerning eligibility as a Tenant, apparently due to the settlement of most of these types of disputes. However, in the 1987 case of *Tuttle Farms v. Travelers Insurance*, Judge Arends ruled that a corporation could qualify as a farmer owner-tenant and that the rights created by H.B. 1284 are not limited solely to "natural persons."²⁴ In addition, Judge Arends determined in this case that a farmer or rancher who has leased property to a third party, to the extent that the lease was in effect on the date that the foreclosure action was initiated, did not qualify as a farm owner-tenant because the farmer or rancher was not in actual possession of the subject property. The decision has not been appealed; apparently it will be published soon.²⁵

The Tenant's Right to Continued Possession:

A Tenant may retain possession of the property provided the person agrees in writing to lease the property for the crop year from the owner on "fair and reasonable" terms.²⁶ Generally, fair and reasonable terms would be prevailing terms in the area. However, H.B. 1284 does make specific reference to rents.²⁷

Recently, in *Tuttle Farms*, Judge Arends ruled that a 12 percent rate of interest would be an appropriate rate of compensation to a secured party for "delayed rent." The determination of the appropriate interest rate is to be made on a case-by-case basis. Moreover, Judge Arends entered into an analysis of a third-party or competing lease situation and determined what rights a qualified farm owner-tenant had under H.B. 1284 in such a situation. Again, the analysis of competing lease situations is fact specific.²⁸

This forced lessor/lessee relationship is subject to a finding by the court that the lease is reasonably feasible, fair and equitable and that the Tenant can reasonably be expected to perform under the lease. H.B. 1284 makes it clear that the Tenant is not to be denied a lease to the property solely because the Tenant's financial condition is less favorable than that of a third-party offer.²⁹

Right of First Refusal:

H.B. 1284 also provides that a Tenant is entitled to a right of first refusal to acquire property from a selling owner. The statute requires that the selling owner submit its third-party offer to the Tenant or at least ninety days before the anticipated closing date.³⁰

Amendments to Colorado's Foreclosure Statutes

Provision for "Agricultural Homestead Real Estate":

H.B. 1284 amends the redemption rules with respect to agricultural foreclosures by carving out from foreclosed agricultural real estate a portion of the property which the statute terms "Agricultural Homestead Real Estate" ("Homestead Property").³¹ In effect, H.B. 1284 allows a forced division of the agricultural real estate by permitting the owner to redeem less than all of the property from a foreclosure sale. This is the Homestead Property portion, which generally will consist of the owner's residence, with reasonable access to domestic water and mineral rights. The Homestead Property portion may not contain more than five acres unless the consent of the secured lender is obtained. However, there is a forty-acre cap on what may be carved out as Homestead Property.³²

H.B. 1284 attempts to provide certain safeguards for the secured lender. The Homestead Property may not contain a facility material to the operation of the remaining agricultural real estate nor may the Homestead Property or the use of it

materially interfere with the access to water rights usable on the remaining agricultural real estate. Furthermore, the Homestead Property may not materially interfere with access to the agricultural real estate. The cost of redeeming the Homestead Property will be an amount equal to its fair market value portion plus interest, together with its share of taxes and other proper charges provided by law.³³

Amendment to Colorado Banking Laws

H.B. 1284 amended CRS § 11-8-101 (d), to provide that assets acquired by a state bank to satisfy indebtedness are subject to the provisions of the statute and assets entered on the books of the bank shall not be categorized as classified assets.³⁴ This provision will be repealed effective January 31, 1990.

COLORADO LEGISLATIVE UPDATE

Senate Bill 123

S.B. 123 became effective on July 1, 1987, and has a sunset date of January 31, 1989. The bill was the work product of a broad spectrum of individuals and entities, including the Department of Agriculture of the State of Colorado ("DOA"), the Colorado Bankers Association, the Farm Credit System, and the Rocky Mountain Farmers Union. It should be remembered that H.B. 1284 still applies to "all court actions" initiated prior to July 1, 1987.³⁵ S.B. 123 provides for major revisions to H.B. 1284 for those "court actions" filed after July 1, 1987.

UCC Repossessions and Sales/Mandatory Mediation:

One significant change is in the area of UCC repossession and sale of "Agricultural Personal Property" such as machinery and equipment. There is now a forty-five-day mandatory mediation period based upon the Iowa mediation law. The Colorado DOA will act as a farm mediation program coordinator and will help select mediators. The DOA is given a period of ninety days in which to obtain contracts with appropriate mediators or mediating companies. Once the program is running, user fees of approximately \$30 per hour per participant will be charged.³⁶ It is only after mediation efforts have failed that access to the courts will be allowed. It is the burden of the secured party to file a request for mediation with the mediation program coordinator.

Once the request for mediation is filed, the debtor and the creditor must appear for an initial consultation with the mediator within twenty-one days. A final mediation hearing must be held with forty-two days; the mediation period expires at the end of forty-five days. If the debtor fails to appear at either of the mediation sessions, all mediation rights are lost. Moreover, the mediation rights can be waived. At the end of a forty-five day period from the date the request for mediation is filed, the mediation coordinator either will have been successful, resulting in a mediated agreement or a statement that mediation efforts have failed will be issued. At that point, the secured creditor can initiate court action or self-help to repossess and sell the farm machinery and equipment.

It appears that the mandatory mediation requirements only pertain to Agricultural Personal Property, which includes farm or ranch machinery or equipment, livestock, or feed or inventory held for livestock or otherwise used by the debtor farmer or rancher. A debtor who owns agricultural real estate or a secured party of such a debtor may request mediation of the indebtedness by applying to the farm mediation program coordinator. However, mediation of agricultural real property loans appears voluntary, whereas mediation of Agricultural Personal Property loans is mandatory.

S.B. 123 also clarifies that a debtor is given the right to cure past due payments by tendering the "cure amount" in cash. As previously discussed, this corrects the misnomer created by H.B. 1284 pertaining to "redemption" of Agricultural Personal Property.³⁷ In order to preserve the debtor's right to cure a default, S.B. 123 makes it mandatory upon a secured creditor that a notice of default and right to cure be mailed to a debtor notifying the debtor that it has a forty-five day period in which to cure its default. The forty-five day cure period is timed to run simultaneously with the mandatory mediation period of forty-five days. Accordingly, a secured party will want to mail a notice of default and right to cure and to file a request for mediation simultaneously so that either a cure will be made or a mediation will have occurred during the same forty-five day period.

At the end of that forty-five days, assuming there has been no successful mediation or cure, the secured creditor can proceed with repossession and sale of Agricultural Personal Property under the UCC without any further interference from S.B. 123. All applicable UCC provi-

sions regarding commercially reasonable sales still apply. Nothing in S.B. 123 excuses a secured party from complying with other applicable UCC provisions.

S.B. 123 makes it clear that *all of the rights* conferred upon a borrower by S.B. 123 may be waived at any time. The waiver requirement is analogous to the "informed consent" waiver typical of UCC transactions.³⁸

Agricultural Real Estate Foreclosures:

S.B. 123 makes significant revisions to the foreclosure of agricultural real estate and a separate five-acre parcel, which is now known as the "agricultural residence." S.B. 123 applies to all outstanding mortgages and deeds of trust on agricultural real property which existed as of January 1, 1986, and all refinancing of these obligations *unless* the loan is refinanced through a new lending institution or the borrower waives all S.B. 123 rights on an "informed consent" basis.³⁹

When a secured party forecloses on agricultural real property, the notice of election and demand filed must disclose that agricultural property is involved and that special redemption rights apply. In turn, the debtor must file a notice of intent to exercise the agricultural residence rights not less than five days prior to the C.R.C.P. Rule 120 hearing, or no later than thirty days after service of a complaint if a judicial foreclosure is involved. The notice of intent to exercise the agricultural residence rights must also contain a survey of the five acres to be redeemed. The debtor must pay for the survey.⁴⁰

At the Rule 120 hearing, or during a judicial foreclosure proceeding, the court may order a bifurcated sale of the agricultural residence and the remaining property known as the agricultural real estate.⁴¹ If all of the statutory requirements for a bifurcated sale are met, there will be two separate sales, two separate certificates of purchase, two separate trustee deeds, two separate bids, and two separate chances for the debtor to redeem. The redemption period remains at six months, except that in the case of agricultural real estate or the agricultural residence, the debtor is given an additional five days at the expiration of all other redemption periods in which to redeem. Redemption must be in cash. Moreover, if the farmer intends to exercise a right of redemption, a notice of intent to redeem must be filed not more than thirty days prior to the expiration of the original six-month period. If no intent to redeem is filed, the debtor loses all redemption rights.⁴²

FED Actions:

The definition of a Tenant, as established by H.B. 1284, has not been changed. Once a secured party obtains title to real estate, a FED action must be brought to remove the farmer or rancher, unless a voluntary surrender can be effectuated. Once a FED action is filed, a Tenant has the right to submit a lease offer to the secured party similar to those established by H.B. 1284. Moreover, a first right of refusal to buy the real property if it is to be sold is also preserved.

Perhaps the most significant change effectuated by S.B. 123 concerns this first right of refusal. The first right of refusal to the former owner seems to expire ninety days after the expiration of all redemption rights expires.⁴³ Accordingly, the first right of refusal does not continue on in perpetuity as it did under H.B. 1284. The farmer must be in a position to close on terms equal to or better than the competition within thirty days after exercising its right of first refusal.

Other Provisions:

Finally, S.B. 123 specifically prohibits certain entities and persons from purchasing real property or other collateral at sales. This was apparently done in a response to actions of lenders using strawmen to make questionable bids at foreclosure sales and other auctions.⁴⁴

OTHER LEGISLATION

The 1987 session of the Colorado Legislature has, in addition to S.B. 123, dealt with a variety of statutes affecting agriculture and agricultural lenders. One of the new legislative proposals has already been defeated in the legislature, while another is still alive.

House Bill 1114 provides that suppliers of seed, feed, fertilizer, utilities, and other agricultural materialmen have an unrecorded first lien in the agricultural crop. This first lien would be superior to even recorded lenders' liens. The bill was opposed in the House Agricultural Committee by the Colorado Banker's Association. The bill was significantly amended to require that the agricultural supplier's lien be recorded and that priorities will be determined based upon the chronological order of filing. The bill has now passed out of the House Agricultural Committee and was pending before the House Appropriations Committee when the legislature recessed in August.

Colorado counsel should also be aware of CRS § 38-20-102, which specifically creates an agistor's lien for one who pro-

vides boarding and care of livestock. That statute has been in effect for several years.⁴⁵

House Bill 1218 was introduced in the legislature to provide for a broad definition of earnings of farmers and ranchers. Earnings would be exempt from attachment and garnishment in a manner currently provided for other wage earners. Up to 75 percent of the present market value of income from the sale of crops, livestock, poultry, dairy products and agricultural products grown would have been considered exempt earnings. The bill passed out of the House Agricultural Committee and was pending in the House State Affairs Committee when it automatically died due to deadlines in the Committee. It is unclear at this time whether the legislation will be reintroduced at the next session of the Colorado legislature. It should be noted that H.B. 1218 closely parallels a decision of the U.S. Bankruptcy Court in Colorado which provided for a wage-earner exemption in an amount equal to 75 percent of gross proceeds from the sale of crops or livestock.⁴⁶

PACKERS AND STOCKYARDS ACT

The Packers and Stockyards Act ("PSA") was enacted in 1921 to assure fair trading practices in the livestock marketing and meatpacking industry.⁴⁷ It was amended in 1976 to provide livestock suppliers with a statutory trust that was designed to prevent the kinds of losses experienced by such suppliers in the American Beer Packers bankruptcy proceeding. In that proceeding, a finance company possessing a valid and perfected security interest in the meat packers' accounts receivable and inventory received the benefits of its collateral to the detriment of the livestock suppliers possessing over \$20 million in unpaid unsecured claims.⁴⁸

The statutory trust created by the 1976 amendments constitutes a valuable remedy to unpaid livestock suppliers and their assignees and poses a serious problem to lenders financing packers involved in interstate commerce. The PSA and its subsequent amendments were adopted as remedial legislation and have been construed liberally by the courts.⁴⁹

Characteristics of Statutory Trust

The statutory trust provision is contained in § 196 of the 1976 amendments to the PSA and provides in relevant part:

(b) 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, shall be held by such packer in trust for the benefit of all unpaid cash seller of such livestock until full payment has been received by such unpaid sellers; *Provided*, That any packer whose average annual purchases do not exceed \$500,000 will be exempt from the provisions of this section. Payment shall not be considered to have been made if the seller receives a payment instrument which is dishonored; *Provided*, That the unpaid seller shall lose the benefit of such trust, if in the event that a payment instrument has not been received, within thirty days of the final date for making a payment under section 228b of this title, or within fifteen business days after the seller has received notice that the payment instrument promptly presented for payment has been dishonored, the seller has not preserved his trust under this subsection. The trust shall be preserved by giving written notice to the packer and by filing such notice with the Secretary.⁵⁰

The *res* of the trust consists of all livestock purchased in cash sales, whether or not such livestock has been paid for by the packer, all inventories of meat food products or livestock products derived therefrom, and all receivables and proceeds thereof.⁵¹ The packer, and not the person seeking to enforce that trust, possesses the burden of proving certain livestock or the products and proceeds thereof were not derived from cash sales. If the livestock derived from cash sales or the proceeds and products thereof have been commingled and cannot be segregated from their non-cash sale counterparts, all of the disputed assets will be subject to the statutory trust. A lender or other third party who has repossessed or disposed of the livestock, meat products or livestock products and been paid the proceeds thereof will be required to disgorge such assets to the unpaid cash sellers.⁵²

The statutory trust was intended to preempt conflicting state laws.⁵³ The trust does not create a statutory lien that may be avoided by the trustee-in-bankruptcy or debtor-in-possession under the Bankruptcy Code. Instead, the assets subject to the trust are not considered to be part of the debtor's estate.⁵⁴

All sellers, and not only producers of livestock, are entitled to invoke the statutory trust. In addition, assignees will be afforded the same protection granted to livestock sellers under the PSA.⁵⁵

Requirements for Enforcement of Statutory Trust

The statutory trust will not be enforced unless five elements can be demonstrated in a full and complete manner. First, the disputed assets must consist of "livestock" or the proceeds and products thereof. The PSA defines the term "livestock" as "cattle, sheep, swine, horses, mules, or goats—whether live or dead."⁵⁶ The PSA regulates and licenses live poultry dealers and handlers; however, sales of poultry are not subject to the trust provisions of the PSA.

Second, the livestock must be purchased by a "packer" whose average livestock purchases exceed \$500,000 per year. The term "packer" is defined in § 191 of the PSA as follows:

When used in this chapter the term "packer" means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce.⁵⁷

The PSA provides that a packer must be "engaged" in one of the activities described in § 191. Being engaged in an activity requires more than a single act or transaction or an occasional participation in such activity.⁵⁸

The courts have adopted a broad definition of the term "packer" under the PSA. In *Safeway Stores, Inc. v. Freeman*,⁵⁹ the court held that supermarket chains were "packers" if these companies operated centralized facilities to process the meats which were sold in their retail stores. Likewise, in *Bruhn's Freezer Meats v. U.S. Department of Agriculture*,⁶⁰ the court found that freezer plant operators (who cut up sides and quarters of beef into consumer cuts, boned and ground meats, and then trimmed and wrapped individual cuts and froze prepared meat to preserve it) were engaged in "preparing" meats and were "packers" under the PSA. Finally, in *In re G&L Packing Co., Inc.*,⁶¹ the court held that sellers of livestock to a slaughterer were entitled to have the statutory trust impressed upon the accounts owing to its sister company, a meat processor, on the theory that the slaughterer and meat processor formed a single "packer" under the PSA.

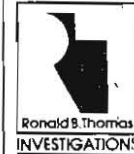
Third, the sale must constitute a "cash sale." The term "cash sale" is defined in § 196(c) of the PSA:

(c) For the purpose of this section, a

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cash sale means a sale in which the seller does not expressly extend credit to the buyer.⁶²

A sale will be presumed to be a "cash sale" unless the seller or its duly authorized agent⁶³ executes and delivers a written agreement to a packer that waives the trust provisions of the PSA.⁶⁴ The written agreement must incorporate or contain equivalent language to the following waiver promulgated by the United States Department of Agriculture ("USDA"):⁶⁵

On this date I am entering into a written agreement for the sale of livestock on credit to _____, a packer, and I understand that in doing so I will have no rights under the trust provisions of section 206 of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 196, Publ.L. 94-410), with respect to any such credit sale. The written agreement for such selling on credit

Covers a single sale.

Provides that it will remain in effect until (date).

Provides that it will remain in effect until canceled in writing by either party.

(Omit the provisions not applicable.)

Date _____

Signature _____

Neither an oral agreement nor a course of dealing will constitute an adequate replacement for the written agreement required by the PSA.⁶⁶

The packer must retain the original waiver signed by the seller, the agreement providing for the sale on credit and any other documents relating to the terms of the credit sales in its files for a period of two years after the expiration of the agreement to extend credit or for any longer period that may be required by law.⁶⁷ In addition, the packer must provide the seller with a copy of the waiver.⁶⁸ If a dealer or market agency acts as an agent for the packer, these entities must satisfy the requirements set forth in the regulations promulgated by the USDA.

Fourth, the livestock seller will be entitled to assert its rights under the statutory trust only if the packer fails to pay the seller in a timely manner. The payment terms for the purchase of livestock are set forth in § 228b of the PSA:

(a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price; . . .⁶⁹

There is an exception to the general rule

regarding the time of payments in the event that the livestock is purchased on a carcass or "grade and yield" basis. Also, the method of payment to the seller is controlled by § 228b of the PSA.⁷⁰

Fifth, the seller must preserve its statutory trust rights by giving written notice to the packer and filing a copy of the notice with the U.S. Secretary for the Department of Agriculture ("Secretary") within thirty days of the final date for making a payment under § 228b or within fifteen business days after the seller has received notice that the payment instrument properly presented for payment has been dishonored.⁷¹ The Secretary will be deemed to have received the notice of the seller's intention to invoke its statutory trust rights if the notice is filed with the PSA area office or with the PSA Division of the USDA in Washington, D.C.⁷² The date of the actual receipt of the notice by the seller or the Secretary will be used to determine when the notice is deemed given or filed under the PSA.⁷³

Notice can be given to the packer and the Secretary by letter, mailgram or telegram and should contain the following information: notification to preserve trust benefits; identification of packer; identification of seller; date of the transaction; date of seller's receipt of notice that payment instrument has been dishonored (if applicable); and amount of money due. However, any written notice which informs the packer and the Secretary that the packer has failed to pay for livestock is sufficient to meet the statutory requirements of the PSA.⁷⁴

Statutory Remedies Available to Unpaid Seller

An unpaid seller has two remedies under the PSA. First, the seller may commence a suit against the packer in the applicable federal district court to recover the damages arising from the packer's failure to pay the seller for the cash sale of the livestock and to collect those damages from the *res* of the statutory trust.⁷⁵ In such an action, the seller is entitled to recover the unpaid portion of the purchase price, prejudgment interest on that amount from date following delivery and acceptance of the livestock and the costs incurred in entering the seller's rights under the PSA.⁷⁶ It is unclear whether these costs include the seller's attorneys' fees.

Second, the unpaid seller may file a reparation complaint with the Secretary. The Secretary is authorized to investigate the complaint, conduct a hearing and enter an order directing the packer to pay a certain sum by a specified date. If the packer

does not comply with the order, the unpaid seller may file an action in the applicable federal district court seeking a judgment against the packer. In that action, the seller is entitled to recover its reasonable attorneys' fees.⁷⁷

These statutory remedies do not preclude the unpaid seller from enforcing its other rights under federal and state law that do not controvert the provisions of the PSA.⁷⁸

PERISHABLE AGRICULTURAL COMMODITIES ACT

The Perishable Agricultural Commodities Act ("PACA") was enacted in 1930 to regulate unfair trade practices in the shipping and handling of perishable agricultural commodities.⁷⁹ It was amended in 1984 to provide perishable agricultural commodities suppliers with a statutory trust to enforce the payment of their obligations from commission merchants, dealers and brokers.⁸⁰ This statutory trust was patterned after the trust contained in the PSA.⁸¹ Accordingly, the courts have examined PSA decisions to interpret the trust provision of PACA.⁸²

Characteristics of Statutory Trust

The statutory trust provision is contained in § 499(e) of PACA:

(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 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 this subsection shall not apply to transactions between a cooperative association (as defined in section 1141j(a) of Title 12), and its members.⁸³

The *res* of the trust consists of all perishable agricultural commodities of the commission merchant, dealer or broker, all food and other products derived therefrom, and all receivables and proceeds thereof. The commission merchant, dealer or broker, and not the person seeking to enforce the trust, possesses the burden of proving that certain assets are not subject to the trust.⁸⁴

the judicial interpretation regarding the extent and scope of the statutory trust applied to livestock suppliers under the law was codified in the USDA regulations pertaining to PACA. These regulations provide that PACA establishes a nongated "floating" trust for the benefit of unpaid suppliers of perishable agricultural commodities and contemplates commingling of trust assets.⁸⁵

PACA does not create a statutory lien that may be avoided by the trustee-in-receivership or debtor-in-possession under the Bankruptcy Code. Instead, the assets of the trust are not considered to be part of the debtor's estate.⁸⁶

Some confusion exists regarding the continuation of the statutory trust in perishable agricultural commodities or products that are sold by the commission merchant, dealer or broker to a third party. The legislative history of the PSA states that its trust provision was not intended to extend to livestock or the products thereof that the packer sold to third parties in good faith.⁸⁷ Nevertheless, the PSA adopted a different view in its comments on the proposed federal regulations relating to PACA:

The commentor 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 full until full payment is made to the sellers. A purchaser of trust assets could not hold a secondary interest since the assets would be subject to recall.⁸⁸

Requirements for Enforcement of Statutory Trust

The statutory trust will not be enforced unless five conditions are satisfied in a complete manner. First, the disputed assets must have constituted "perishable agricultural commodities" when delivered to the commission merchant, dealer, or broker. PACA defines the term "perishable agricultural commodity" as fresh fruits and fresh vegetables of every kind and character, whether or not frozen or packed, and including cherries in brine.⁸⁹ The term "fresh fruits and fresh vegetables" is defined in the regulations promulgated by the USDA in the following man-

(u) "Fresh 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 does not include those perish-

able fruits and vegetables which have been manufactured into articles of food of a different kind or character. . . .⁹⁰

These regulations also describe a number of operations that will not be considered to change a "perishable agricultural commodity" into an "article of food of a different kind of character" and outside the scope of the statutory trust.⁹¹

Second, the perishable agricultural commodity must be delivered to a "commission merchant, dealer or broker." The terms are defined in § 499(a) of PACA.

(5) The term "commission merchant" means any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another;

(6) The term "dealer" means 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. . . .

(7) The term "broker" means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively. . . .⁹²

A number of exceptions to the definitions of dealer and broker can be found in the statute.

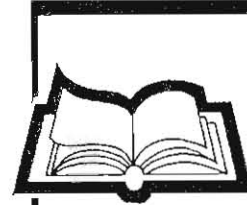
Third, the sale must not involve a cooperative association and its members. PACA adopted the definition of "cooperative association" that is contained in the Agricultural Marketing Act.⁹³

. . . any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also . . . any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services: . . .

Such associations must be operated for the mutual benefit of their members and satisfy a variety of statutory conditions.

Fourth, the commission merchant, dealer or broker must fail to pay the seller in a timely manner. The statutory payment terms for the purchase of perishable agricultural commodities are quite complicated and described in detail in the regulations promulgated by the USDA.⁹⁴

The perishable agricultural commodities sellers and the commission merchant, dealer or broker may elect to use different payment terms than those set forth in the governmental regulations;



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however, the seller will not be entitled to invoke the statutory trust established by PACA unless: (1) the contractual payment terms do not exceed thirty days from the receipt and acceptance of the perishable agricultural commodities; (2) the seller and commission merchant, dealer or broker reduce their agreement to writing before entering into the pertinent transaction; (3) the seller and commission merchant, dealer or broker maintain a copy of the agreement in their records; and (4) the payment terms are disclosed on the invoices, accountings, and other documents relating to the transaction.⁹⁵

Fifth, the seller must preserve its statutory trust rights by giving written notice to the commission merchant, dealer or broker and the Secretary within thirty days of any⁹⁶ of the time periods specified in the trust provision of PACA:

(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. . . .⁹⁷

The Secretary will be deemed to have received notice of the seller's intention to preserve its statutory trust rights if the notice is filed with the regional office of the PACA branch of the Fruit and Vegetable Division, Agricultural Marketing Service, or its headquarters in Washington, D.C.⁹⁸ The notice must be in writing, provide that it is a notice of intent to preserve its benefits, and include the following information for each shipment of perishable agricultural commodities:

- (i) The name and addresses of the trust beneficiary, seller-supplier, commission merchant, or agent and the debtor, as applicable,
- (ii) The date of the transaction, commodity, contract terms, invoice, price, and the date payment was due,
- (iii) The date of receipt of notice that a payment instrument has been dishonored (if appropriate),
- (iv) The amount past due and unpaid.⁹⁹

Waiver of Statutory Trust

A seller may elect to waive its right to the statutory trust provided by PACA. To be effective, the waiver must: (1) be in writing and separate and distinct from any agency contract; (2) be signed by the seller prior to the time the affected trading contracts are negotiated; (3) clearly state the seller's intent to waive its right to become a trust beneficiary on a given transaction or a series of transactions; and (4) include the date that the agent's authority to act on the seller's behalf expires if the seller has employed an agent for the sale of perishable agricultural commodities.¹⁰⁰

Remedies Available to Unpaid Seller

PACA provides that the unpaid seller may commence a federal action to enforce the payment of the commission merchant, dealer or broker's obligations from the trust assets.¹⁰¹ The unpaid seller's claim will be limited to the "net amount due after allowable deductions of contemplated expenses or advances [are] made in connection with the transaction by the commission merchant, dealer or broker."¹⁰² The unpaid seller may not be entitled to collect its attorneys' fees from the trust assets.

PACA also authorizes the Secretary to commence a federal action to prevent and restrain the dissipation of the trust assets.¹⁰³ A temporary or permanent injunction would be the relief sought in such proceedings.¹⁰⁴

Furthermore, PACA provides that the unpaid seller may seek to recover damages from the commission merchant, dealer or broker by civil suit or complaint to the Secretary.¹⁰⁵ These statutory remedies do not preclude the unpaid seller from enforcing its other rights under federal and state law.¹⁰⁶

CONCLUSION

Agricultural lenders are besieged by problem loans in this troubled economy. These problems are aggravated when the lenders ignore or improperly comply with the federal and state statutes applicable to these loans. Counsel for agricultural lenders can play only a limited role in alleviating their clients' problems. They cannot increase the profitability of farming and ranching operations nor prevent the depressed economy from affecting the value of agricultural collateral. Nevertheless, counsel can assist their clients in avoiding the legal pitfalls associated with agricultural lending by keeping the lenders apprised of existing but ignored legislation and new developments in this area of the law.

NOTES

1. See, Colorado H.B. 1284 (1986); the Bankruptcy, Judges, U.S. Trustees and Family Farmer Bankruptcy Act of 1986, Pub.L. 99-554 (Oct. 27, 1986), codified at 11 U.S.C. 1201 *et seq.*; and Colorado S.B. 123 (1987).

2. See, the Food Security Act of 1985, (*hereafter*, "FSA"), Pub.L. 99-198, 99th Cong., 2d Sess. (Dec. 13, 1985) at § 1324(J). The rules and regulations pertaining to the administration of the Food Security Act can be found in the Fed. Reg. (March 31, 1986).

3. CRS § 4-9-307.

4. FSA § 1324(a) (1) and (b). Farm products are defined in FSA § 1324(C)(5).

5. CRS § 4-9-307.

6. See, *Colorado Bank & Trust Co. v. Western Slope Investments, Inc.*, 36 Colo. App. 149, 539 P.2d 501 (1975) and *First National Bank v. Iowa Beef Processors Inc.*, 626 F.2d 764 (1980).

7. FSA § 1324(c).

8. *Supra*, note 2.

9. S.B. 123 was introduced in the Colorado Senate in January of 1987 by Senator James Brandon. It was effective upon signature.

10. See § 32 of S.B. 123 which repeals CRS §§ 4-9-503(3), 504(6) and (7); 506(2); 38-39-102(2)(b)(II), (3)(b), (8), (9) and (10). Section 34 of S.B. 123 exempts "court actions" filed prior to July 1, 1987, from coverage of these new amendments.

11. See, Miller, "The Colorado Farm Homestead Protection Act," 15 *The Colorado Lawyer*, (Sept. 1986) at 1642.

12. See, CRS §§ 4-9-503, -504, -506, 38-39-102.5, 13-40-125 and 4-9-503 *et seq.*

13. CRS § 4-9-503(3)(A).

14. *Id.*

15. The statute is unclear as to whether the debtor must be a farmer or rancher. Other provisions are specific and require that the debtor be a farmer or rancher or an *active* farmer or rancher. The noticeable absence of such specific language for purposes of the twenty-day notice, together with the existence of such language in other provisions, creates substantial uncertainty as to whether the debtor must be a farmer or rancher for purposes of CRS § 4-9-504.

16. CRS § 4-9-506.

17. S.B. 123, amending CRS §§ 4-9-503(4) and 506(3).

18. CRS § 4-9-504(7)(A).

19. See, notes 16 and 18, *supra*.

20. CRS § 4-9-504(7)(B).

21. CRS §§ 4-9-506 and 504(7)(A).

22. CRS § 4-9-508(1).

23. CRS § 13-40-124. For a discussion of the definition of a Qualified Farm Owner-Tenant, see, Miller, *supra*, note 11 at 1645.

24. *W. Harold Tuttle Farms, Ltd. v. The Travelers Insurance Co.*, Kiowa County Dist. Court, Case No. 86CV7, Order and Opinion entered April 14, 1987.

25. See also, *Perry Pomeroy et. al. v. The Travelers Insurance Co.*, Logan County Dist. Court, Case No. 87CV11, Order and Opinion entered May 28, 1987.

26. CRS § 13-40-125.
27. See, Miller, *supra*, note 11 at 1646.
28. Tuttle Farms, *supra*, note 24.
29. CRS § 13-40-125.
30. CRS § 13-40-125(1)(a).
31. CRS § 38-39-102(1).
32. CRS § 38-39-102(3)(b)(1).
33. See, Miller, *supra*, note 11, at 1642.
- 1645.
34. CRS § 11-8-101(1)(d)(1).
35. S.B. 123, § 34.
36. S.B. 123, amending CRS §§ 4-9-503(4) and 506(3).
37. S.B. 123, amending CRS § 4-9-506(3)(d).
38. S.B. 123, amending CRS §§ 13-40-125(3.5), 4-9-509, and 38-39-102.5(17)(13) and (14).
39. S.B. 123, amending CRS § 38-39-102.5(17).
40. S.B. 123, amending CRS § 38-39-102.5(7).
41. S.B. 123, amending CRS § 38-37-140(2)(b).
42. S.B. 123, amending CRS § 38-39-102.5(10).
43. S.B. 123, amending CRS § 13-40-125(1)(A).
44. S.B. 123, amending CRS § 38-39-120.
45. See, Asher, "The Colorado Agistor's Lien Statute: Scope, Enforcement and Due Process," 16 *The Colorado Lawyer* 989 (June 1987).
46. See, *Steffens v. Colorado Seed Company*, ___ B.R. ___, (Bankr. Colo. 1985), Bankruptcy Case No. 84-B-405C, Memorandum Opinion dated May 5, 1985. This decision was discussed at length in Guyerson and Watkins, "A Review of Agricultural Law; Hard Times and Hard Choices," *The Colorado Lawyer*, 629-638 (April 1986).
47. 7 U.S.C. §§ 181-231. In *Safeway Stores, Inc. v. Freeman*, 369 F. 2d 952 (D.C. Cir. 1966), the court discussed the prevailing events leading to the enactment of the PSA:
- In 1921 there were no large combinations of retail stores. The middleman, the "packer," controlled the full range of services between the rancher and the local level. Dealing in fantastic volume and being few in number, the "Big Five" exerted tremendous influence on the meat market. The 1921 law was enacted to prevent harm to the rancher and the consumer through an abuse of this position.
48. The preamble to the statutory trust provision of the PSA provides in relevant part:
- (a) It is hereby found that a burden on and obstruction to commerce in livestock is caused by financing arrangements under which packers encumber, given lenders security interest in, or place liens on, livestock purchased by packers in ease sales, or on inventories of or receiveables or proceeds therefrom when payment is not made for the livestock and that such arrangements are contrary to the public interest. This section is intended to remedy such burden on and obstruction to commerce in livestock and protect the public interest. 7 U.S.C. § 196(a).
- See also, *Pennsylvania Agricultural Cooperative Marketing Assoc. v. Ezra Martin Co.*, 495 F.Supp. 565 (U.S.D.C. N.D. Pa. 1980); *In re Frosty Morn Meats, Inc.*, 7 B.R. 988 (U.S.D.C. N.D. Tenn. 1980).
49. See, *Bruhn's Freezer Meats of Chicago, Inc. v. U.S. Department of Agriculture*, 438 F.2d 1332 (8th Cir. 1971); *In re G & L Packing Co., Inc.* 20 B.R. 789 (U.S.B.C. N.D.N.Y. 1982), *aff'd*, 41 B.R. 903 (U.S.D.C. N.D.N.Y. 1984).
50. 7 U.S.C. § 196(b).
51. The PSA defines "meat food products" as "all products and by-products of the slaughtering and meat-packing industry, if edible." 7 U.S.C. § 182(3). It defines "livestock products" as "all products and by-products (other than meats and meat food products) of the slaughtering and meat-packing industry derived in whole or in part from livestock." 7 U.S.C. § 182(5). See, *In the Matter of Harmon*, 11 B.R. 162 (U.S.B.C. N.D. Tex. 1980); *In re Frosty Morn Meats, supra*, note 48.
52. See, *In re Gotham Provision Co., Inc.*, 669 F.2d 1000 (5th Cir. 1982), *cert. denied*, 459 U.S. 858 (1982); *In re G & L Packing Co. Inc.*, *supra*, note 49; *In re Frosty Morn Meats, supra*, note 48. Also see, *In the Matter of Harmon, supra*, note 51.
53. It should be noted that UCC § 9-104(a) (9th ed. 1978) provides in relevant part:
- This Article does not apply (a) to a security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property. . . .
54. See, *In re Frosty Morn Meats, supra*, note 48.
55. *Id.* See also, *In re G & L Packing Co., Inc.*, *supra*, note 49; *In re Gotham Provision Co., Inc.*, *supra*, note 52.
56. 7 U.S.C. § 182(4).
57. 7 U.S.C. § 191.
58. See, *Phillippo v. S. Bonaccorso & Sons, Inc.*, 466 F. Supp. 1008 (U.S.D.C. E.D. Pa. 1978).
59. *Supra*, note 47.
60. *Supra*, note 49.
61. *Supra*, note 49.
62. 7 U.S.C. § 196(c).
63. It should be noted that waivers signed by truckers or haulers on behalf of the sellers will be deemed insufficient unless those truckers or haulers have explicit authority to act as the seller's agent in executing these documents. See, *In re Frosty Morn Meats, Inc.*, *supra*, note 48.
64. See, *In re Gotham Provision Co., Inc.*, *supra*, note 52.
65. 9 C.F.R. § 201.200. See, *In re Arbogast & Bastian, Inc.*, 42 B.R. 633 (U.S.B.C. E.D. Pa. 1984); *Hedrick v. S. Bonaccorso & Sons, Inc.*, 466 F.Supp. 1025 (U.S.B.C. E.D. Pa. 1978); *In re Gotham Provision, Co., Inc.*, *supra*, note 52; *In re G & L Packing Co., Inc.*, *supra*, note 49.
66. See, *Phillippo, supra*, note 58; *In re Gotham Provision Co., Inc.*, *supra*, note 52; *In re G & L Packing Co., Inc.*, *supra*, note 49.
67. 9 C.F.R. § 201.200(a)(2).
68. 9 C.F.R. § 201.200(a)(3).
69. 7 U.S.C. § 228(b).
70. *Id.*
71. 7 U.S.C. § 196 (b).
72. 9 C.F.R. § 203.15.
73. See, *In re Gotham Provision Co., Inc.*, *supra*, note 52; *Hedrick, supra*, note 65.
74. 9 C.F.R. §§ 203.15(a)(b).
75. 7 U.S.C. § 209.
76. See, *Pennsylvania Agricultural Cooperative Marketing Assoc.*, *supra*, note 48; *In re Gotham Provision Co., Inc.*, *supra*, note 52; *In re G & L Packing Co., Inc.*, *supra*, note 49.
77. 7 U.S.C. § 210.
78. 7 U.S.C. § 209.
79. 7 U.S.C. § 499(a)-(s). See, e.g., *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Chidsey v. Geurin*, 443 F.2d 584 (6th Cir. 1971); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976).
80. The intent of the 1984 amendments to the PACA is set forth in 7 U.S.C. § 499(e)(c)(1).
81. H.R. Rep. No. 98-543, 98 Cong., 1st Sess., 4 (1983), reprinted in 1984 U.S. Code Cong. Ad. News, 405, 407.
82. See, *In re Fresh Approach, Inc.*, 48 B.R. 926 (U.S.B.C. N.D. Tex.), *aff'd*, 51 B.R. 412 (U.S.D.C. N.D. Tex. 1985).
83. 7 U.S.C. § 499e(c)(2).
84. *In re Fresh Approach, Inc.*, *supra*, note 82.
85. 7 C.F.R. § 46.46(c).
86. See, *In re Fresh Approach, Inc.*, *supra*, note 82.
87. See, H.R. Rep. No. 94-1043, 94 Cong., 2d Sess., 7 (1976); *In re Frosty Morn Meats, Inc.*, *supra*, note 48; *In re Gotham Provision Co., Inc.*, *supra*, note 52.
88. Fed. Reg. Vol. 49, No. 225, P. 45736 (Nov. 20, 1984).
89. 7 C.F.R. § 499(a)(4).
90. 7 C.F.R. § 46.2(u).
91. *Id.*
92. 7 U.S.C. § 499(a)(5)-(7).
93. 12 U.S.C. § 1141j(a) (1929).
94. 7 C.F.R. § 46.2(aa).
95. 7 U.S.C. § 499 e(c)(3); 7 C.F.R. §§ 46.2(aa)(11) and 46.46(f).
96. See, *In re Fresh Approach, Inc.*, *supra*, note 82.
97. 7 U.S.C. § 499e(c)(3).
98. 7 C.F.R. § 46.46(g)(2).
99. 7 C.F.R. § 46.46(g)(3).
100. 7 C.F.R. § 46.46(d)(2).
101. 7 U.S.C. § 499e(c)(4).
102. 7 C.F.R. § 46.46(f)(4).
103. 7 U.S.C. § 499e(c)(4).
104. H.R. Rep. No. 98-543, 98th Cong., 1st Sess., 7 (1983), reprinted in 1984 U.S. Code Cong. Ad. News, 405, 410-411.
105. 7 U.S.C. §§ 499b and e-g.
106. 7 U.S.C. § 499e.