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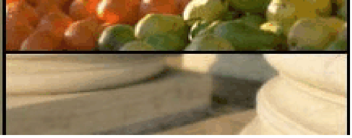

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Reparations Proceedings Under the Perishable Agricultural Commodities Act—Valuable Tool in Need of Change

by

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REPARATIONS PROCEEDINGS UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT — VALUABLE TOOL IN NEED OF CHANGE

By
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And
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*This article examines the Perishable Agricultural Commodities Act of 1930, as amended, and suggests that the reparations procedures require substantial modification. The author suggests that additional formality must be introduced into the proceedings, or in the alternative, that the Act should be amended to limit its coverage to cases not exceeding a certain dollar figure.****

INTRODUCTION

The Perishable Agricultural Commodities Act of 1930, as amended,[1] represents a specific congressional response to numerous complaints from farmers about the practices of commission merchants and brokers.[2] Nevertheless, for a number of reasons, not the least of which is the increased value of the agricultural products being shipped today, the procedures established by the Department of Agriculture under the Act require substantial modification. Additional formality must be introduced into reparations proceedings under the Perishable Agricultural Commodities Act of 1930,[3] in order to insure that both complainants and respondents have an adequate opportunity to present their cases. In the alternative, it is time to amend the Act to make it clear that it does not apply to cases presenting claims that exceed a certain dollar figure.

THE ACT

The Perishable Agricultural Commodities Act of 1930[4] was

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1. 7 U.S.C. §§ 499a-499s (1970).
2. George Steinberg & Son, Inc. v. Butz, 491 F.2d 988 (2d Cir. 1974); Chidsey v. Guerin, 443 F.2d 584 (6th Cir. 1971).
3. 7 U.S.C. §§ 499a-499s (1970).
4. *Id.*

enacted in response to a storm of criticism and complaints, principally from small farmers and shippers, who were being victimized repeatedly by the so-called sharp practices of brokers, dealers and commission merchants.[5] The nature of the complaints being received by the Congress is, in essence, set forth in that section of the Act which defines unfair conduct.[6] The practices condemned range from unfair, unreasonable, discriminatory or deceptive practices in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity, to the making of a "change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity."[7] In between those two poles other unfair conduct is defined. It includes full rejection of the goods, dumping the goods without just cause, making fraudulent or misleading statements in connection with any transaction, making misrepresentations by any means as to the quality, quantity, size, pack, weight, condition, and degree of maturity, etc., of the goods, and fraudulently tampering with any mark on the container or car containing the goods.[8]

Only three years earlier, Congress had attempted to remedy these abusive practices by enacting the Produce Agency Act,[9] which was designed to prevent the destruction or dumping of farm produce that had been received by commission merchants and others in interstate commerce, absent good and sufficient cause. Additionally, the measure required these individuals to account truly and correctly for all farm produce received. Rules of conduct were laid down and penalties for violation thereof provided. The Produce Agency Act[10] was, however, only a partial remedy. A person whose goods were destroyed or dumped without sufficient cause was unable to obtain an award of money damages from the person whose act had damaged him and caused him pecuniary loss. No reparations provisions of a civil nature had been provided for by Congress. Moreover, this legislation failed to deal with acts of unwarranted rejection of goods or failure of a buyer or seller to deliver goods.

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5. One court stated the problem as follows:

> The Perishable Agricultural Commodities Act is designed to protect the producers of perishable agricultural products who in many instances must send their products to a buyer or commission merchant who is thousands of miles away. It was enacted to provide a measure of control over a branch of industry which is almost exclusively in interstate commerce, is highly competitive, and presents many opportunities for sharp practice and irresponsible business conduct.

Zwich v. Freeman, 373 F.2d 110, 116 (2d Cir. 1967); *see also* Rothenberg v. H. Rothstein & Sons, 183 F.2d 524 (3rd Cir. 1950); Cohen v. Frima Products Co., 181 F.2d 324 (5th Cir. 1950); Joseph Martinelli & Co. v. Simon Siegel Co., 176 F.2d 98 (1st Cir. 1949); Ernest E. Fadler Co. v. Hesser, 166 F.2d 904 (10th Cir. 1948); LeRoy Dyal Co., Inc. v. Allen, 161 F.2d 152 (4th Cir. 1947).

6. 7 U.S.C. § 499b (1970).
7. *Id.*
8. *Id.*
9. *Id.* §§ 491, 493-97.
10. *Id.*

Instead, the measure was limited to acts that contained elements of fraud deleterious to the public interest.[11]

As the shortcomings of the Produce Agency Act[12] became more and more apparent, there was pressure on Congress to broaden the scope of federal regulation vis-a-vis shipments of perishable agricultural commodities moving in interstate commerce. Suggestions were made whereby the adjudication of civil rights and controversies between persons dealing in such goods would fall within the jurisdiction of the federal government. Consequently, Congress passed the Perishable Agricultural Commodities Act of 1930,[13] which provided for the licensing through the Secretary of Agriculture of persons operating as dealers, commission merchants, or brokers in the handling of perishable agricultural commodities. The most important provision of the Act was the Secretary of Agriculture's power to award money damages to a complainant if the facts showed a violation of a provision and consequent loss to the complainant. Thus the Perishable Agricultural Commodities Act of 1930,[14] by permitting the Secretary of Agriculture to remedy a wide range of abuses previously unassailable, attempted to fill the gaping holes found in its precursor.[15]

The congressional debate on the bill centered upon the difficulties faced by farmers as a result of the practices of some unscrupulous brokers and commission merchants. Congressman Summers of Washington, the bill's sponsor in the House of Representatives, typified the situation as follows:

> Everyone familiar with the situation knows that the farmers have suffered from the unscrupulous handlers for ages. Of the many men who handle these types of fruits and vegetables the great majority are honorable, upright men, but unfortunately there are some unscrupulous people mixed in all trades and professions and these take advantage when the market declines, or when there is a long distance intervening between the point of shipment and the point where goods are received and insist on discounts before they will accept the goods or make settlement. . . .[16]

It is important to keep in mind that the Act begins with a definition of unfair conduct.[17] Everything that follows in the Act is keyed to that section. The remainder of the Act is essentially divided into three parts. The first part contains the sections deal-

11. J. DUNCAN, DIGEST OF THE PERISHABLE AGRICULTURAL COMMODITIES ACT 1-2 (1934) [hereinafter cited as DUNCAN].
12. 7 U.S.C. §§ 491, 493-97 (1970).
13. *Id.* §§ 499a-499s.
14. *Id.*
15. DUNCAN, *supra* note 11, at 1-2.
16. 72 CONG. REC. 8537 (1930) (remarks of Rep. Summers).
17. 7 U.S.C. § 499b (1970). "The bill is designed, in the first place, to lay down certain rules as to what shall be unfair conduct. . . ." *See* 71 CONG. REC. 2163 (1929) (remarks of Senator Borah).

ing with licenses under the Act.[18] Basically, the Act requires that the commission merchants, brokers, and dealers be licensed.[19] Obviously, the intent of this section was to see to it that the Department had ready access to those who might engage in the unfair conduct previously defined in the Act.[20]

The last portion of the Act deals with the disciplinary proceedings brought against those found to have engaged in unfair conduct of a particularly egregious nature.[21] Remedies are set forth, which include repeated scrutiny of the accounts and records of the violator, suspension or revocation of a license, and injunction against the particular activities about which complaint has been made.[22]

The middle section of the Act is that portion with which this paper is particularly concerned. Therein are the provisions of the Act dealing with reparation proceedings.[23] The intent of those sections of the Act, and the regulations enacted thereunder by the Department,[24] was to establish a relatively informal and inexpensive procedure by which disputes between farmers and others involving perishable agricultural commodities could be adjudicated.[25] It is noteworthy that throughout the consideration of these sections of the Act, the Congress was concentrating upon the fact that most claims presented would be relatively small.[26] Indeed, it was reported to the Congress that they would be so small that it would not be economical for the party to press his complaint through the courts given the amount in controversy and the relatively great distances involved.[27] In any event, the legislative history makes

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18. 7 U.S.C. §§ 499c-499e (1970).
19. *Id.*
20. "[S]econdly, to place the commission merchant and dealer under license, and to give to the Secretary of Agriculture power under certain conditions, to cancel the license." 71 CONG. REC. 2163 (1929) (remarks of Senator Borah).
21. 7 U.S.C. § 499h (1970).
22. *Id.*
23. *Id.* §§ 499f-499g.
24. 7 C.F.R. § 47 (1977).
25. One author states as follows:

> The reparation proceeding was designed to be in the nature of an action at law, and the administrative process was invoked in order to eliminate from the path to recovery such unnecessary impediments as great legal expense, judicial delays, difficulties of proof usual in judicial proceedings, etc., and in order to have the disputes tried before persons who are more closely familiar with technical trade terms and general trade practices. In other words, the [legislative] history shows that the Congress intended to expedite justice in connection with disputes arising out of the marketing of fresh fruits and fresh vegetables, by allowing the Secretary of Agriculture, as well as the courts, to entertain complaints and to adjudicate claims for damages.

M. WHITE, ADMINISTRATIVE PROCEDURE AND PRACTICE IN THE DEPARTMENT OF AGRICULTURE UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT OF 1930, 50 (1939) [hereinafter cited as WHITE].

26. *Id. See also* [1962] U.S. CODE CONG. & AD. NEWS 2749; [1972] U.S. CODE CONG. & AD. NEWS 1960.
27. The Department of Agriculture estimated to the Congress that the average claim was $196.50. 72 CONG. REC. 8538 (1930) (remarks of Rep. Summers).

it clear that the Seventy-First Congress intended to create a relatively informal adjudicatory proceeding through which these types of claims could be resolved relatively quickly and in a relatively inexpensive way.[28] Although the validity of the new Act was soon questioned, its constitutionality was upheld.[29]

THE REGULATIONS

The Rules of Practice under the Perishable Agricultural Commodities Act of 1930[30] expand upon the statutory provisions dealing with reparations complaints, and in certain significant respects modify those statutory guidelines.[31] The Rules of Practice do in large part comply with the statutory intent to establish relatively informal procedure. They introduce a degree of informality into the proceedings, however, which may be greater than that intended by the Congress and which certainly creates difficulties today, particularly involving sums many times larger than the so-called average claim of 1930.[32]

A particular modification of the statutory scheme that was created by the Rules of Practice is the provision for an informal complaint procedure.[33] Under the Department's Rules of Practice, an informal complaint filed within the nine month period set forth in the statute[34] is sufficient to comply with the statutory requirement.[35] Indeed, the Rules of Practice provide that, "Informal complaints may be the basis of either a disciplinary complaint, or a claim for damages, or both."[36] The informal complaint procedure is not mentioned anywhere in the legislative history of the Act. It appears to have been created by the drafters of the Rules of Practice under the Act. In spite of the lack of statutory authority, the procedure became quickly established and was accepted without question by treatise writers describing the Act soon after its enactment.[37]

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28. *See* Ernest E. Fadler Co. v. Hesser, 166 F.2d 904 (10th Cir. 1948); LeRoy Dyal Co. v. Allen, 161 F.2d 152 (4th Cir. 1947); A. J. Conroy, Inc. v. Weyl-Zuckerman & Co., 39 F. Supp. 784 (N.D. Cal. 1941).
29. Krueger v. Acme Fruit Co., 75 F.2d 67 (5th Cir. 1935).
30. 7 C.F.R. §§ 47.1-47.68 (1977).
31. Section 499o of the Act authorizes the Secretary to "make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter." Smith v. White, 48 F. Supp. 554, 556 (E.D. Mo. 1942).
32. *E.g.*, 7 C.F.R. § 47.16.
33. *Id.* § 47.3.
34. 7 U.S.C. § 499f(a).
35. 7 C.F.R. § 47.3(1).
36. *Id.*
37. DUNCAN, *supra* note 11, at 148.

> Complaints for reparations involving the rendering of an award of money damages will not be accepted by the Secretary if the facts show that the violation occurred more than nine months prior to receipt of the complaint by the Department of Agriculture. However, where an informal complaint of the violation was filed with the Department of Agriculture within the nine month period and the respondent was notified within that period, it is held that this operates as a toll of the running of the statutory period and

As a practical matter, the filing of an informal complaint will result only in the forwarding of that complaint to the respondent by the Department of Agriculture. The respondent then may, if he so chooses, send a response to the Department. Nothing in the Rules of Practice, however, compels such an answer nor can the Department take any action by way of ordering reparation if a respondent fails to reply to an informal complaint.[38] There have been reported cases in which substantial amounts of time have passed between the filing of an informal complaint and the filing of a formal complaint.[39] The lulling effect upon a particular respondent is obvious. Additionally, it is submitted that this type of procedure was not contemplated by the Congress when it considered the Perishable Agricultural Commodities Act.

The validity of the Department's position that the filing of an informal complaint within the nine month statutory period preserves complainant's right to file a formal complaint at any time thereafter has been challenged on a number of occasions. The issue was first raised in *White and Allen, Inc. v. John Jacobs Co.*[40] Neither that decision nor the others dealing with this issue squarely meet the question of whether or not the Congress intended to create an informal complaint procedure such as that found in the Department of Agriculture's regulations, nor do they meet the issue of whether, even if there was such a congressional intent, there was the further congressional intent that an informal filing under that procedure be sufficient to satisfy the period of limitation found in the statute. What the decisions do is simply assert in a definitive, if cursory, way that the filing of an informal complaint within nine months is sufficient to satisfy the statutory period of limitations. According to one court, where an informal complaint has been timely filed and followed at some point by a formal complaint, the court will assume that the Secretary had jurisdiction.[41] The cases do not discuss the clear implication of such a ruling that the complainant may, after filing an informal complaint, wait an indefinite period of time before filing a formal complaint.

The decided cases at the Department of Agriculture and in the courts have consistently followed the line of reasoning enunciated above.[42] None of the reported decisions have delved into the ques-

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permits the filing of a formal complaint for reparations after the expiration of the nine month period.

38. *Id.*

39. *See, e.g.*, Victory Distributing Co. v. Steel City Fruit Co., 12 Agric. Dec. 862 (1953); Garibaldi & Cuneo v. Ernest E. Fadler Co., 11 Agric. Dec. 805 (1952).

40. PACA Docket No. 172 (1932).

41. Barker-Miller Distributing Co. v. Berman, 8 F. Supp. 60, 62 (W.D. N.Y. 1934).

42. *See, e.g., Id.*; *see also* Gillarde Co. v. Joseph Martinelli and Co., 169 F.2d 60 (1st Cir. 1948); White and Allen, Inc. v. Jacobs, 545 Docket No. 172 (1934); Natale and Frank v. Neally Produce Co., Inc., F803, Docket

tion of whether the Department has the authority under the statute to make such a modification nor have the decisions discussed the troublesome implications of such a holding.[43] Additionally, the courts have shown great deference to the decisions of the Secretary in this area.[44] Such judicial deference has permitted the Secretary of Agriculture to expand and justify his authority under the Act in this area simply by repetition.

> [S]ince the Department has interpreted its regulation in a manner which it thinks necessary to carry out the purposes of the Act and since the interpretation has been adhered to for over ten years . . . the Department's interpretation is not plainly erroneous; it is a possible and reasonable interpretation of the regulation, even if not the only possible one.[45]

The Department's Rules of Practice tacitly admit that the informal complaint procedure is not the same as the complaint procedure set forth in the statute.[46] The statutory complaint procedure provides for filing, service upon the respondent by the Department, and a response within a specific period of time.[47] Additionally, a hearing may be demanded if the amount in controversy exceeds three thousand dollars.[48] Only after each of those steps is complied with may a reparation order be entered.[49]

The Department's Rules of Practice with respect to informal proceedings do not follow the same rigid pattern. They do not require that the Department of Agriculture forward a copy of the complaint to the respondent.[50] Further, the Rules do not require that the respondent make any answer, let alone that he make an answer within a specified period of time.[51] Finally, the Rules of Practice make it clear that a reparation order may not result after the completion of an informal investigation.[52] As a result it is difficult to see how a court could have found that the Secretary's ruling with respect to informal complaints and the period of limitation was not "plainly erroneous."[53]

At the present time the rules for reparation proceedings under the Perishable Agricultural Commodities Act make only limited

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No. 981 (1934); Kirpatrick v. Syracuse Fruit Co., S907 Docket No. 1392 (1935).

43. *Id.*

44. Gillarde Co. v. Joseph Martinelli & Co., 169 F.2d 60 (1st Cir. 1948); Barker-Miller v. Berman, 8 F. Supp. 60 (W.D. N.Y. 1934).

45. Gillarde Co. v. Joseph Martinelli & Co., 169 F.2d 60-61 (1st Cir. 1948).

46. 7 C.F.R. § 47.3 (1977).

47. 7 U.S.C. § 499f(a).

48. *Id.* § 499f(c).

49. *Id.* § 499g.

50. 7 C.F.R. § 47.3 (1977).

51. *Id.*

52. *Id.*

53. Gillarde Co. v. Joseph Martinelli & Co., 169 F.2d 60, 61 (1st Cir. 1948).

provision for adequately preparing a reparations case. The thrust of the Rules of Practice is toward production of evidence at hearing and not before.[54] Thus a request for production of documents is returnable only at the hearing,[55] and depositions upon oral examinations may be taken only within 100 miles of the opposing party's place of business.[56] Indeed, until a relatively recent amendment of the Rules of Practice, in response to a decision of the Department, depositions upon written interrogatories and oral depositions could not be taken for the purpose of discovery.[57]

These limitations upon the preparation of one's case are in keeping with the legislative intent when that intent is viewed in the context of the complaints received by the Congress at the time the Act was being considered.[58] The limitations upon discovery are becoming more troublesome as the value of the products being shipped and consequently the amounts in controversy increase. That is, the Rules of Practice make adequate provision for preparing a reparations complaint that involves a relatively small amount of money. Extensive discovery is not necessary under such circumstances nor, it could reasonably be argued, would such discovery be in keeping with the congressional intent. But the Rules of Practice, which in effect allow "trial by ambush," create serious and substantial risks in cases involving substantial sums of money, of which there are an increasing number. Furthermore, the rationale for the limitations contained in the Rules of Practice disappears when one is dealing with a case of substantial magnitude.

The Rules of Practice under the Perishable Agricultural Commodities Act contain a further element that, like the departmentally created informal complaint procedure and the limited discovery provisions found in the rules, has a detrimental effect upon the adjudication of reparations claims under the Act involving relatively large sums. The section referred to is that which provides that reparations proceedings shall be heard by examiners.[59] In practice the examiners are staff attorneys of the General Counsel's office of the Department of Agriculture.

Several difficulties arise as a result of the fact that the examiners handling cases under the Act are members of the staff of the General Counsel's office. In the first instance, potential conflicts arise because of the fact that the General Counsel's office has

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54. 7 C.F.R. §§ 47.16-47.18 (1977).
55. *Id.* § 47.17.
56. *Id.* § 47.16.
57. In *Knapp-Sheriff-Koelle v. Mendelson-Zeller Co.*, 18 Agric. Dec. 508 (1958) the Department ruled that depositions upon written interrogatories or upon oral examination were not available for purposes of discovery. A subsequent amendment of 7 C.F.R. § 47.17 has modified that decision, though discovery is still extremely limited.
58. *See* note 27 *supra*.
59. 7 C.F.R. § 47.11 (1977).

the responsibility for providing advice and opinions to the Agricultural Marketing Service of the Department, which Service initially considers complaints filed under the Act. Furthermore, the General Counsel's office provides advice to the Secretary of Agriculture, who considers reparations cases after the examiner has rendered his decision.[60] Thus the General Counsel's office is put in the anomalous position of advisor and judge in reparations proceedings under the Act.

While it is true that the Department has taken the position that, insofar as it is concerned, the reparations proceedings are not adversary ones,[61] there can be no question that the filling of these various roles by the General Counsel's office creates pressures and potential conflicts. It may be asserted that utilizing staff from the General Counsel's office to hear reparations proceedings is in keeping with the congressional intent that the proceedings be kept relatively informal.[62] As in the case of the limited discovery provisions and the informal complaint procedure, however, the rationale disappears when one considers reparations proceedings involving a substantial dollar value. In commenting upon the bill, its sponsor in the Senate said,

> It does not propose to accomplish anything which might not be accomplished under existing law, but it does eliminate the necessity of going into court before a jury, at a long distance and at a great expense to secure an adjustment of a hundred dollars or two hundred dollars difference.[63]

It can hardly be argued that such a congressional intent was meant to create rules of practice which prevent parties to a reparations proceeding under the Act from adequately presenting their case.

The parties would be better served in cases involving substantial amounts by having administrative law judges hear the cases. Having administrative law judges hear proceedings under the Act would not be unprecedented. All disciplinary proceedings brought under the Act are heard by administrative law judges.[64] Thus they are familiar with the type of trade which is involved and the problems which frequently arise between shippers and receivers of perishable commodities.[65] While it is true that administrative law

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60. *Id.* § 47.21.
61. *See* DUNCAN, *supra* note 11, at 52-53.
    The proceeding, taken as a whole, is not an adversary one insofar as the Secretary is concerned, and that consideration controls largely the procedural requirements with which the participants must comply.
62. *See* text accompanying notes 25-28 *supra*.
63. 72 CONG. REC. 8538 (1930) (remarks of Senator Borah).
64. 7 C.F.R. § 47.29 (1977).
65. The creation of a forum where complaints involving shipments of perishable commodities could be heard by an individual knowledgeable in the trade was clearly on the mind of the Congress as it created the Act. *See* WHITE, *supra* note 25, at 50.

judges should not be burdened with cases involving small amounts, cases involving larger amounts should be tried before such individuals in order to protect the parties.

CONCLUSION

This paper has suggested that while reparations proceedings under the Perishable Agricultural Commodities Act have been well handled by the Department of Agriculture and have served the agricultural community well in the past the time has come to modify certain aspects of those procedures in response to the fact that larger claims are being filed. The changes are needed in order to allow parties to cases involving substantial sums of money to adequately prepare and present their cases. While it is clear that the Congress intended that these matters be handled as informally as possible, it is submitted that it was never the intent of Congress that the party should be put in the position of being unable to prosecute or defend his rights adequately. Accordingly, it is suggested that the Rules of Practice, or if need be, the Act, be amended to provide for substantially greater discovery, hearings before administrative law judges, and a clear indication that the filing of an informal complaint does not indefinitely place the respondent at the mercy of a potential complainant.

It is submitted that an amendment of the Act making it clear that claims amounting to 50,000 dollars or more should be handled in strict compliance with the nine month period of limitation and be heard by administrative law judges under discovery rules substantially the same as those contained in the Federal Rules of Civil Procedure would alleviate the difficulties currently encountered by parties to reparations proceedings involving claims of that magnitude.