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**The 1984 PACA Amendments after Six Years:
Producing Sellers' Trust and Lenders' Disgust**

by

John M. Himmelberg and Mitchell H. Stabbe

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The 1984 PACA Amendments after Six Years: Producing Sellers' Trust and Lenders' Disgust

*John M. Himmelberg and Mitchell H. Stabbe**

I. INTRODUCTION

Sellers of perishable agricultural commodities, defined as fresh or frozen fruits or vegetables¹ purchased by a commission merchant,² dealer,³ or broker,⁴ have sometimes found too late that a buyer is in serious financial difficulty and is unable to remit payment for the produce sold.⁵ Until recently, these sellers were left with little legal recourse and, in the event of a bankruptcy proceeding, most times, received only pennies on the dollar as unsecured creditors. This need no longer be the case.

In 1984, Congress amended the Perishable Agricultural Commodities Act (PACA) of 1930⁶ to help sellers of produce receive payment by imposing a statutory trust on the proceeds of the sale.⁷ Using these provisions, sellers have sought to re-

* John M. Himmelberg is a partner in the Washington, D.C. office of the Florida law firm of Holland & Knight. He is a graduate of Holy Cross College (B.A. 1968) and Catholic University Law School (J.D. 1974).

Mitchell H. Stabbe is a partner in the Washington, D.C. office of the Florida law firm of Holland & Knight. He is a graduate of the University of Rochester (B.A. 1977) and the University of Chicago Law School (J.D. 1980).

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1. 7 U.S.C. § 499a(4)(A)(1988); 7 C.F.R. § 46.2(u)-(w)(1988). Sellers and suppliers of cherries packed in brine are also protected by the Perishable Agricultural Commodities Act of 1930 (PACA). 7 U.S.C. § 499a(4)(B) (1988); 7 C.F.R. § 46.2(w)(1990).

2. The term "commission merchant" is defined at 7 U.S.C. § 499a(5) (1988).

3. The term "dealer" is defined at 7 U.S.C. § 499a(6) (1988); *see also* 7 C.F.R. § 46.2(m)(1990).

4. The term "broker" is defined at 7 U.S.C. § 499a(7) (1988); *see also* 7 C.F.R. § 46.2(n) (1990).

5. Buyer is required to pay within ten days of final sale. 7 C.F.R. § 46.2(aa) (1990).

6. 7 U.S.C. § 499a-s (1988).

7. The PACA amendments, codified at section 499e(c) of Title 7 of the United States Code, were "designed to repair what had become in recent years a gap" in the

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

Section II of this Article briefly introduces the statute and its mode of operation. Discussions of the constitutional and jurisdictional issues follow. Section III focuses on the issues involving the enforcement of a PACA trust: who may enforce the trust; the characteristics of the trust; the action for injunctive relief; and the relief obtainable by a trust creditor. Sections IV and V treat the issue of recovery by the creditor from third party payees, including lending institutions, and Section VI forecasts the impact this may have upon the availability of loans for produce buyers.

II. THE TRUST PROVISIONS OF PACA

In 1930, Congress enacted the Perishable Agricultural Commodities Act to provide economic support and protection for licensed shippers and handlers of fresh and frozen fruits and vegetables. In 1984, after finding that buyers' financial difficulties and financing arrangements had been imposing a substantial burden on the commerce of such goods,⁸ Congress

protection of produce sellers. H.R. REP. NO. 543, 98th Cong., 2d Sess. 8, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 412.

8. Congress found that a

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

Id. at 4-5, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 408. Because of these financing arrangements and resulting payment delinquencies, the perishable commodities industry lost approximately \$65 million during fiscal year 1982. *Id.* at 8, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 412. The United States Department of Agriculture estimated that without the 1984 amendments "an additional 10% could be added to the consumer's purchase price as a result of price markups to offset no-pay risks." *Id.* at 9, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 412. Thus, it has been recognized that PACA was enacted:

to prevent the chaos and disruption in the flow of perishable agricultural commodities sure to result from an industry-wide proliferation of unpaid obliga-

amended the Act.⁹ In doing so, Congress intended to “provide a remedy for the seller of perishable commodities to an

tions. While in isolation this may seem a harsh course to follow, in the macroeconomic sense PACA serves to ensure continuity of payment and therefore survival of the industry.

In re Fresh Approach, Inc., 51 Bankr. 412, 420 (Bankr. N.D. Tex. 1985).

9. 7 U.S.C. § 499e(c) (1988) reads as follows:

(c) Trust on commodities and sales proceeds for benefit of unpaid suppliers, sellers, or agents; preservation of trust; jurisdiction of courts

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

(2) Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers and sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents. Payment shall not be considered to have been made if the supplier, seller, or agent receives a payment instrument which is dishonored. The provisions of this subsection shall not apply to transactions between a cooperative association (as defined in section 1141j(a) of title 12[]), and its members.

(3) The unpaid supplier, seller, or agent shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust to the commission merchant, dealer, or broker and has filed such notice with the Secretary within thirty calendar days (i) after expiration of the time prescribed by which payment must be made, as set forth in regulations issued by the Secretary, (ii) after expiration of such other time by which payment must be made, as the parties have expressly agreed to in writing before entering into the transaction, or (iii) after the time the supplier, seller, or agent has received notice that the payment instrument promptly presented for payment has been dishonored. When the parties expressly agree to a payment time period different from that established by the Secretary, a copy of any such agreement shall be filed in the records of each party to the transaction and the terms of payment shall be disclosed in invoices, accounting, and other documents relating to the transaction.

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

Id. (footnote omitted).

eventual debtor in bankruptcy, wherein the former, as an unsecured creditor, would otherwise be forced to await satisfaction of the claims of those creditors with security interests in inventory and proceeds."¹⁰

Upon a sale of perishable agricultural commodities, the amendments impressed a statutory trust on the goods themselves, the buyer's inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products.¹¹ The trust created by PACA is "for the benefit of all unpaid suppliers or sellers of perishable agricultural commodities or agents involved in the transaction which, if properly perfected, exists 'until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.'"¹² As a result of the creation of the PACA trust, in the event of bankruptcy by the buyer, an unpaid seller of perishable agricultural commodities who has complied with the statutory requirements is a trust beneficiary and may even lay claim against assets which will be deemed outside of the debtor's estate.¹³ Thus, the seller's

10. *In re Fresh Approach, Inc.*, 48 Bankr. 926, 931 (Bankr. N.D. Tex. 1985); *accord* *Dubin v. Carlton Fruit Co. (In re Carlton Fruit Co.)*, 84 Bankr. 810, 811-12 (Bankr. M.D. Fla. 1988); *East Coast Potato Distrib. v. Grant (In re Super Spud, Inc.)*, 77 Bankr. 930, 931 (Bankr. M.D. Fla. 1987); *see also* Lander, *Is the Agricultural Security Interest Legally Healthy?*, 34 U. KAN. L. REV. 505, 511 (1986).

11. 7 U.S.C. § 499e(c)(2) (1988).

12. *In re W.L. Bradley Co.*, 78 Bankr. 92, 92-93 (Bankr. E.D. Pa. 1987) (quoting 7 U.S.C. § 499e(c)(2)(1988)); *accord* *Yeager v. Dole Fresh Fruit Co. (In re Asinelli, Inc.)*, 93 Bankr. 433, 434 (M.D.N.C. 1988); *Allied Grocers Coop. v. United Fruit & Produce Co. (In re United Fruit & Produce Co.)*, 86 Bankr. 14, 15 (Bankr. D. Conn. 1988).

13. Under the PACA trust provisions, trust assets are not to be considered part of the debtor's estate to be distributed to other creditors or sold unless all trust beneficiaries have been paid. *C & E Enters. v. Milton Poulos, Inc. (In re Milton Poulos, Inc.)*, 94 Bankr. 648, 653 (Bankr. C.D. Cal. 1988), *aff'd*, 107 Bankr. 715 (Bankr. 9th Cir. 1989); *Monterey Mushrooms, Inc. v. Carolina Produce Distributors, Inc. (In re Carolina Produce Distributors, Inc.)* 110 Bankr. 207, 210 (W.D.N.C. 1990); *C. H. Robinson Co. v. B. H. Produce Co.*, 723 F. Supp. 785, 791 (N.D. Ga. 1989); *In re Asinelli Inc.*, 93 Bankr. at 433; *Pereira v. Marine Midland Bank (In re Al Nagelberg & Co.)*, 84 Bankr. 19, 21 (Bankr. S.D.N.Y. 1988); *In re Super Spud, Inc.*, 77 Bankr. at 931; *In re W.L. Bradley Co.*, 75 Bankr. at 512-13; *Houston Avocado Co. v. Monterey House, Inc. (In re Monterey House, Inc.)*, 71 Bankr. 244, 247-48 (Bankr. S.D. Tex. 1986); *In re Fresh Approach, Inc.*, 51 Bankr. 412, 419-20 (Bankr. N.D. Tex. 1985). *See also* 49 Fed. Reg. 45,738 (1984).

recovery may take priority over those of secured and unsecured creditors.

A. Constitutionality of the PACA Trust Provisions

For the first four years after the PACA trust provisions were enacted,¹⁴ there were no challenges to their constitutionality discussed in the reported court opinions. Other courts¹⁵ have addressed the constitutionality of the similar trust provisions of the already extant Packers and Stockyards Act (P&SA), as amended.¹⁶ Because courts have looked to decisions under the P&SA for guidance in interpreting the PACA trust provisions,¹⁷ these cases provide reasonable assurance against any attack on the constitutionality of the PACA amendments.

14. The PACA trust provisions, codified at section 499e(c) of Title 7 of the United States Code, became effective on May 7, 1984. *In re Fresh Approach, Inc.*, 48 Bankr. at 928-30; *accord St. Joseph Bank & Trust Co. v. DeBruyn Produce Co. (In re Prange Foods, Corp.)*, 63 Bankr. 211, 215 (Bankr. W.D. Mich. 1986). The implementing regulations, 7 C.F.R. § 46.46 (1990), were promulgated pursuant to the PACA trust fund amendments and became effective on December 20, 1984. See 49 Fed. Reg. 45,735 (1984).

15. *In re Frosty Morn Meats, Inc.*, 7 Bankr. 988 (M.D. Tenn. 1980); *Hedrick v. S. Bonaccorso & Sons, Inc.*, 466 F. Supp. 1025 (E.D. Pa. 1978).

16. Congress found that the trust provisions included in the 1976 amendments to the Packers and Stockyards Act (P&SA), codified at sections 182, 191, 196, 196(c), 228(b) of Title 7 of the United States Code, effectively protected livestock sellers from similar burdens on commerce, problems with insolvent buyers, and injurious effects of discriminatory pricing that fruit and vegetable sellers face. In addition, the P&SA trust provisions created no undue hardship to any seller, buyer, or lending institution. H.R. REP. NO. 543, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 407.

17. The PACA trust provisions are intended to operate in the same manner as the P&SA trust provisions to alleviate the burdens on commerce in the produce industry. *Id.* Accordingly, courts will look to P&SA precedents for guidance in interpreting the PACA trust provisions so that the goals of the PACA amendments are effected. *In re Al Nagelberg & Co.*, 84 Bankr. at 21; *DeBruyn Produce Co. v. Victor Foods, Inc.*, 674 F. Supp. 1405, 1408 (E.D. Mo. 1987); *In re Super Spud, Inc.*, 77 Bankr. at 931; *Forestwood Farm, Inc. v. Tanner (In re Tanner)*, 77 Bankr. 897, 899-00 (Bankr. N.D. Ala. 1987); *Consolidated Mktg., Inc. v. Marvin Properties, Inc. (In re Marvin Properties, Inc.)*, 76 Bankr. 150, 153 (Bankr. 9th Cir. 1987), *aff'd on other grounds*, 854 F.2d 1183 (9th Cir. 1988); *In re W.L. Bradley Co.*, 75 Bankr. at 509; *In re Monterey House, Inc.*, 71 Bankr. at 246-47; *In re Fresh Approach, Inc.*, 51 Bankr. at 420; *Fresh Approach, Inc. v. United States (In re Fresh Approach, Inc.)*, 49 Bankr. 494, 497 (Bankr. N.D. Tex. 1985); *In re Fresh Approach, Inc.*, 48 Bankr. 926, 931 (Bankr. N.D. Tex. 1985).

In *In re Frosty Morn Meats, Inc.*,¹⁸ for example, the court held that the P&SA trust provision,¹⁹ "does not, by its application, violate any constitutionally protected rights of holders of liens on assets of meatpackers."²⁰ Further, it was specifically held that security interests in assets of the buyer that came into existence after the enactment of the P&SA trust provisions may validly be subordinated to a trust for the benefit of livestock sellers.²¹

Almost four and one half years after the effective date of the PACA trust provisions, their constitutionality was finally addressed. In *In re Milton Poulos, Inc.*,²² the court found the PACA trust provisions to be constitutional. It considered that the P&SA trust provisions have been found to be constitutional, the PACA trust provisions were modeled after those of the P&SA, and the PACA and PS&A trust provisions were intended to remedy similar problems and to afford similar protection.²³ Accordingly, the PACA amendments were held to be constitutional.

B. Federal Pre-emption

Generally, a state statute will be pre-empted by a federal statute addressing the same issue.²⁴ Thus, the PACA trust

18. 7 Bankr. 988 (M.D. Tenn. 1980).

19. 7 U.S.C. § 196 (1988).

20. *In re Frosty Morn Meats, Inc.*, 7 Bankr. at 1003. Another case under the P&SA also held that there was "no constitutional impediment to Congress' action in creating the [P&SA] statutory trust of 7 U.S.C. § 196." *Hedrick v. S. Bonaccorso & Sons, Inc.*, 466 F. Supp. 1025, 1029 n.3 (E.D. Pa. 1978). By analogy, the trust provisions of PACA, 7 U.S.C. § 499e(c) (1988), do not violate any constitutionally protected rights of holders of liens on assets of commission merchants, dealers, or brokers of perishable agricultural commodities. *See supra* notes 16-17.

21. *In re Frosty Morn Meats, Inc.*, 7 Bankr. at 1003.

22. 94 Bankr. 648 (Bankr. C.D. Cal. 1988), *aff'd*, 107 Bankr. 715 (9th Cir. 1989).

23. *Id.* at 652.

24. Federal law may "pre-empt state law to the extent it actually conflicts with federal law." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). Additionally, "[f]ederal law may supersede state law in several different ways. . . . [C]ongressional intent to pre-empt state law in a particular area may be inferred where the scheme on federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Id.* at 280-81 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). It is clear that Congress intended to protect produce sellers under federal statutory trust provisions, and the regulations in Part 46 of the Code of Federal Regulations are sufficiently detailed so as to effect the goals of the statute without supplementary state regulation.

provisions will likely pre-empt the operation of any state statute dealing with rights, such as security interests, in perishable agricultural commodities or their proceeds.

In particular, section 9-104(2) of the Uniform Commercial Code (U.C.C.) provides:

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.²⁵

This provision of the U.C.C. tacitly recognizes the doctrine of federal pre-emption²⁶ which serves to defeat any objection to the enforceability of the trust provisions by valid lienholders under state law.

Thus, the enactment of the P&SA trust amendments "prospectively rendered . . . floating liens upon . . . inventory, and resulting receivables and proceeds therefrom, subordinate to the trust."²⁷ Similarly, in *Hedrick v. S. Bonaccorso & Sons, Inc.*, the court applied the concept of federal supremacy to the PACA trust amendments:

The choice of law rule this Court applies is as follows: To the extent plaintiff and others in the position of unpaid sellers qualify as beneficiaries of the statutory trust set up by 7 U.S.C. § 196(b), the federal Act controls whether they have priority over Continental Bank's [the third party lender's] claims; to the extent plaintiff and such other sellers do not so qualify, Pennsylvania's version of Article 9 of the Uniform Commercial Code controls whether they have priority over the Bank's claims; the rights of plaintiff against the other defendants are determined initially by looking to the federal Act.²⁸

Because the PACA trust provisions are superior to state statutes, valid and timely perfected PACA claims must therefore be satisfied before any distribution of a creditor's assets ac-

25. U.C.C. § 9-104(2)(a) (1977). This provision has been enacted in forty-nine states and the District of Columbia. 3 U.L.A. 1 (Supp. 1990).

26. *In re Frosty Morn Meats, Inc.*, 7 Bankr. 988, 1003 (M.D. Tenn. 1980).

27. *Id.*

28. *Hedrick v. S. Bonaccorso & Sons, Inc.*, 466 F. Supp. 1025, 1030 (E.D. Pa. 1978) (referring to 7 U.S.C. § 228c and PA. STAT. ANN. tit. 12A, § 9-104(a)).

ording to state law, including Article 9 of the Uniform Commercial Code.

C. Jurisdiction

As provided in the statutory trust provisions, actions to enforce a PACA trust may be brought in United States district court.²⁹ Most reported PACA opinions involving insolvent buyers, however, have been rendered by the United States bankruptcy courts, and thus, most of the guiding principles for the operation of the PACA trust provisions have emanated from cases decided in bankruptcy court.³⁰ This creates a tension, or at least a confusion, as to the jurisdictional powers of the district and bankruptcy courts.

Before an unpaid seller can bring an action to enforce a PACA trust in district court, he may find that the buyer-debtor to whom he sold produce is already in a proceeding in bankruptcy court, wherein the court is preparing to distribute the assets of the buyer-debtor to secured and unsecured creditors. According to decisions applying the intent of Congress to give produce sellers greater protection in just these types of cases, however, the PACA trust assets are not to be considered part of the debtor's estate until all obligations to the valid PACA claimants have been satisfied.³¹

A perfected PACA claimant who finds that the buyer has filed for the protection of the bankruptcy court may file a motion for withdrawal of reference.³² If the district court finds

29. 7 U.S.C. § 499e(c)(4) (1988).

30. Most PACA cases have been before the bankruptcy courts and many questions (including whether or not PACA trust assets are part of a debtor's estate) have been answered there. PACA claimants have had to bring their claims in bankruptcy courts in order to prevent other creditors of the debtor-in-bankruptcy from receiving PACA trust assets, thereby leaving the unpaid produce seller without a remedy. *See, e.g., In re Fresh Approach, Inc.*, 51 Bankr. 412 (Bankr. N.D. Tex. 1985); *In re Fresh Approach, Inc.*, 48 Bankr. 926 (Bankr. N.D. Tex. 1985).

31. *See supra* note 13.

32. The grounds for withdrawal of a case by the district court from a bankruptcy court are as follows:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

that the case involves material and substantial questions of both bankruptcy and non-bankruptcy law, it will withdraw the proceeding from bankruptcy court and hear the case itself, deciding both the PACA issues and the bankruptcy issues.³³

This procedure would not be followed, however, in the view of one bankruptcy court which has decided it has the power to adjudicate all claims involving assets of the debtor-in-bankruptcy. The court stated:

I fail to see why the trustee should not collect PACA receivables and the bankruptcy court determine the rights of the beneficiaries. The bankruptcy court, among all courts, state or federal, is the one endowed with the most powers to collect receivables from account debtors wherever located through the United States, to process the filing of claims, and to make any other determinations appropriate for such proceedings.³⁴

Moreover, at least one district court has found it now to be so beyond question that PACA trust assets are not part of the debtor's estate that there are no material and substantial issues of both PACA and bankruptcy law to be decided.³⁵ Rather, it stated that all that need be addressed by the bankruptcy court would be the "simple determination of whether defendant properly perfected his interest" in PACA trust assets.³⁶ Accordingly, the court discerned no conflict between the Bankruptcy Code and non-bankruptcy law that would require a withdrawal of reference of the adversary proceeding from the bankruptcy court.³⁷

These decisions suggest that bankruptcy courts may hear

28 U.S.C. § 157(d)(1988).

33. In a case in which the PACA beneficiary was claiming trust assets from a debtor-in-bankruptcy, one district court determined that a resolution of the proceeding involved material and substantial questions under both Title 11 (e.g., the distribution of a debtor's estate) and other federal laws (the PACA trust provisions). *Block v. Anthony Tammaro, Inc. (In re Anthony Tammaro, Inc.)*, 56 Bankr. 999 (D.N.J. 1986). In particular, the court was concerned with the "key issue . . . whether a PACA trust is part of or separate from [the debtor's] estate." *Id.* at 1007.

34. *Allied Grocers Coop. v. United Fruit & Produce Co. (In re United Fruit & Produce Co.)*, 86 Bankr. 14, 16 (Bankr. D. Conn. 1988).

35. *Yaeger v. Dole Fresh Fruit Co. (In re Asinelli, Inc.)*, 93 Bankr. 433, 435-36 (M.D.N.C. 1988).

36. *Id.* at 435.

37. *Id.* at 436. *Accord In re Carolina Produce Distributors, Inc.*, 110 Bankr. 207, 210 (W.D.N.C. 1990).

PACA claims. The PACA trust provisions expressly empower the district courts to try PACA cases.³⁸ Thus, it appears that, for the time being, where the buyer has filed for protection under the bankruptcy laws, PACA claims may be adjudicated in both bankruptcy and district courts. Claims to recover PACA trust assets held by the debtor, however, will likely be heard by the bankruptcy courts in the first instance.

III. THE ENFORCEMENT OF A PACA TRUST

It is important to understand who may bring an action to enforce a PACA trust and how the trust provisions operate. Additionally, one should be familiar with the action for injunctive relief sought by a PACA trust claimant and the relief available.

A. Who May Enforce a PACA Trust

Trust beneficiaries may bring an action to enforce payment from a PACA trust.³⁹ The Secretary of the United States Department of Agriculture (Secretary) may also initiate an action to preserve the assets of the PACA trust for the benefit of unpaid sellers.⁴⁰ It was originally contemplated that the Secretary would take "immediate action to conserve the trust when there appeared to be dissipation" by the produce buyer to third parties. Congress contemplated that the Secretary could move expeditiously "when it has been determined that a person is failing to maintain the required trust, is dissipating trust assets or is in financial difficulty."⁴¹ This authority vested in the Secretary is critical for the effective protection of sellers of produce. When a produce buyer encounters serious financial hardships, its lending institution and local creditors act quickly to collect monies due them to avoid having to present their claims in bankruptcy court in the likely event that the debtor becomes bankrupt. Suppliers of produce, however, may be unable to act as quickly because they

38. See *supra* note 29 and accompanying text.

39. 7 U.S.C. § 499e(c)(4)(i) (1988).

40. 7 U.S.C. § 499e(c)(4)(ii) (1988).

41. H.R. REP. NO. 543, 98th Cong., 2d Sess. 7, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 410.

[a]re often located thousands of miles from their customers. Sales transactions must be made quickly or they are not made at all. Many sales are consummated while the commodities are en route to a particular destination. Under such conditions it is often difficult to make credit checks, conditional sales agreements, and take other traditional safeguards⁴²

Further, Congress recognized, “[o]nce funds are dissipated, it is all but impossible to effect recovery.”⁴³

It is, therefore, crucial that the Secretary, who may be able to receive notice of the buyer’s insolvency and initiate proceedings more quickly than a distant produce seller, have the power to freeze a receiver’s trust assets. Without this grant of power to the Secretary, as given in the 1984 PACA amendments, “the trust requirement would be rendered virtually unenforceable . . . until the produce creditors [had] been apprised of the situation and . . . [had] had an opportunity to protect their interests.”⁴⁴ Unfortunately, because there has been such an onslaught of PACA trust claims,⁴⁵ in many cases, the government has not been able to act quickly enough to prevent dissipation and the consequent elimination of produce sellers’ remedies.⁴⁶ It is, therefore, quite important that the produce seller understand the trust statute and regulations and move speedily in obtaining a temporary restraining order to preserve a pool of assets in the buyer-trustee’s hands sufficient in value to satisfy the PACA trust claims.

The importance of prompt action, or the lack thereof, by

42. *Id.* at 3, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 406.

43. *Id.* at 7, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 411.

44. *Id.*

45. Personnel at the PACA Branch, Agricultural Market Service, United States Department of Agriculture, indicated that the industry filed more than 100,000 trust notices for fiscal years (October-September) 1984 through 1986, with 43,000 trust notices filed for fiscal year 1987, 55,000 for fiscal year 1988 and 75,000 for fiscal year 1989.

46. Additionally, the United States Department of Agriculture (Department) must clear its cases with the Department’s Office of General Counsel (OGC), the United States Department of Justice (DOJ) and the United States Attorney’s Office, which often takes several months. Consequently, there is a need for a special accommodation between the Department, the DOJ, and the U.S. Attorney’s Office allowing the Secretary to proceed quickly in district court to fulfill or effectuate the Department’s obligations under the trust provisions. It is advisable, however, for the produce seller himself to keep abreast of the payment status of his buyers, so that he may act as quickly as possible to preserve his rights under PACA.

the Secretary has become even greater in light of a recent decision holding that private parties may not obtain injunctive relief in actions under PACA.⁴⁷ The soundness of this decision will be discussed in Section III.D. Assuming, *arguendo*, that this view is followed, PACA debtors will be free to dissipate trust assets without fear of contempt proceedings, even as trust claimants pursue their remedies in court, if only because the Secretary is unwilling or unable to discharge his statutory obligations. Until the issue is resolved or the Department of Agriculture becomes more active in initiating injunctive proceedings, private parties can only try to vindicate their PACA rights through court action or run the risk of having them rendered meaningless.

If one claimant does act to prevent the dissipation of trust assets, however, its efforts may redound to the benefit of all the trust creditors. The expense of obtaining such relief, however, may be substantial. For creditors with small claims, it may well be out of proportion to the amount at stake. It seems inherently inequitable either to let creditors who take no action to be "free riders" on the efforts of those who do or to put creditors with valid, but relatively small, claims in a position where they cannot afford to vindicate their rights.

The preferable solution would seem to be for the Department of Agriculture to act with more vigor in enforcing the provisions of PACA, seeing that trust assets are not dissipated and are paid to those with valid claims. If private parties must shoulder the burden of initiating and prosecuting such actions, then it is submitted that the reasonable attorneys' fees and costs incurred be paid first from the trust assets recovered.⁴⁸ In effect, each creditor would pay a pro rata share of

47. *Frio Ice, S.A. v. Sunfruit, Inc.*, 724 F. Supp. 1373, 1378 (S.D. Fla. 1989).

48. By analogy to cases under the P&SA, one court has awarded attorneys' fees to a successful PACA claimant acting solely for its own interests. *Houston Avocado Co. v. Monterey House, Inc.* (*In re Monterey House, Inc.*), 71 Bankr. 244, 248 (Bankr. S.D. Tex. 1986). Subsequent decisions have declined to follow this rule. *Debruyne Produce Co. v. Richmond Produce Co.* (*In re Richmond Produce Co.*), 112 Bankr. 364, 376 (N.D. Cal. 1990); *C & E Enterprises, Inc. v. Milton Poulos, Inc.* (*In re Milton Poulos, Inc.*), 94 Bankr. 648 (Bankr. C.D. Cal. 1988), *aff'd*, 107 Bankr. 715 (Bankr. 9th Cir. 1989). The question should be answered differently where the claimant's efforts benefit the entire group of trust creditors.

the costs incurred to preserve its remedies and provide it relief.

The courts that have denied relief have disregarded the equities discussed above. The rationale for such an approach is questionable. For example, the only appellate decision to address the issue denied interest, fees, and costs because such an award “would unfairly deplete the bankruptcy estate.”⁴⁹ If the fees are paid out of the PACA trust funds, rather than the debtor’s estate as the court seemed to contemplate, it is hard to see how this depletion could be said to be possible.

The unfairness of this ruling is exemplified by the fact that, in that case, two claimants appeared to assert their claims only after the moving parties obtained a decision granting relief from the automatic stay in bankruptcy and for the turnover of property which was not part of the debtor’s estate—the PACA trust assets. The two claimants did not move to intervene and first appeared at a hearing that was scheduled to settle the contents of the proposed order. The claimants were nevertheless permitted to share in the trust assets.

While it would probably be contrary to the intent of the statute to award all available trust assets to those who happen to win the race to the courthouse, it seems clearly inequitable to force those who do act to subsidize others who sit on their rights. This result also creates a disincentive for any private party to take action to enforce his trust rights. The preferable solution would be to award attorneys’ fees from the trust assets to those essentially acting as “private attorneys general.”

Although there is no specific statutory authority for such a result, it may be ordered either by analogy to interpleader actions⁵⁰ or on the basis of the common benefit exception to the American rule that a prevailing party may not recover its

49. *In re Milton Poulos, Inc.*, 94 Bankr. at 653.

50. A litigant or lawyer who protects or “recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys’ fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161 (1939). The equitable theory behind this common fund doctrine is as follows:

[P]ersons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant’s expense. . . . Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by

attorneys' fees.⁵¹ Such relief would be both equitable and facilitate the enforcement of PACA, although appropriate steps would have to be implemented to avoid duplicitous, parallel actions by different PACA trust beneficiaries. Where, for example, local court rules provide that related cases must be assigned to a single judge, the court could order the consolidation of cases brought by different PACA claimants. The court might even go so far as to appoint or recognize one lead counsel, however, set criteria for making such a decision might be difficult to formulate.

B. Perfection of Trust Claims

In order to preserve their rights under PACA, unpaid sellers and suppliers of perishable agricultural commodities must file both with the delinquent buyer and with the Secretary,⁵² a written notice of their intent to preserve the trust benefits.⁵³ A trust claimant may file the requisite notice with the Secretary with copies to the buyer as sufficient notice of its

assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefitted by the suit."

Boeing Co., 444 U.S. at 478.

51. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 (1975).

52. Following precedent established under the P&SA, *see supra* notes 16-17 and accompanying text, and in *First State Bank v. Gotham Provision Co.* (*In re Gotham Provision Co.*), 669 F.2d 1000 (5th Cir.), *cert. denied*, 459 U.S. 858 (1982), the court in *In re Marvin Properties, Inc.* held that:

mere actual notice [to the buyer] is inadequate where the statute expressly requires the seller to give formal notice.

Section 449e(c)(3) [of Title 7 of the United States Code] unambiguously requires the *seller* of the commodities to give the buyer *written* notice of the intent to preserve the trust benefits [and] [t]he acknowledgement from the Secretary of Agriculture [is] clearly inadequate to this task.

Consolidated Mkt., Inc. v. Marvin Properties, Inc. (*In re Marvin Properties*), 76 Bankr. 150, 153 (Bankr. 9th Cir. 1987), *aff'd*, 854 F.2d 1183 (9th Cir. 1988) (emphasis in original & citations omitted). On appeal, the holding of the Bankruptcy Appellate Panel was affirmed without reference to the P&SA. *In re Marvin Properties, Inc.*, 854 F.2d 1183 (9th Cir. 1988).

53. In addition,

7 C.F.R. § 46.46(g)(3) provides that a notice of intent under PACA must be in writing, must include a statement to the effect that it is a notice of intent to preserve trust benefits, and must include information which establishes for each shipment (1) the name and address of the trust beneficiary and the debtor, (2) the date of the transaction, commodity, contract terms, invoice price and the date payment was due and (3) the amount past due and unpaid.

Dubin v. Carlton Fruit Co. (*In re Carlton Fruit Co.*), 84 Bankr. 810, 811 (Bankr. M.D. Fla. 1988).

intent to preserve trust benefits.⁵⁴ If a trust claimant does not file the requisite notice with the buyer, but does file with the Secretary who, in turn, gives the buyer notice, it may be possible to argue that the Secretary was acting as an agent for the seller.⁵⁵ Obviously, the seller should give the notice to both, if possible.

Once litigation is commenced, buyers may simply deny receipt of trust notices even though the Department of Agriculture (Department) acknowledges receipt of its corresponding notice which was mailed at the same time. It is probably economically impractical for sellers to send all trust notices by certified mail because very few of the trust claims will ultimately require action to enforce them. Thus, the question arises of how the seller can establish compliance with the filing notice in the face of a bald denial of receipt by the buyer.

In the context of a motion for a preliminary injunction, if the Department has acknowledged receipt of its notice, the seller may be deemed to have submitted sufficient proof that it perfected its rights.⁵⁶ Although preliminary relief may be granted, the buyer's denial may well raise an issue of material fact for trial and preclude the grant of summary judgment.⁵⁷

The trust notices must be given to the buyer and filed with the Secretary within thirty days after expiration of the time by which payment for the produce was to be made.⁵⁸ Trust notices filed prior to the date of default have been held to be valid,⁵⁹ although notices filed more than thirty days after

54. *Wilson Mushroom Co. v. Annde Foods, Inc.* (*In re Annde Foods, Inc.*), 110 Bankr. 346, 352 (Bankr. N.D. Ill. 1989).

55. The argument was discussed, but not decided, in *In re Marvin Properties, Inc.*, because the seller failed to raise it before the bankruptcy court. *In re Marvin Properties, Inc.*, 854 F.2d at 1186-87.

56. *JSG Trading Corp. v. Tray-Wrap, Inc.*, No. 89-5724 (S.D.N.Y. Sept. 25, 1989) (LEXIS, Genfed library, Dist. file); *Finest Fruits, Inc. v. Korean Produce Corp.*, No. 87-6579 (S.D.N.Y. Oct. 2, 1987) (LEXIS, Genfed library, Dist. file); *Cf. A & J Produce Corp. v. Foodways, Inc.*, No. 88-0754 (S.D.N.Y. Nov. 2, 1988) (LEXIS, Genfed library, Dist. file) (letter from USDA reflecting filing of PACA claims with it "contains no proof whatever that any defendant was notified . . . and will not be accepted as proof on any issue." but trust nevertheless will be established by order).

57. *C. H. Robinson Co. v. B. H. Produce Co.*, 723 F. Supp. 785, 795-96 (N.D. Ga. 1989).

58. 7 U.S.C. § 499e(c)(3) (1988).

59. *In re Richmond Produce Co.*, 112 Bankr. 364, 369 (Bankr. N.D. Cal. 1990); *In re W.L. Bradley Co.*, 75 Bankr. 505, 511-512 (Bankr. E.D. Pem. 1987) (holding that the

payment became due do not satisfy the statutory requirements. The Secretary has prescribed by regulation the times by which payment must be made.⁶⁰ Parties may also agree to a different payment schedule from that set forth in the regulations.⁶¹ In order to maintain the availability of the trust provisions, however, an agreement for a payment schedule differing from those set forth in the regulations must be set forth in writing prior to the transactions⁶² and may not contain a provision for a payment period of greater than thirty days after receipt and acceptance of the commodities.⁶³ The payment time period, if different from that listed in the regulations, must also be filed in the records of each party and disclosed on invoices, accountings, and all other documents relating to the transaction.⁶⁴ Disclosure of the extended payment period

statutory use of the word "after" marks the beginning of the thirty-day period but does not prohibit early filings).

60. 7 C.F.R. § 46.2(aa) (1990).

61. The statutory trust provisions do "not, in any way, interfere with the ability of the seller-supplier, and buyer-receiver to set contract terms." H.R. REP. NO. 543, 98th Cong., 2d Sess. 5, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 408. To qualify for protection of trust benefits under PACA, however, the parties must conform the payment agreement to the regulations. 7 C.F.R. § 46.2(aa)(11) (1990).

62. 7 U.S.C. § 499e(c)(3) (1988); *Hull Co. v. Hauser Foods, Inc.*, 721 F. Supp. 224, 226 (D. Minn. 1989); *Goldman Fruit & Produce Co. v. Lombardo Fruit & Produce Co. (In re Lombardo Fruit & Produce)*, 106 Bankr. 593, 598 (Bankr. E.D. Mo. 1989). See also *supra* note 53.

63. 7 C.F.R. § 46.46(f)(2) (1990). "The thirty-day period . . . fulfills the intent of Congress that the Secretary of Agriculture establish a reasonable time for payment for credit transactions." 49 Fed. Reg. 45,737 (1984).

Current payment practices, as reflected by administrative experience and industry sources, indicate that contracts calling for payment within thirty days from receipt and acceptance of the goods should qualify for trust coverage, and contracts that call for later payment should not qualify for trust coverage. Therefore, as set forth in 7 C.F.R. § 46.46(f)(2), if an agreement calls for payment 31 days or more after receipt and acceptance of the goods, the trust provisions will not apply to that transaction.

Id. at 45,738. In verification of these findings on current payment practices, members of the Western Growers Association reported that "as a practical matter, [sellers of perishable agricultural commodities] receive payment generally within 30 days after receipt of the product." H.R. REP. NO. 543, 98th Cong., 2d Sess. 11, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 414. Therefore, the regulations reflect common industry experience regarding prompt payment, and the PACA trust provisions are therefore intended to operate once the payment status would be viewed by industry standards as delinquent.

64. 7 U.S.C. § 499e(c)(3) (1988).

only on the invoices is insufficient.⁶⁵

Alternatively, if the buyer's check is dishonored, the trust notice can be filed within thirty days after notice of dishonor.⁶⁶ In that event, the dishonored check must have been presented in the first instance within the time required for payment.⁶⁷

These requirements, while seemingly simple, will be strictly construed and may present hazards for the unwary. Where the trust notices do not contain all the required information, one court found them inadequate.⁶⁸ Another indicated that "nearly sufficient compliance" would at least allow the case to move on to trial and that "the most prudent course is to determine the sufficiency of each Notice on a case-by-case basis."⁶⁹ In one instance, where the contract required payment within thirty days, but also expressly postponed defaults for an additional sixty days, the requirement limiting the payment period to thirty days was deemed not met.⁷⁰

In another case, the parties entered into a written agreement that payment was due within thirty days from the date set forth on the invoice. Even though the parties "contracted with an eye towards the PACA," virtually all the trust articles were deemed untimely because of the "flaw . . . that the mechanism for invoicing resulted in the production of an invoice one to four days after the produce arrived."⁷¹

If the parties reach an agreement that extends the time for payment to thirty days, thus delaying the due date for the trust notices, but the invoices include standard language allowing too long for payment, one court has held that the fail-

65. *C. H. Robinson Co. v. B. H. Produce Co.*, 723 F. Supp. 785, 797 (N.D. Ga. 1989).

66. 7 U.S.C. § 499e(c)(3)(iii) (1988).

67. *Goldman Fruit & Produce Co. v. Lombardo Fruit & Produce Co.* (*In re Lombardo Fruit & Produce*), 106 Bankr. 593, 600 (Bankr. E.D. Mo. 1989).

68. *Blair Merriam Fresh Fruit & Produce Co. v. Clark* (*In re D.K.M.B., Inc.*), 95 Bankr. 774 (Bankr. D. Colo. 1989); see also *In re Lombardo Fruit & Produce*, 106 Bankr. at 600.

69. *Tom Lange Co. v. Lombardo Fruit & Produce Co.* (*In re Lombardo Fruit & Produce Co.*), 107 Bankr. 654, 661 (Bankr. E. D. Mo. 1989). See also *In re Richmond Produce Co.*, 112 Bankr. 364, 372 (Bankr. N.D. Cal. 1990).

70. *Wilson Mushroom Co. v. Davis Distributions, Inc.* (*In re Davis Distributions, Inc.*), 861 F.2d 416, 420 (4th Cir. 1988).

71. *In re Lombardo Fruit & Produce Co.*, 107 Bankr. at 660.

ure to omit the statement from the invoice is merely an inadvertent mistake that does not undo the effect of the written agreement.⁷² The court reasoned, quite logically, that the seller could not impose different terms from those agreed to by placing them at the bottom of the invoices. Therefore, the terms that were actually agreed to governed.

This court also stated that any payment terms must be honored or the seller could lose trust protection because the course of dealing established the actual terms of payment.⁷³ In dicta, the court commented that an agreement to extend payment terms or provide an extended payment plan may also render the seller unable to preserve its statutory trust benefits.⁷⁴ This approach could create more problems than it resolves. It may also unfairly reward a delinquent buyer who is allowed additional time to satisfy his debts by absolving him of responsibility under the PACA trust provisions.

Recently, the Perishable Agricultural Commodities Act Industry Advisory Committee (Committee) recommended to Congress that the PACA be amended to allow all trust beneficiaries, regardless of the contract terms for payment, sixty days from the date of shipment within which to file their trust notices.⁷⁵ Such an amendment would standardize the length of time within which to file trust notices and eliminate the burden of computing filing deadlines for varying payment terms.⁷⁶ Further, sellers would not have to consider transit time for produce which is currently necessary in computing date of receipt or acceptance.⁷⁷

As indicated previously, notices of intent to preserve trust benefits must be filed by the seller with the Department of Agriculture. Upon request, the PACA Branch of the Department's Agricultural Marketing Service will certify the amount of a particular seller's claim which qualifies for pro-

72. *Tom Lange Co. v. Lombardo Fruit & Produce Co. (In re Lombardo Fruit & Produce Co.)*, 107 Bankr. 952, 957 (Bankr. E.D. Mo. 1989).

73. *Id.* at 958-59.

74. *Id.* at 959.

75. Perishable Agricultural Commodities Act Industry Advisory Committee, Final Report at 8 (May 1, 1990).

76. *Id.*

77. *Id.*

tection under the trust provisions.⁷⁸ It will also advise parties who may be holding trust assets, including the primary debtor, of the amounts claimed by various creditors as being trust claims, as well as the amount which the Department considers qualified. These written statements will likely be given due deference by the courts of the amount qualified for PACA protection, although they will not necessarily establish that the seller was given the requisite notice or that they satisfy all the statutory requirements.⁷⁹

If a seller-creditor has a written agreement properly extending the time for payment, it should provide the Department with a copy of the agreement when the trust notices are submitted. Otherwise, in determining whether the trust notice was timely filed for particular transactions, the Department will consider whether the notice was received within thirty days from the end of the time for payment prescribed by the regulations, rather than from the longer time for payment—usually thirty days—to which the parties agreed.

Until recently, the Department has taken the position that unless all the statutory requirements are satisfied, an agreed-to time period for payment will not be given effect in calculating the amount of a claim which qualifies as a valid trust claim. This view is erroneous. It is true that the statute and the Department's implementing regulations call for the terms of payment to be disclosed on the invoices, if they are different from those prescribed by the Secretary.⁸⁰ Unlike other PACA requirements, however, such disclosure should not be considered a condition precedent to the validity of trust claims or the preservation of trust assets.⁸¹ The legislative history of the 1984 amendments to PACA reveals that, while an earlier version of the bill expressly contemplated such a result, this provision was expressly deleted. The bill which eventu-

78. A seller's claim qualifies for protection under PACA trust provisions if the seller has complied with the written notice requirements of 7 U.S.C. § 499e(c)(3) (1988). See *supra* notes 52-60 and accompanying text.

79. See *C. H. Robinson Co. v. B. H. Produce Co.*, 723 F. Supp. 785, 796 (N.D. Ga. 1989); *A & J Produce Corp. v. Foodways, Inc.*, No. 88-0754 (S.D.N.Y. Nov. 2, 1988) (LEXIS, Genfed library, Dist. file).

80. 7 U.S.C. § 499e(c)(3) (1988) (last sentence); 7 C.F.R. § 46.46(f) (1990).

81. *Cf.* 7 U.S.C. § 499e(c)(3)(i)-(iii) (1988); 7 C.F.R. § 46.46(g) (1990).

ally became Title 7, section 499e(c), of the United States Code was originally submitted as House Report 3867.

As submitted and as enacted, subsection 3 of the PACA trust provisions provides:

The unpaid seller . . . shall lose the benefits of such trust unless such person has given written notice of intent to preserve the benefits of the trust . . . and has filed such notice with the Secretary within thirty business days . . . (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 transaction⁸²

As proposed, however, House Report 3867 stated:

*To be effective for the purpose of clause (ii) of this paragraph, when the parties expressly agree to a payment time period different from that established by the Secretary, . . . the terms of payment shall be disclosed on invoices*⁸³

The language which is emphasized above was not in subsection 3 of the law as enacted. Clearly, Congress did not intend that, in order to be effective, an agreement modifying the time for payment need be disclosed on invoices. Indeed, from both a policy and a practicality viewpoint, such a requirement would serve no purpose. After all, the parties to the transaction agreed in writing to the terms of payment and they would be aware of the terms of their own agreement.

This Congressional intent was unambiguously expressed in the House Report:

Finally, the amendment *deleted the requirement as a condition precedent to the validity of the trust that if the parties agreed to a different time period for payment than that established by the Secretary, copies of their agreement must be filed in their records and disclosed on all invoices and other documents to the transaction.*⁸⁴

It now appears that the Department has reconsidered and changed its position in light of this legislative history. Therefore, even if the parties agree in writing to an extended period for payment, and this agreement is not disclosed on the

82. 7 U.S.C. § 499e(c)(3) (1988).

83. 129 Cong. Rec. 15,482 (1983) (emphasis added).

84. H.R. REP. NO. 543, 98th Cong., 2d Sess. 12, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS, 405, 419 (emphasis added).

invoices, the agreed upon date for payment should be used as the start of the thirty-day period within which trust notices must be filed.

C. The Nature of the PACA Trust

Produce sellers and suppliers with valid and timely perfected claims may bring suit in United States district court to enforce payment from the trust.⁸⁵ Unpaid sellers may seek to obtain payment for the goods from the buyer.⁸⁶ Because the PACA amendments create a trust obligation upon the sale and receipt of produce, "it is the fiduciary duty of the [buyer] to ensure that there exists sufficient funds to assure prompt payment for produce received."⁸⁷

The seller who chooses to obtain payment from the buyer, however, may encounter a dry well.⁸⁸ The trust provisions were enacted to protect sellers from, among other hazards, insolvent buyers.⁸⁹ To limit the detrimental impact of this occurrence, the statutory trust imposed under the PACA is a nonsegregated floating trust, similar to that imposed by the 1976 amendments to the P&SA, which permits the commingling of trust assets.⁹⁰

85. 7 U.S.C. § 499e(c)(4) (1988); see *In re Anthony Tammaro, Inc.*, 56 Bankr. 999, 1001 (D.N.J. 1986).

86. Unpaid sellers may also seek a temporary restraining order or other injunctive relief to prevent the dissipation of trust assets by the producer buyer. *Finest Fruits, Inc. v. Korean Produce Corp.*, No. 87-6579 (S.D.N.Y. Oct. 2, 1987) (LEXIS, Genfed library, Dist. file); see *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 108 (2d Cir. 1987).

87. "Should a licensee [authorized to buy goods subject to PACA] . . . breach that duty the supplier's remedy is against the licensee." *Forestwood Farm, Inc. v. Tanner* (*In re Tanner*), 77 Bankr. 897, 901 n.9 (Bankr. N.D. Ala. 1987). See 10 N. HARL. AGRICULTURAL LAW § 72-08[5] (1989).

88. At times, a buyer may legitimately refuse to pay a seller for goods covered by the PACA based on a contractual dispute, e.g., the shipment of goods did not conform to the invoices. This Article, however, does not examine such issues, focusing only on nonpayment resulting from buyer's delinquency or financial insolvency.

89. H.R. REP. NO. 543, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. CODE, CONG. & ADMIN. NEWS 405, 407.

90. The trust "is imbued with an unusual 'floating' characteristic, i.e., it applies to all of Debtor's produce related inventory and proceeds thereof, regardless of whether [the seller who is claiming trust benefits] or another supplier was the source of such inventory." *In re Fresh Approach, Inc.*, 51 Bankr. 412, 422 (Bankr. N.D. Tex. 1985) (emphasis in original). *Accord C & E Enterprises, Inc. v. Milton Poulos, Inc.* (*In re Milton Poulos, Inc.*), 107 Bankr. 715, 718 (Bankr. 9th Cir. 1989); *Stelly v. Galley Sup-*

Due to this floating nature of trust assets, not only are the specific perishable agricultural commodities of the transaction subject to the trust, but the proceeds and products derived from the commodities are also assets of the trust.⁹¹ Commingling is specifically contemplated by PACA, as well as its implementing regulations.⁹² The buyer-trustee, however, is charged with the responsibility of maintaining sufficient funds to satisfy obligations to produce sellers.⁹³ The statute was, therefore, intended to provide that dissipation of the initial trust assets by the buyer-trustee would not leave the trust beneficiary without a remedy.⁹⁴ Accordingly, to the extent that trust assets related to the transaction have been commingled with other assets, including proceeds from other "qualified" transactions with other trust creditors, the assets of the buyer may be considered produce-related and subject to the trust.⁹⁵

D. Injunctive Relief

A number of courts have indicated or squarely held that PACA claimants may seek injunctive relief to prevent the further dissipation of trust assets.⁹⁶ Several decisions, however,

ply, Inc., No. 86-5662 (E.D. La. Dec. 7, 1987) (LEXIS, Genfed library, Dist. file); H.R. REP. NO. 543, 98th Cong., 2d Sess. 5, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 409; 7 C.F.R. § 46.46(c) (1990).

91. 7 U.S.C. § 499e(c)(2) (1988).

92. 7 C.F.R. § 46.46(c) (1990).

93. *Forestwood Farm, Inc. v. Tanner (In re Tanner)*, 77 Bankr. 897, 901 n.9 (Bankr. N.D. Ala. 1987).

94. "Where a trustee commingles his beneficiary's money with his own, and then invades the common store, he will be presumed to have used his own money first—the law presumes that he does right rather than wrong." *Turley v. Mahan & Rowsey, Inc. (In re Mahan & Rowsey, Inc.)*, 35 Bankr. 898, 904 (Bankr. W.D. Okla. 1983) (citing *Kansas Flour Mills Co. v. New State Bank*, 124 Okla. 185, 256 P. 43 (1926)). The court continued: "The converse should therefore be true. When a trustee replenishes a commingled account which has fallen below the amount held in trust due to the trustee's invasion, the trustee is presumed to return the beneficiary's money first." *Id.*

95. *See supra* note 90.

96. *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 108 (2d Cir. 1987); *JSG Trading Corp. v. Tray-Wrap, Inc.*, No. 89-5724 (S.D.N.Y. Sept. 25, 1989) (LEXIS, Genfed library, Dist. file); *My Fruit, S.A. v. Pacific Sun Mktg., Inc.*, No. 89-833 (D. Ore. Aug. 17, 1989) (LEXIS, Genfed library, Dist. file); *J. R. Brooks & Son, Inc. v. Norman's Country Mkt., Inc.*, 98 Bankr. 47, 50-51 (Bankr. N.D. Fla. 1989); *Fresh W. Mktg. v. M & L Food Center, Inc.*, 707 F. Supp. 515, 516 (S.D. Fla. 1989); *Finest Fruits, Inc. v. Korean Produce Corp.*, No. 87-6579 (S.D.N.Y. Oct. 2, 1987) (LEXIS, Genfed library, Dist. file); *DeBruyn Produce Co. v. Olympia Produce Co.*, 734 F. Supp. 483, 485 (N.D.Ga. 1989).

have taken a narrow view of the statute and held that, because there is an express authorization for injunctive relief in favor of the government, but not to a private claimant, none is available to the latter.⁹⁷

The latter view is mechanistic and erroneous. A trust, even one created by statute, is inherently equitable in nature and thus equitable remedies should be available. Moreover, the availability of injunctive relief is not dependent on statutory authorization. It is a form of relief that courts may inherently provide. The statute's express authorization for actions by the Secretary to prevent and restrain dissipation of the trust⁹⁸ should be regarded as an adjunct to the concomitant rights of claimants, rather than a remedy exclusively available to the government.

Moreover, as a practical matter, the Department of Agriculture currently lacks the resources to seek injunctive relief against every buyer in violation of the PACA trust provisions. If private parties are unable to seek injunctive relief, defaulting buyers will be free to disregard their statutory fiduciary duties and the purpose of the statute will be effectively undermined. The admonition that private parties "must seek the Secretary's aid"⁹⁹ will be of little solace if such aid is not forthcoming or is so delayed that the trust assets are dissipated before the court can act. Instead, courts should stand ready to enforce the statute through the available remedy of traditional injunctive relief. The PACA claimant should be entitled to injunctive relief to prevent the further dissipation of trust assets and to enforce payment from those assets.¹⁰⁰

The traditional requirements for the issuance of preliminary injunctive relief are: (1) either (a) likelihood that the movant will succeed on the merits, or (b) sufficiently serious questions going to the merits to make them a fair ground for

97. *Frio Ice, S.A. v. Sunfruit, Inc.*, 724 F. Supp. 1373, 1378-79 (S.D. Fla. 1989); *DeBruyn Produce Co. v. Victor Foods, Inc.*, 674 F. Supp. 1405, 1407-08 (E.D. Mo. 1987).

98. 7 U.S.C. § 499e(c)(4)(ii) (1988).

99. *Frio Ice, S.A.*, 724 F. Supp. at 1379.

100. 7 U.S.C. § 499e(c)(4) (1988). See also *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106 (2d Cir. 1987); *Finest Fruits, Inc. v. Korean Produce Corp.*, No. 87-6579 (S.D.N.Y. Oct. 2, 1987) (LEXIS, Genfed library, Dist. file); *DeBruyn Produce Co.*, 734 F. Supp. at 485.

litigation; (2) likelihood of irreparable harm to the movant; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the public interest favors the issuance of a preliminary injunction.¹⁰¹

First, the moving party who has perfected his PACA claims according to the regulations and whose payment terms comply with the regulations,¹⁰² will usually be able to show a substantial likelihood of success on the merits if the case were to go to trial. The PACA trust provisions operate mechanically, and, as at least one court has recognized,¹⁰³ proper notice and documentation of the transactions should suffice to show a likelihood of success on the merits.

In addition, a PACA trust claimant will not be required to trace his produce and the proceeds therefrom into the buyer's inventory.¹⁰⁴ The seller need only prove notice to the debtor and the Secretary; the balance due him; and the existence of a floating pool of commingled inventories of perishable agricultural commodities, accounts receivable, and proceeds derived from produce sales.¹⁰⁵ Should a dispute arise, it is the

101. *JSG Trading Corp. v. Tray-Wrap, Inc.*, No. 89-5724 (S.D.N.Y. Sept. 25, 1989) (LEXIS, Genfed library, Dist. file); *Finest Fruits, Inc. v. Korean Produce Corp.*, No. 87-6569 (S.D.N.Y. Oct 2, 1989) (LEXIS, Genfed library, Dist. file). *See also* *Shatel Corp. v. Mao Ta Lumber & Yacht Corp.*, 697 F.2d 1352, 1354-55 (11th Cir. 1983) (setting forth the fourth requirement for injunctive relief that the injunction not be adverse to the public interest); *accord* *Otero Sav. & Loan Ass'n v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981); *ABA Distrib., Inc. v. Adolph Coors Co.*, 661 F.2d 712, 714 (8th Cir. 1981), *on remand*, 542 F. Supp. 1272; *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 435 (5th Cir. Unit B Feb. 1981); *Ciechon v. City of Chicago*, 634 F.2d 1055, 1057 (7th Cir. 1980); *Reinders Bros., Inc. v. Rain Bird E. Sales Corp.*, 627 F.2d 44, 48-49 (7th Cir. 1980); *Punnett v. Carter*, 621 F.2d 578, 582 (2d Cir. 1980); *Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 356-57 (3d Cir. 1980); *North Carolina State Ports Auth. v. Dart Containerline Co.*, 592 F.2d 749, 750 (4th Cir. 1979).

102. *See supra* notes 52-74 and accompanying text.

103. *See* *Yaeger v. Dole Fresh Fruit Co. (In re Asinelli, Inc.)*, 93 Bankr. 433, 436 (M.D.N.C. 1988).

104. It would be extremely difficult for a seller to trace its goods or the proceeds derived therefrom after being purchased by a buyer, and by imposing such a requirement a court would eviscerate the purpose of the trust provisions. *In re Fresh Approach, Inc.*, 51 Bankr. 412, 422 (Bankr. N.D. Tex. 1985).

105. *Id.* (citing *First State Bank v. Gotham Provision Co. (In re Gotham Provision Co.)*, 669 F.2d 1000, 1011 (5th Cir.), *cert. denied*, 459 U.S. 858 (1982)). The *Gotham* court held that "[t]he only burden on the cash sellers [in a P&SA trust asset case] is to prove the balance due to them and the existence of a floating pool of commingled inven-

burden of the debtor to establish which, if any, assets are not subject to the PACA trust.¹⁰⁶

Second, the unpaid seller seeking a temporary restraining order must also show that it is likely to be irreparably injured if the temporary restraining order is not granted.¹⁰⁷ Such a plaintiff may argue that, if the produce buyer is not restrained from dissipating trust assets to third parties, the action by an unpaid seller to enforce payment of trust benefits from the soon-to-be insolvent buyer may be fruitless. If the court were to deny a motion for injunctive relief, it would negate its ability to grant meaningful relief when a judgment is rendered in favor of the seller at trial.¹⁰⁸ The purpose of injunctive relief is to preserve the status quo to allow for meaningful relief to be granted at the end of the trial.¹⁰⁹

Dissipation constitutes the irreparable harm which PACA was intended to prevent. The regulations define "dissipation" as "any act or failure to act which could result in the diversion of trust assets or which could prejudice or impair the ability of unpaid suppliers, sellers or agents to recover

ories of livestock products, accounts receivables and proceeds derived from cash and credit livestock sales." *Id.*

106. C. H. Robinson Co. v. B. H. Produce Co., 723 F. Supp. 785, 794 (N.D. Ga. 1989); *In re Fresh Approach, Inc.*, 51 Bankr. at 422.

107. See *supra* note 101 and accompanying text.

108. The United States Court of Appeals for the Ninth Circuit requires a showing of more than mere pecuniary damage before it will find irreparable injury and issue injunctive relief. *Regents of the Univ. of Cal. v. American Broadcasting Cos.*, 747 F.2d 511, 519 (9th Cir. 1984). Other circuits, however, have held that the absence of an available remedy by which the plaintiff may later recover monetary damages may be sufficient to show irreparable injury. *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 473 (5th Cir. 1985); *accord American Hosp. Supply Corp. v. Hospital Prod. Ltd.*, 780 F.2d 589, 596 (7th Cir. 1986); *Central States, Southeast & Southwest Areas Pension Fund v. Admiral Merchants Motor Freight, Inc.*, 511 F. Supp. 38, 43 (D. Minn. 1980), *aff'd per curiam sub nom.*, *Central States, Southeast & Southwest Areas Pension Fund v. Jack Cole-Dixie Highway Co.*, 642 F.2d 1122 (8th Cir. 1981).

109. The purpose of preliminary injunctive relief is to preserve the relative positions of the parties until a trial on the merits can be held. *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Litton Sys., Inc. v. Sundstrand Corp.*, 750 F.2d 952, 961 (Fed. Cir. 1984); *Regents of the Univ. of Cal.*, 747 F.2d at 514. The preliminary injunction should issue to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 627 (5th Cir. 1985); *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984); *Federal Leasing, Inc. v. Underwriters at Lloyd's*, 487 F. Supp. 1248, 1259 (D. Md.), *aff'd*, 650 F.2d 495, 499 (4th Cir. 1980).

money owed in connection with produce transactions."¹¹⁰

If the definition is read literally, then the mere non-payment of a trust claim should be viewed as "dissipation." If a buyer has funds to make payment, but does not do so and is free to apply them elsewhere, then the unpaid sellers' ability to recover will likely be prejudiced. At least one court has held that, where the plaintiff has no assurance that the defendant has not dissipated the trust assets, the irreparable harm which PACA was implemented to prevent still exists.¹¹¹ Another court has similarly recognized that, if the buyer has failed to preserve the trust assets, injunctive relief will issue.¹¹² One court has taken a somewhat stricter view.¹¹³ In that case, however, the court seemed to define "dissipation" as an actual and wrongful transfer of trust assets, rather than using the proper regulatory definition.

The third injunctive requirement for a PACA trust beneficiary, a threat of greater injury to the movant if the motion is denied than to the opposing party if the motion is granted, poses little problem. The claimant who is statutorily entitled to trust assets in payment for fruits and vegetables sold, but is not paid, is damaged monetarily at least to the extent of the value of the produce sold. In contrast, because the produce buyer owes a fiduciary duty to pay a PACA claimant for produce sold, an injunctive order which requires the buyer-trustee to restrain from dissipating trust assets to third parties and to remit payment to the rightful PACA trust beneficiary works no damage to the buyer-trustee. Such an order would merely require the buyer-trustee to do what he is obligated to do under the statute. Finally, the public interest must not be disserved by the granting of injunctive relief.¹¹⁴ The legislative history¹¹⁵ and the statute itself¹¹⁶ clearly address the bur-

110. 7 C.F.R. § 46.46(b)(2) (1990).

111. *JSG Trading Corp. v. Tray-Wrap, Inc.*, No. 89-5724 (S.D.N.Y. Sept. 25, 1989) (LEXIS, Genfed library, Dist. file).

112. *J. R. Brooks & Son, Inc. v. Norman's Country Mkt., Inc.*, 98 Bankr. 47, 50-51 (Bankr. N.D. Fla. 1989).

113. *My Fruit, S.A. v. Pacific Sun Mktg., Inc.*, No. 89-833 (D. Ore. Aug. 17, 1989) (LEXIS, Genfed library, Dist. file).

114. See *supra* note 101.

115. H.R. REP. NO. 543, 98th Cong., 2d Sess. 3-4, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 406-07; see *supra* note 8.

116. 7 U.S.C. § 499e(c)(1) (1988).

dens on the commerce of perishable agricultural commodities caused by financing arrangements which promote payment to third parties ahead of produce sellers. Congress enacted the PACA trust provisions to remedy these obstructions to trade,¹¹⁷ and an injunction to restrain dissipation of trust assets would clearly foster the achievement of the goal of prompt payment to produce sellers.

By meeting these four requirements, the PACA claimant is entitled to preliminary injunctive relief. The produce buyer will then be prevented from dissipating assets to any third party until the unpaid seller is paid in full¹¹⁸ and is required to remit payment to the seller if he holds sufficient assets to do so.

There has been a difference in viewpoint as to what specific form an injunction should take. A number of courts have directed the buyer to deposit trust assets into an account in the court's registry, or a separate trust bank account that is subject to control by the court.¹¹⁹ Others have viewed their authority as limited to ordering the defendant not to dissipate trust assets¹²⁰ or in other words, not to do what he was already prohibited by law from doing. Presumably, the added threat of a citation for contempt will protect the seller. If such an order is disregarded, and there are not funds available

117. *Id.*; H.R. REP. NO. 543, 98th Cong., 2d Sess. 1-4, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 405-07.

118. In *Finest Fruits, Inc. v. Korean Produce Corp.*, No. 87-6579 (S.D.N.Y. Oct. 2, 1987) (LEXIS, Genfed library, Dist. file), the court found that defendant's use of an escrow account holding a sum exceeding the amount owed to the unpaid seller did not afford proper protection of PACA trust assets because the defendant-buyer could still dissipate this sum through payments made to third party creditors. Because the PACA trust was intended to prevent such dissipation, the court granted injunctive relief, noting that "PACA . . . contemplates a trust in which the full amount of debt is guaranteed to be held for the full term of the debt." *Id.*

119. *JSG Trading Corp. v. Tray-Wrap, Inc.*, No. 89-5724 (S.D.N.Y. Sept. 25, 1989) (LEXIS, Genfed library, Dist. file); *J. R. Brooks & Son, Inc. v. Norman's Country Mkt., Inc.*, 98 Bankr. 47, 50-51 (Bankr. N.D. Fla. 1989); *DeBruyn Produce Co. v. Olympia Produce Co.*, 734 F. Supp. 483, 486 (N.D. Ga. 1989). See also *Frio Ice, S.A. v. Sunfruit, Inc.*, 724 F. Supp. 1373, 1376 n.4 (S.D. Fla. 1989); see also *supra* note 47 and accompanying text.

120. *Fresh W. Mktg. v. M & L Food Center, Inc.*, 707 F. Supp. 515, 516 (S.D. Fla. 1989); *DeBruyn Produce Co. v. Victor Foods, Inc.*, 674 F. Supp. 1405, 1409 (E.D. Mo. 1987).

to satisfy trust claims or a contempt citation, the trust beneficiary will have cold comfort indeed.

E. The Amount of Recovery

The PACA claimant may collect the full amount of the value of all produce sold, if he has properly and timely filed the required notices,¹²¹ and if the produce buyer holds sufficient assets subject to the trust¹²² to satisfy the trust claims. If the produce buyer does not possess sufficient assets to satisfy the valid claims of the PACA trust beneficiary, all of the produce-related assets held may be transferred to the beneficiary since all produce-related assets are subject to the trust. In this case, no non-PACA creditors, secured or unsecured, will receive any assets, except to the extent assets may be shown to be outside the *res* of the trust, because valid PACA claims must be satisfied in full before distribution of assets to non-PACA creditors may occur.¹²³

There will be many occasions when a produce buyer, however, has not paid several sellers, and the dollar sum of their PACA claims is greater than the value of the buyer's produce-related proceeds or inventories. It must be remembered that many trust creditors will likely have filed the required notice of intent to preserve trust benefits, but only a few might bring actions in court seeking payment. Thus, the question has arisen regarding the manner of distribution of the buyer-trustee's assets. Typically, two ways of distributing the debtor's assets are used: (1) distribution on a pro rata basis

121. See *supra* notes 52-74 and accompanying text.

122. Perishable agricultural commodities sold, 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 are subject to PACA trust obligations imposed by the 1984 amendments. 7 U.S.C. § 499e(c)(2) (1988). As discussed in Section IV, *infra*, there may be allowances for payments made by the produce buyers to third parties who lacked knowledge of the character of the trust funds received. See *Forestwood Farm, Inc. v. Tanner (In re Tanner)*, 77 Bankr. 897, 900-01 (Bankr. N.D. Ala. 1987). Some of these deductions are contemplated in the regulations. 7 C.F.R. § 46.46(f)(4) (1990). Ordinary operating expenses, e.g., electricity, are to be paid before a PACA trust beneficiary may claim trust assets: "The amount claimable against the trust by a beneficiary or grower will be the net amount due after allowable deductions of contemplated expenses or advances made in connection with the transaction by the commission merchant, dealer, or broker." *Id.*

123. See *supra* notes 13 and 31 and accompanying text.

among all timely and perfected PACA trust beneficiaries, and (2) distribution to those creditors who are first to bring court actions.

The pro rata distribution arrangement would allow all PACA creditors to share the debtor's assets proportionally, in relation to the amounts of their claims. The Department has suggested the manner by which a debtor's assets should be distributed to PACA creditors, and the force of this suggestion depends in part on the formality of the action:

Where USDA may become involved, an informal distribution would be made on a *pro rata* basis to beneficiaries who have protected their rights to trust benefits. Where a court is involved, USDA would recommend to the court that the available trust assets be distributed on a *pro rata* basis to all beneficiaries who have protected their right to trust benefits.¹²⁴

Such a scheme raises several practical problems. All PACA creditors may not be able to receive payment because they may not be notified of the action. Unless the PACA action is in class action form, a court will not undertake to seek all PACA claimants so that they may share in the distribution. Additionally, a pro rata distribution may discourage creditors from initiating a court action. A PACA creditor may be hesitant to incur legal fees and court costs if he knows his recovery will be reduced by the claims of the other PACA creditors. In the meantime, while the PACA creditors wait for the Secretary or another creditor to file, trust assets are dissipated by the produce buyers.

In contrast, the "first-in-time" distribution rule, favoring the first to file a complaint, rewards the PACA creditor who is diligent. Under this rule, the PACA claimant who files and thereby incurs attorneys' fees and costs would be given the fruits of his pursuit, without being required to share the award with PACA trust beneficiaries who did not share the expense of attorneys' fees and costs.

124. 49 Fed. Reg. 45,735-36 (1984); *accord* McLean Cattle Co. v. Culton, Morgan, Britain & White (*In re* Harmon), 11 Bankr. 162, 164 (Bankr. N.D. Tex. 1980) (P&SA case); Allied Grocers Coop. v. United Fruit & Produce Co. (*In re* United Fruit & Produce Co.), 86 Bankr. 14, 16 (Bankr. D. Conn. 1988).

On the other hand, it is clear that each trust beneficiary has a right to claim the PACA trust proceeds:

PACA establishes a trust for the benefit of *all* unpaid suppliers or sellers of perishable agricultural commodities or agents involved in the transaction which, if properly perfected, exists "until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers or agents."¹²⁵

As noted, where the trust proceeds are inadequate to satisfy all the qualified trust claims, the statute does not expressly provide how the assets are to be divided. However, the legislative history of PACA strongly suggests that the claimants should share.¹²⁶

The Department is expressly authorized to take action to prevent and restrain dissipation of the trust.¹²⁷ Congress stated that it was granting this authority to the Secretary to "act for the benefits of unpaid *suppliers* in securing an order which will prevent the dissipation of assets that make up the floating trust."¹²⁸ It further recognized:

Suppliers of produce cannot protect their interests because they may lack the necessary information and are usually many miles away. . . . [T]he trust requirement would be granted virtually unenforceable without the authority to act on behalf of produce *suppliers* to freeze a receiver's trust assets until the produce *creditors* have been apprised of the situation and have had opportunity to protect their interests.¹²⁹

Further, Congress expressly intended, "[i]f an investigation reveals the trust is being dissipated, *each unpaid supplier-seller should be informed* so that it will be able to protect its statu-

125. *In re* W. L. Bradley Co., 78 Bankr. 92, 92-93 (Bankr. E.D. Pa. 1987) (quoting 7 U.S.C. § 499(e)(c)(2) (1988)) (emphasis added).

126. Although the legislative history does not expressly state that PACA claimants should share proceeds from the trust, it implies such sharing by suggesting the Secretary notify *all* unpaid suppliers or sellers so each may protect its statutory trust rights. H.R. REP. NO. 543, 98th Cong., 2d Sess. 8, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 411.

127. *See supra* notes 41-46 and accompanying text.

128. H.R. REP. NO. 543, 98th Cong., 2d Sess. 7, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 410 (emphasis added).

129. *Id.*, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 411 (emphasis added).

tory rights."¹³⁰

By these directions, Congress implicitly intended that all trust beneficiaries share in the trust assets on an equitable basis. As noted above, the Department has expressly stated that this should be the case.¹³¹

In construing the provisions of PACA, courts have the obligation to accord great deference to this interpretation which has been adopted by the agency charged with the daily administration of the statute.¹³² It would not only be contrary to Congress's and the Department's intentions to permit a claimant or several claimants to receive virtually all of the trust assets, it would also be inequitable. As with any trust, the PACA trust is subject to equitable principles and any disposition of trust assets is subject to the same equitable principles.¹³³ Where all parties have a beneficial right to a fund, it is inherently inequitable to permit the fund to be dissipated, without notice, by those who won the race to the courthouse.

Moreover, the rights granted to unpaid sellers of produce would be effectively eviscerated if those parties whose claims may not warrant engaging counsel and filing lawsuits are not protected. The Department is empowered and is arguably obligated to take the appropriate steps to protect all trust beneficiaries. Particular claimants should not be permitted to take advantage of the fact that the Department may not have acted to enforce the PACA provisions properly.

Initially, one court indicated *in dictum* that a pro rata distribution is appropriate. In *In re United Fruit and Produce Co.*,¹³⁴ the court cited favorably to the Department's comment set forth above. In addition, the court noted that the opposing party advanced no argument why a distribution other than on a pro rata basis should prevail, although it issued no ruling on the issue at the time.¹³⁵

130. *Id.* at 8, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 411 (emphasis added).

131. *See supra* note 124 and accompanying text.

132. *Talley v. Mathews*, 550 F.2d 911, 919 (4th Cir. 1977) (citing *Udall v. Tallman*, 380 U.S. 1 (1965); *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356 (1973)).

133. *Air Transp. Ass'n of Am. v. PATCO (In re PATCO)*, 26 Bankr. 337 (Bankr. D.D.C. 1982), *aff'd*, 724 F.2d 205 (D.C. Cir. 1984).

134. 86 Bankr. 14 (Bankr. D. Conn. 1988).

135. *Id.* at 16-17.

Now, several courts have squarely addressed the question. Initially, in *Finest Fruits, Inc. v. Korean Produce Corp.*,¹³⁶ the court considered the Department's views at the time it published the implementing regulations,¹³⁷ as well as an affidavit from the Chief of the PACA Branch. The affidavit suggested that, in enacting PACA, Congress intended that there be a pro rata distribution of trust assets to those suppliers who file valid claims.¹³⁸ The court concluded that:

[T]he legislative intent behind the PACA trust regulations was that trust assets be distributed on a pro rata basis between those suppliers who file valid claims. . . . [T]his interpretation rests more soundly with the purpose of the trust: to protect all unpaid sellers or suppliers of agricultural commodities. A race to the courthouse or the winner take all does not seem to accord with this purpose.¹³⁹

Subsequently, several courts have had occasion to address this issue. They have uniformly, and without much discussion, recognized that a pro rata distribution is required.¹⁴⁰ The rule now seems to be settled.

While pro rata distribution seems to be the only equitable solution, the mechanics for resolving the practical problems raised above have not been settled. A solution to the "free rider" problem is suggested above.¹⁴¹ The notice problem may be resolved simply by direction of the court to the moving party, whether a private claimant or the Department, that all those who are listed by the Department as having properly submitted trust notices be given notice of the action. Alternatively, the court may require a more formal procedure such as the trustee's bringing an interpleader action or the moving claimant's bringing a third party declaratory action or a plaintiffs' class action. Then, the remaining claimants who wish to

136. No. 87-6579 (S.D.N.Y. Sept. 5, 1988) (LEXIS, Genfed library, Dist. file).

137. See *supra* note 124 and accompanying text.

138. *Finest Fruits, Inc. v. Korean Produce Corp.*, No. 87-6579 (S.D.N.Y. Sept. 5, 1988) (LEXIS, Genfed library, Dist. file).

139. *Id.*

140. *C. H. Robinson Co. v. B. H. Produce Co.*, F. Supp. 785, 795 (N.D. Ga. 1989); *J. R. Brooks & Son, Inc. v. Norman's Country Mkt., Inc.*, 98 Bankr. 47, 51 (Bankr. N.D. Fla. 1989).

141. See *supra* notes 50-51 and accompanying text.

assert their rights can either answer, intervene, or file a proof of claim.

If the court will give due deference to the Department of Agriculture's determination of qualified claims, then the remaining claimants can either try to contest the amount tabulated as qualified and unpaid or not contest the Department's determination. In the event that one claimant wishes to contest the Department's determination as to the amount qualified, but unpaid, for others, it would do so, presumably at its own expense. If the court does not accept the Department's determinations, then each claimant will have to prove its entitlement to a share of trust funds.

IV. RECOVERY FROM THIRD PARTY PAYEES

PACA trust beneficiaries can seek to recover trust assets in the hands of certain third parties to whom produce buyers have dissipated PACA trust funds. Congress did not intend, however, to give PACA trust beneficiaries an independent cause of action against third party payees "like the corner grocery store, the telephone company, or the United States as payee of income taxes," who received trust assets from a PACA trustee in the ordinary course of business.¹⁴² Should the produce buyer-trustee breach his fiduciary duty by dissipating trust assets, the seller's first remedy is against the produce buyer-trustee.¹⁴³

It may be that the buyer-trustee will be insolvent and unable to fulfill its trust obligations to the seller. Further, a financial institution will commonly have taken as collateral for a loan a security interest in the buyer's inventories, receivables, and proceeds from the sale of produce, and therefore will have a blanket security interest in all potential assets of the floating trust. This is precisely the scenario which the PACA trust provisions were intended to address.¹⁴⁴

142. *Forestwood Farm, Inc. v. Tanner (In re Tanner)*, 77 Bankr. 897, 900-01 (Bankr. N.D. Ala. 1987).

143. *Id.* at 901 n.9. See also *supra* note 17 and accompanying text.

144. *In re Tanner*, 77 Bankr. at 901 n.9. In footnote 9 of the *Tanner* opinion, the court discusses *First State Bank v. Gotham Provision Co. (In re Gotham Provision Co.)*, 669 F.2d 1000 (5th Cir.), *cert. denied*, 459 U.S. 858 (1982), a P&SA case wherein a lending institution held a blanket security interest in all potential assets of the floating trust.

In *In re Tanner*.¹⁴⁵ the court did not permit a PACA trust beneficiary to trace funds into the hands of third party payees merely described as the produce buyer's creditors "who received the funds in payment of antecedent debts for goods or services" in the ordinary course of business. The court announced a method of identifying those third party payees from whom a PACA claimant may recover trust funds:

Put simply, this Court does not believe the PACA authorizes trust beneficiaries to trace trust funds into the hands of third parties who 1) had no knowledge of the character of the funds received and 2) who received monies for the payment of antecedent debts for services or goods.¹⁴⁶

To illustrate its interpretation, the court discussed three cases brought under the P&SA, the template for the PACA trust provisions.¹⁴⁷

In the first case, *In re Harmon*,¹⁴⁸ a supplier of livestock was allowed to recover trust funds which had been paid to a third party law firm. The supplier recovered from the third party that portion of an advance retainer which had not yet been earned. The firm was held to have knowledge, upon researching the case for its client (the eventual debtor in bankruptcy), that the funds it had received were burdened by the statutory trust obligations of the client.¹⁴⁹ The retainer was therefore held subject to the P&SA trust. The firm was, however, able to keep that portion of the retainer which it had lawfully earned, that is, the value of antecedent services it had rendered prior to having knowledge that the retainer was im-

145. 77 Bankr. 897 (Bankr. N.D. Ala. 1987).

146. *Id.* at 899-00.

147. The trust provisions of the P&SA serve as a model for those of PACA, and courts look to precedents established under the P&SA for guidance when interpreting the trust provisions of PACA. *In re Fresh Approach, Inc.*, 48 Bankr. 926, 931 (Bankr. N.D. Tex. 1985); *see also supra* note 17.

148. 11 Bankr. 162 (Bankr. N.D. Tex. 1980)

149. *Id.* at 166-67. The attorney of the third party law firm had previously represented meat packers in cases under the P&SA and was cognizant of the implications of the trust provisions of that Act. The court held that upon learning that the client of the law firm had bought livestock from a seller but had not yet paid for the livestock, the attorney then received knowledge of the character of the funds received as assets subject to a valid P&SA trust. At that point, he could no longer be viewed as a *bona fide* purchaser of goods or renderer of services.

pressed with a statutory trust obligation.¹⁵⁰

In *In re Gotham Provision Co.*,¹⁵¹ the second case, the court held that a trust beneficiary under the P&SA could force a bank, a secured lending institution, to disgorge funds it had received from a meat packer's accounts receivable line in which it held a perfected security interest.¹⁵² In satisfaction of the loan owed by the packer, the bank had been collecting all of the receivables and trust assets of the packer. Arrangements such as this were deemed to be in contravention of the intent of the statutory trust provisions of the P&SA.¹⁵³ In the factual setting of *Gotham*, the bank had knowledge of the character of the funds which it received and had not rendered any antecedent services for which a debt was owed. The unpaid seller could therefore obtain trust funds from the bank.¹⁵⁴

In the third case under the P&SA, *In re G & L Packing Co.*,¹⁵⁵ the court held that a livestock seller could recover trust assets in the hands of the buyer's lending institution.¹⁵⁶ As in

150. *Id.* at 167.

151. 669 F.2d 1000 (5th Cir.), *cert. denied*, 459 U.S. 858 (1982).

152. "Where the packer has given a lender a security interest in inventories or receivables that are subject to the [P&SA statutory] trust, the unpaid cash sellers have priority over those assets and may recover the proceeds of those receivables to the extent of the outstanding balance on the cash sales." *Id.* at 1010.

153. By analogy, the principles apply to trusts under PACA, and financing arrangements which delay or obstruct payment to unpaid produce sellers are therefore likely to be found in contravention of the purposes of the PACA amendments. *See supra* note 17.

154. The unpaid seller could collect from the bank because "Congress carved out an exception to the normal commercial laws and established a statutory trust which would prime secured lenders until the suppliers were paid in full." *Forestwood Farm, Inc. v. Tanner (In re Tanner)*, 77 Bankr. 897, 901 n.9 (Bankr. N.D. Ala. 1987) (discussing the operation of the P&SA, and, by analogy, the PACA trust provisions).

155. 41 Bankr. 903 (N.D.N.Y. 1984).

156. "Proceeds from livestock sales which are collected by a packer's creditor and applied against the principal amount of the packer's debt are considered part of that 'floating pool,' and are subject to recovery by the livestock seller." *Id.* at 915 (citing *First State Bank v. Gotham Provision Co. (In re Gotham Provision Co.)*, 1 Bankr. 255, 261 (Bankr. S.D. Fla. 1979), *aff'd*, 669 F.2d 1000 (5th Cir. 1982), *cert. denied*, 459 U.S. 858 (1982)). The bank is thus required to "return to the [livestock sellers,] from the payments on the accounts receivable which were applied to reduce the balance of the Bank's loan to [the debtor,] the amount necessary to compensate the [livestock sellers] in full for their cash sales to [the debtor]." *Bast v. Orange Meat Packing Co. (In re G & L Packing Co.)*, 41 Bankr. 903, 915 (N.D.N.Y. 1984) (citing *In re Gotham Provision Co.*, 669 F.2d at 1009-10).

Gotham,¹⁵⁷ the buyer was financed by a line of credit extended to it by a bank, and for collateral, the bank was given a blanket security interest in the present and future inventories, accounts receivable, and contract rights of the buyer.¹⁵⁸

The court in *G & L* reached the same result as *Harmon* and *Gotham*, without expressly addressing the question of the third party's knowledge of the character of the funds received. Instead, the court in *G & L* intimated that it is the character of the funds themselves, not necessarily the third party's knowledge of the character of those funds, which allows the unpaid seller to recover his trust benefits.¹⁵⁹ By addressing the issue in terms of the nature of the trust assets while remaining silent on the issue of the bank's knowledge of their characteristics,¹⁶⁰ the court in *G & L* advanced an alternative approach to identifying those third party payees who must disgorge PACA trust assets for the benefit of unpaid produce sellers, although decisions under PACA have not pursued this approach.¹⁶¹

It now appears that more cases under PACA against third party payees, particularly secured lenders, are reaching the courts. Recently, in *C. H. Robinson Co. v. B. H. Produce Co.*,¹⁶² the three cases cited above were discussed and synthesized to establish a standard for recovery against secured lenders who may have received PACA trust assets. The court adopted a two-pronged standard under which it would allow an unpaid PACA claimant to recover funds paid to a third-party bank to the extent that the bank either had actual

157. *In re Gotham Provision Co.*, 669 F.2d at 1000.

158. *In re G & L Packing Co.*, 41 Bankr. at 906.

159. The creditor-supplier asked the court to order the third party lending institution to remit the balance of trust assets which could not be collected from the produce buyer due to dissipation. Although the produce buyer could not make payment to the creditor-supplier, the bank held sufficient funds to satisfy the obligation of the buyer because it had collected much of the buyer's accounts receivable. The court held: "This relief must also be granted. The mere mechanical act of collection and application of the Debtor's accounts receivable to an outstanding loan owing from the Debtor does not remove the *statutory trust 'res' identity* of those funds." *Bast v. Orange Meat Packing Co. (In re G & L Packing Co.)*, 20 Bankr. 789, 809 (Bankr. N.D.N.Y. 1982), *aff'd*, 41 Bankr. 903 (N.D.N.Y. 1984) (emphasis added).

160. *Id.*

161. *Forestwood Farm, Inc. v. Tanner (In re Tanner)*, 77 Bankr. 897 (Bankr. N.D. Ala. 1987).

162. 723 F. Supp. 785 (N.D. Ga. 1989).

knowledge of the trust or had a security interest in the trust assets.¹⁶³

With regard to the “knowledge” requirement, the court recognized that a bank is deemed to have constructive knowledge of a trust created by a federal statute. Even so, it said that constructive notice should not be imputed to a recipient of money unless there are circumstances such that the person should know that the money was derived from the sale of trust property. Further, the court said that not all commodities sold by a licensee will be under trust; therefore, it is insufficient to impute knowledge of a trust where there is no security interest. Rather, if, from facts known to the bank about the affairs of its customers, there is a high probability that all or part of the funds must have come from the proceeds of the sales of property in which a trust was perfected, then the burden will be shifted to the bank to demonstrate the existence of sufficient non-encumbered cash sources before it can retain the money payments.¹⁶⁴

With regard to the “security interest” requirement, the court held that, if the lender was secured by accounts receivable and inventories, the trust claimants are entitled to recover payments made to the bank. The court’s reasoning was that such assets will almost always contain some trust assets. Further, the court seemed to say that, once this test is satisfied, then payments from cash accounts are subject to trust claims, although the defendant can show that certain assets were not subject to the trust.¹⁶⁵

Somewhat paradoxically, the court indicated, in dicta, that it would not have allowed the plaintiff to recover funds paid to banks based on the fact that the lender had a security interest in cash accounts as opposed to accounts receivable in inventory. Its reasoning was that there is a probability that there are sources of funds for cash accounts other than the proceeds of the sale of perishable agricultural commodities.¹⁶⁶

163. *Id.* at 793. One other court has now followed this standard. *In re Richmond Produce Co.*, 112 Bankr. 364, 377-78 (Bankr. N.D. Cal. 1990).

164. *Id.* C.H. Robinson Co. v. B.H. Produce Co., 723 F. Supp. 483 (N.D. Ga. 1989).

165. *Id.* at 794.

166. *Id.* at 794 n. 4.

Perhaps a different conclusion would be reached where the buyer's business consisted primarily of the sale of perishable agricultural commodities.

V. STANDARDS USED BY COURTS TO REACH THIRD PARTIES

In *In re Tanner*,¹⁶⁷ the court required that a third party payee have knowledge of the character of the funds it received¹⁶⁸—knowledge that the monies it received from the buyer-trustee were subject to a PACA trust—before the court would force it to disgorge trust assets. Language used by the courts in the reported third party trust disgorgement decisions under PACA and under P&SA indicates that the amount of requisite knowledge may vary, and the means of obtaining this knowledge may also differ.¹⁶⁹

A. No Knowledge of the Character of the Funds Received

The court in *G & L*,¹⁷⁰ suggested that the third party payee need have no knowledge about the particular funds which it receives in order for the funds to be subject to the claims of a P&SA livestock seller. In *C. H. Robinson*,¹⁷¹ one of the prongs of the standard that was adopted permits recovery, regardless of the lender's knowledge, if it had a security interest in accounts receivable or inventories. The third party is presumed to have constructive knowledge of the trust because the trust is created by federal statute.¹⁷² The trust assets, because of their "floating" character, have thus been recognized as recoverable from third party payees, without re-

167. *Forestwood Farm, Inc. v. Tanner (In re Tanner)*, 77 Bankr. 897 (Bankr. N.D. Ala. 1987).

168. *Id.* at 901 n.9.

169. See *First State Bank v. Gotham Provision Co. (In re Gotham Provision Co.)*, 669 F.2d 1000 (5th Cir.), cert. denied, 459 U.S. 858 (1982); *Bast v. Orange Meat Packing Co. (In re G & L Packing Co.)*, 41 Bankr. 903 (N.D.N.Y. 1984); *In re Tanner*, 77 Bankr. at 897; *McLean Cattle Co. v. Culton, Morgan, Britain & White (In re Harmon)*, 11 Bankr. 162 (Bankr. N.D. Tex. 1980).

170. 41 Bankr. 903 (N.D.N.Y. 1984).

171. 723 F. Supp. 785 (N.D. Ga. 1989).

172. *C. H. Robinson Co.*, 723 F. Supp. at 793; *First State Bank v. Gotham Provision Co. (In re Gotham Provision Co.)*, 1 Bankr. 255, 261 (Bankr. S.D. Fla. 1979), *aff'd*, 669 F.2d 1000 (5th Cir.), cert. denied, 459 U.S. 858 (1982).

gard to the actual degree of knowledge by the third party of the trust character of the assets.¹⁷³

Such an interpretation, as applied to the PACA trust provisions,¹⁷⁴ would provide the most protection possible to sellers. Under this approach,¹⁷⁵ a seller need only prove that he sold perishable agricultural commodities to a buyer; that he notified the buyer and the Department; and that the buyer dissipated the trust assets to a third party. Regardless of whether the third party payee was a *bona fide* purchaser without knowledge of the character of the funds, the third party may be compelled to return trust assets to the unpaid seller.¹⁷⁶

B. Knowledge of the Character of the Funds Received

The interpretation adopted by the courts in *Tanner* and in the alternative test set forth in *C. H. Robinson* would require convincing proof that the third party payee did in fact have full knowledge that the funds it received were burdened by the PACA statutory trust,¹⁷⁷ and constructive knowledge would not satisfy this requirement. This view harmonizes with common law trust principles: “[w]here a trustee transfers trust property in breach of trust, and the transferee when he receives the transfer has notice of the breach of trust, the interests of the beneficiaries are not cut off.”¹⁷⁸ The buyer of perishable goods, by transferring the assets or proceeds from the sale thereof which he is statutorily required to maintain in trust,¹⁷⁹ has breached the trust and has violated PACA.¹⁸⁰ Further, the beneficiary of the trust may compel the transferee

173. *In re G & L Packing Co.*, 41 Bankr. at 915. Additionally, if accounts receivable subject to a PACA trust obligation (by virtue of having been commingled with other trust assets) are sold by a produce buyer to a third party, e.g., a lending institution, those “trust assets are subject to recall for payment to unpaid produce sellers” because “the purchaser of accounts receivable is not a trust beneficiary” and is not entitled to assets rightfully belonging to a valid PACA claimant. 49 Fed. Reg. 45,735 (1984).

174. *See supra* note 13.

175. This discussion assumes that the seller has timely perfected his valid trust claims under PACA. 7 U.S.C. § 499e(c)(3) (1988); 7 C.F.R. § 46.46(g) (1990).

176. *See In re G & L Packing Co.*, 41 Bankr. at 915.

177. *Forestwood Farm, Inc. v. Tanner (In re Tanner)*, 77 Bankr. 897, 901 n.9 (Bankr. N.D. Ala. 1987); *C. H. Robinson Co. v. B. H. Produce Co.*, 723 F. Supp. 785, 793 (N.D. Ga. 1989).

178. 4 A. SCOTT & W. FRATCHER, *THE LAW OF TRUSTS* § 288 (4th ed. 1989).

179. 7 U.S.C. § 499e(c)(2) (1988).

180. 7 C.F.R. § 46.46(e)(1) (1989).

who has notice to restore the trust property to the trust; pay its value; or, if he has disposed of it, to surrender the proceeds.¹⁸¹ These principles would require the transferee to have notice as to the character of the assets transferred before he would be liable to the unpaid seller for the value of the trust assets.¹⁸²

This approach, however, may limit the protection given to produce sellers under PACA. For example, if a buyer of produce is able to dissipate trust assets freely to third party payees who do not have the requisite degree of knowledge of the character of the funds to subject the transferred funds to a trust obligation, he could pay monies to satisfy debts to his creditors, including lending institutions, until he became insolvent. In this manner, a produce supplier or seller who has valid and timely perfected PACA trust claims would be able to recover no money whatsoever. The trust provision amendments of PACA, which were designed "to create a *priority* status for unpaid produce claimants,"¹⁸³ would thereby be effectively nullified.¹⁸⁴ It is clear that Congress did not intend for the trust provisions to be bypassed in this fashion.¹⁸⁵ In enacting legislation to protect the interests of produce sellers¹⁸⁶ by facilitating prompt payments for goods received,

181. 4 A. SCOTT & W. FRATCHER, *supra* note 178, § 291.4.

182. C. H. Robinson Produce Co. v. B. H. Produce Co., 723 F. Supp. 785, 793 (N.D. Ga. 1989); Forestwood Farm, Inc. v. Tanner (*In re Tanner*), 77 Bankr. 897, 901 n.9 (Bankr. N.A. Ala. 1987).

183. *In re Fresh Approach, Inc.*, 51 Bankr. 412, 420 (Bankr. N.D. Tex. 1985) (emphasis in original). This priority status was intended by Congress to subordinate "even the administrative claims which normally stand first in line in a bankruptcy distribution." *Id.*

184. "To approve a plan which grants anything but such a priority would be in direct contravention of the purpose and intent of the PACA amendments. It must be remembered that PACA was not enacted to protect those in Debtor's shoes, but rather to prevent" commercial disruption and resulting inefficiencies in the perishable agricultural commodities industry. *Id.*

185. Congress intended to remedy the difficulties caused by the recent and "substantial increase in instances where commission merchants, dealers or brokers have failed to pay for perishable agricultural commodities received by them or have been slow in making payment therefor." H.R. REP. NO. 543, 98th Cong., 2d Sess. 3, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 406. The amendments were intended to "give the industry and Department [of Agriculture] effective new tools to overcome the payment problems." *Id.* at 4, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 407.

186. The PACA trusts provisions intend to protect *all* participants in the chain of

Congress believed that the PACA trust also contemplated benefits to all parties involved, including buyers and lending institutions.¹⁸⁷

A court may analyze the issue of who is a reachable third party under one of the above approaches. In other words a court could either require knowledge of the character of the funds before disgorgement from a third party is permitted or not require any knowledge of the character of the funds because it is their character and not the knowledge thereof which effectively implements the PACA trust provisions. Thus, depending upon the analysis undertaken, PACA cases with similar fact patterns may produce inconsistent results as to the third party payees from which recovery may be obtained. The latter would seem to represent the better view as it would materially further Congress's primary intent in enacting the 1984 PACA amendments to aid unpaid sellers. It may well be some time before a consistent rule develops.¹⁸⁸

C. Lending Institutions as Third Party Payees

Like the debtors under the P&SA in *Gotham*¹⁸⁹ and *G & L*,¹⁹⁰ most produce buyers involved in PACA claims are either in financial difficulty or insolvent, and have undertaken a lending program with a financial institution. Such a third party payee will be the proverbial "deep pocket," insofar as it receives the largest portion of the debtor's liquid assets. Courts have therefore been faced with the decision of whether

sale of perishable agricultural commodities, not solely farmers. Growers, dealers, brokers, shippers, and agents of these goods are eligible for the trust benefits if they perfect their interests properly. 7 C.F.R. § 46.46(m)-(q) (1990).

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

H.R. REP. NO. 543, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 407.

188. Both sides have noted appeals from the *C. H. Robinson* decision.

189. *First State Bank v. Gotham Provision Co.* (*In re Gotham Provision Co.*), 1 Bankr. 255, 261 (Bankr. S.D. Fla. 1979), *aff'd*, 669 F.2d 1000 (5th Cir.), *cert. denied*, 459 U.S. 858 (1982).

190. *Blast v. Orange Meat Packing Co.* (*In re G & L Packing Co.*), 41 Bankr. 903 (N.D.N.Y. 1984).

to allow an unpaid produce seller to reach the floating trust assets in the hands of a lending institution which has been given as collateral a blanket security interest in all the potential trust assets of the buyer, including accounts receivable.

The very nature of the collateral for such a loan—accounts receivable for sales of perishable agricultural commodities—should be construed as giving the lending institution constructive knowledge that those assets of the buyer are subject to PACA trust obligations. In *C. H. Robinson*, just such a rule was adopted.¹⁹¹ Most PACA cases will therefore involve fact situations which satisfy both the “character of the funds themselves” test and the “knowledge of the character of the funds” test. There is no case authority suggesting that unpaid produce sellers with valid and timely perfected PACA trust claims will not recover from third party lending institutions, at least to some degree. Indeed, one court, in dicta, indicated that recovery would be automatic if a valid PACA trust exists.¹⁹²

VI. THE EFFECT ON LENDING INSTITUTIONS OF THE PACA TRUST PROVISIONS

Produce buyers in financial difficulty frequently apply for working capital loans. Lending institutions, as a general practice, will inquire into the existence of liens held by other creditors against the assets of the prospective borrower. Upon finding a borrower's financial and lien status acceptable, banks may approve a working capital loan and file the appropriate general liens.

Banks, however, are gradually becoming aware of the statutory trust imposed by the 1984 PACA amendments. Many lending institutions which have given working capital loans to produce buyers believe that such loans are safe because they involve transactions secured by properly executed and filed liens on the buyer's assets. Under the impression that the borrower's produce, inventories, accounts receivable, and proceeds from the sales thereof are unencumbered, the banks take this blanket security interest in the assets of the

191. See *supra* note 13 and accompanying text.

192. *Hull Co. v. Hauser Foods*, 721 F. Supp. 224, 224-25 (D. Minn. 1989).

buyer as collateral for the loan.¹⁹³ Banks are now finding, however, as claims are decided by the courts, that a substantial portion of a produce buyer's assets are subject to the legitimate trust claims of PACA produce sellers.¹⁹⁴ While the banks have taken, as collateral, a blanket security interest in what they believed to be the assets owned by the buyer, these assets are actually the potential assets of the floating trust.¹⁹⁵ The banks' security interest may be defeated by valid and timely perfected PACA claims. Only after all of the PACA claimants are paid in full from the trust assets, as mandated by the PACA trust provisions,¹⁹⁶ can the secured claims of lending institutions against those assets be satisfied.

Even the recent "clear title" provisions of the Food Security Act of 1985,¹⁹⁷ which protect purchasers of farm products from liens held by the creditors of the sellers, should not provide the lending institution with the ability to satisfy its claims against a seller until all of the PACA claimants are paid in full from the trust assets. Under the U.C.C., a buyer in ordinary course of business¹⁹⁸ generally takes purchased goods free of any security interest. In other words, the buyer is granted clear title to the goods.¹⁹⁹ However, there is an exception for "person[s] buying farm products from a person en-

193. The blanket security interest is a floating lien on the buyer-debtor's property. See U.C.C. § 9-205 (1977).

194. All of the buyer's produce-related assets are subject to the PACA trust to the extent of the amounts of the valid and timely perfected claims of PACA trust beneficiaries. 7 C.F.R. § 46.46(c) (1990).

195. *First State Bank v. Gotham Provision Co.* (*In re Gotham Provision Co.*), 1 Bankr. 255, 261 (Bankr. S.D. Fla. 1979), *aff'd*, 669 F.2d 1000 (5th Cir.), *cert. denied*, 459 U.S. 858 (1982); *Bast v. Orange Meat Packing Co.* (*In re G & L Packing Co.*), 41 Bankr. 903 (N.D.N.Y. 1984). See *supra* note 116 and accompanying text. Banks also may have a security interest in the produce buyer's building, given as collateral for a loan, but an interest in a non-produce related asset is not subject to the valid claims of PACA trust beneficiaries. See 7 U.S.C. § 499e(c)(2) (1988) (creating a trust in produce only); see also *supra* note 95.

196. 7 U.S.C. § 499e(c)(2) (1988).

197. 7 U.S.C. § 1631 (1988). See also 9 C.F.R. § 205 (1990).

198. "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker." U.C.C. § 1-201(9)(1977).

199. U.C.C. § 9-307(1)(1977).

gaged in farming operations."²⁰⁰ Thus, buyers of agricultural commodities may not be granted clear title under the U.C.C.

Subsequent to the 1984 enactment of the PACA trust provisions, Congress preempted this farm products exception of the U.C.C. as part of the Food Security Act of 1985.²⁰¹ Now, Title VII of this Act, section 1631(d) of Title 7 of the United States Code provides:

[Subject to certain exceptions], notwithstanding any other provision of Federal, State, or local law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest.²⁰²

The primary purposes of this provision are to protect purchasers of farm products from the risk of double liability²⁰³ and to relieve interstate commerce of the burden and obstruction caused by the buyer's exposure to double payment which inhibits the free flow of trade.²⁰⁴ Prior to enactment of the "clear title" provisions, if a seller of farm products gave such goods as collateral on a loan, a buyer in ordinary course of business was not granted clear title to the goods and could be required to pay both the seller of the farm products and the secured party lending institution, for the collateral or its value. By preempting the U.C.C., Congress has given the buyer of farm products clear title in the purchased goods.

These "clear title" provisions arguably run directly against a PACA claimant's interests in maintaining its trust claim against produce (and its proceeds) which was offered by the buyer to secure a working capital loan from a lending institution. If the buyer takes clear title to produce, it could be claimed that there is also clear title to the proceeds from the

200. *Id.* Goods are classified as "farm products" if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states . . . and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. U.C.C. § 9-109(3) (1977).

201. Food Security Act of 1985, Pub. L. No. 99-198, § 1324, 99 Stat. 1535-1540 (codified at 7 U.S.C. § 1631 (1988)).

202. 7 U.S.C. § 1631(d) (1988).

203. 7 U.S.C. § 1631(a)(2), (a)(3) (1988).

204. 7 U.S.C. § 1631(a)(3), (a)(4) (1988).

sale of the produce. The question thus arises whether these provisions affect the PACA trust provisions in such a way that a PACA claimant will no longer be able to reach the lending institution as a third party recipient of trust assets.

To date, there have been no cases dealing with the effect of the Food Security Act of 1985 on the 1984 PACA trust provisions or on the analogous P&SA trust provisions. The Department has not issued any legal opinion on the question and the legislative history does not speak to the issue.²⁰⁵ Despite the lack of any explanation of the Act's effect on the PACA statutory trust, it would appear from the case law and legislative history of both the PACA amendments and the analogous P&SA provisions that a court would uphold the PACA claimant's right to reach a third party lending institution to retrieve trust assets.²⁰⁶

The courts have consistently held that the buyer-debtor of perishable agricultural commodities holds only legal title in these goods, the corpus of the secured PACA trust, and they are not property of the debtor's estate.²⁰⁷ Therefore, unlike a security interest, the PACA provisions create a statutorily imposed, floating trust on the perishable goods which follows the goods with each qualifying sale and prevents the creditors of an insolvent buyer from establishing these assets as part of the debtor's estate to which secured creditors would have priority.

The statute granting clear title to buyers of farm products relieves the buyer of liens based on security interests.²⁰⁸ The PACA trust is not such a security interest. As a trust, the buyer of perishable agricultural commodities holds the property for the benefit of PACA claimants until full payment for the goods has been made. Thus, the buyer-debtor holds only

205. See H.R. REP. NO. 271, 99th Cong., 1st Sess. 108-10, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 1103, 1212-14.

206. See *supra* notes 119-38 and accompanying text.

207. *East Coast Potats Distribs. v. Grant (In re Super Spud, Inc.)*, 77 Bankr. 930, 931 (Bankr. M.D. Fla. 1987) (citing *First State Bank v. Gotham Provision Co. (In re Gotham Provision Co.)*, 1 Bankr. 255, 261 (Bankr. S.D. Fla. 1979), *aff'd*, 669 F.2d 1000 (5th Cir.), *cert. denied*, 459 U.S. 858 (1982)). The Bankruptcy Code provides that a debtor must have legal title in property to be part of debtor's estate. 11 U.S.C. § 541(d)(1988). See also *In re Fresh Approach, Inc.* 51 Bankr. 412, 418-21 (Bankr. N.D. Tex. 1985).

208. The term "security interest" means an interest in farm products that secures payment or performance of an obligation. 7 U.S.C. § 1631(c)(7) (1988).

legal title²⁰⁹ to the goods (or its proceeds), subject to the PACA claimants' equitable interest therein, such that the secured interest of a third party bank will still be subordinate to the PACA claimants in distributing those assets.

Because the PACA amendments have created a trust provision which operates upon the sale of produce, and because claims of PACA trust beneficiaries precede those of all secured and unsecured creditors at bankruptcy proceedings,²¹⁰ approval of a working capital loan to an insolvent produce buyer should be recognized as a specialized type of lending to a specialized type of borrower. To be prudent, banks must know of existing and potential PACA trust obligations of the potential borrower.

In addition to perusing records of other existing liens, banks would be well advised now to search the records of the Department's PACA Branch to be fully informed as to a produce buyer's financial liability situation.²¹¹ The Department

209. "Legal title" is "[o]ne cognizable or enforceable in a court of law, or one which is complete and perfect so far as regards the apparent right of ownership and possession, but which carries no beneficial interest in the property, another person being equitably entitled thereto; in either case, the antithesis of 'equitable title.'" BLACK'S LAW DICTIONARY 807-08 (5th ed. 1979).

210. *In re Fresh Approach, Inc.*, 48 Bankr. 926, 931 (Bankr. N.D. Tex. 1985); *accord In re Super Spud, Inc.*, 77 Bankr. at 931.

211. This filing requirement under PACA can be likened to the requirement of perfection of a security interest in accounts under U.C.C. § 9-302(1)(e):

(1) A financing statement must be filed to perfect all security interests except the following:

...
 (e) an assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor

U.C.C. § 9-302(1)(e) (1977).

The PACA trust provisions contemplate the filing by a trust beneficiary of a notice of intent to preserve trust benefits. 7 C.F.R. § 46.46(g) (1990). The buyer-trustee will likely have transferred a significant part of its accounts, if not a blanket interest in all of its assets, to the third party lending institution.

In the same section, however, the U.C.C. implies that a PACA claimant need not follow U.C.C. guidelines to perfect its statutory trust benefits, because PACA provides for its own notice arrangement:

(3) The filing of a financing statement otherwise required by this Article is not necessary or effective to perfect a security interest in property subject to

(a) a statute or treaty of the United States which provides for a national . . . registration . . . [for example, 7 U.S.C. § 499e(c) and its implementing regulations which require notice to be given to the produce buyer and to the PACA Branch of the U.S.D.A.]

of Agriculture, however, has taken the position that copies of trust notices may be released only to the filing party or the buyer. Presumably, banks can obtain written consent from their borrowers to have the information released.

As discussed above, banks may be presumed to have constructive knowledge of the trust rights and obligations created by the federal statute.²¹² They may therefore be deemed on notice that trust obligations of produce buyers are on record at the Department. By analogy, lending institutions are aware of specialized liens on assets such as airplanes and ships, and they search Federal Aviation Administration and maritime registries to insure that they are fully apprised of a potential borrower's standing.

A significant difference exists, however, with regard to PACA trust claims. A creditor of a produce buyer-borrower may not have filed its notice of intent to claim trust proceeds at the time the loan is made. Indeed, the transaction giving rise to the trust claim may not have yet been entered into when the lending institution makes its loan and obtains its security interests. Nevertheless, the PACA trust creditors who timely perfect their claims will have first priority over others seeking to recover assets that are part of the PACA trust.

As banks learn of the superiority of PACA trust claims, they may become skeptical about lending working capital to commission merchants, brokers, or dealers of produce. This new lending apprehension could have an adverse impact upon the perishable agricultural commodities industry: banks may become more careful in their lending practices and produce buyers may find it more difficult to obtain a loan.

Banks may refuse to lend money to produce buyers, because they will fear that all of the buyer's property may be subject to a non-segregated floating PACA trust, and any loan

U.C.C. § 9-302(3)(a) (1977). Furthermore, U.C.C. § 9-302(4) reads as follows:

(4) Compliance with a statute or treaty described in subsection (3) is equivalent to the filing of a financing statement under this Article, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith. . . .

U.C.C. § 9-302(4) (1977).

212. *First State Bank v. Gotham Provision Co. (In re Gotham Provision Co.)*, 1 Bankr. 255, 261 (Bankr. S.D. Fla. 1979), *aff'd*, 669 F.2d 1000 (5th Cir.), *cert. denied*, 459 U.S. 858 (1982); *see also* notes 183-87 and accompanying text.

payments made to the bank will have to be disgorged later to a PACA trust creditor. Lenders might also require a higher degree of financial stability before making a loan to a buyer, or they might require additional collateral or collateral in the form of assets other than accounts receivable, inventories, and proceeds from the sales of the commodities before lending working capital. Further, banks may charge higher interest rates on working capital loans to produce buyers, in reflection of the bank's awareness of the risk that the produce buyer might be left without adequate distrainable assets after PACA trust beneficiaries had been paid in full.

These occurrences may render difficult, if not impossible, a buyer's ability to obtain a working capital loan. In certain instances, some buyers on the border of insolvency will be unable to obtain financial aid. Some buyers might not have any additional assets to give as collateral, and others might only have additional assets which are already burdened with a security interest (for example a mortgage or lease-back arrangement on the company building and land, or financing arrangements on farm, office, or transportation equipment), and are therefore unfit as collateral for a loan. The overall effect of the banks' increased awareness of the operation of the PACA trust may lead to the earlier demise of some produce dealers. Those businesses which eventually go out of business may now fail sooner, not having access to financial support.

Lending institutions, seeking more protection when lending to produce buyers, may lobby Congress to amend the PACA trust provisions to exempt third party payee banks from having to return trust assets to PACA trust beneficiaries. It is doubtful whether these efforts will be successful given the needs of the perishable agricultural commodities industry as stated in the legislative history.²¹³ It is also doubtful in light of the effectiveness of the P&SA trust provisions since their enactment in 1976 in ameliorating similar problems as those

213. The trust provisions amend "[t]he Perishable Agricultural Commodities Act to increase the legal protection for unpaid sellers and suppliers of perishable agricultural commodities until full payment of sums due have been received by them." H.R. REP. NO. 543, 98th Cong., 2d Sess. 2. *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 406. *See also supra* note 8 (discussing the burdens on commerce in the industry existing prior to 1984, which the PACA trust provisions were intended to remedy).

which face the perishable agricultural commodities industry.²¹⁴

Banks might also attempt to have the Bankruptcy Code amended to have PACA trust assets considered part of the debtor's estate and to provide secured lenders with some higher priority against those assets in bankruptcy proceedings,²¹⁵ just as labor unions²¹⁶ and retirees²¹⁷ have successfully lobbied for special amendments which grant them preferential treatment.²¹⁸ Congress has granted these special interest groups higher priorities in bankruptcy proceedings, but critics claim that these amendments undermine the effectiveness of Chapter 11 to rehabilitate a distressed business and to distribute equally its interests to its creditors.²¹⁹

As is clearly indicated in the legislative history of PACA, Congress expressly contemplated the floating character of the trusts²²⁰ and intended to promote prompt payment for goods

214. "The trust provisions of that Act [the P&SA] have operated very successfully without imposing a regulatory burden on the industry." H.R. REP. NO. 98-543, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 407.

215. The PACA trust benefits are not considered part of the debtor's estate. *See supra* note 13. Banks may therefore seek to have Congress create a new level of priority for banks, above that for PACA claimants.

216. Labor unions benefit from 11 U.S.C. § 1113 (1988) which makes it quite difficult for a company in reorganization to reject a collective bargaining agreement. This allows employees to adjust in their favor the benefits program for the reorganized company.

217. Retiree benefit claims are now treated under 11 U.S.C. § 1114 (1988) as "administrative expenses" of the debtor firm. The classification of benefit claims as such requires the debtor to pay them ahead of claims of employees and other unsecured creditors.

218. Other groups having received special protection under the Bankruptcy Code are securities and commodities brokers, owners of time-share interests, landlords, and the Pension Benefit Guaranty Corp. *See Klee, Bit By Bit, Special Interests Eat Away At Bankruptcy Code*, LEGAL TIMES, July 4, 1988, at 17.

219. *Id.* Kenneth Klee writes that, as a result of the recent numerous grants of preferential treatment, the ability of Chapter 11 of the Bankruptcy Code "to deal equally with creditors in a common pool will deteriorate to the 'grab law' system of first come, first served that exists under non-bankruptcy law." *Id.* Richard Dashefsky comments that granting the retiree benefit exemption in 11 U.S.C. § 1114 may have prevented Congress from carefully considering "the changes the legislation would work on the balance currently existing between competing interests in Chapter 11 reorganization." Dashefsky, *New Retiree Benefits a Mixed Blessing*, LEGAL TIMES, July 4, 1988, at 16.

220. H.R. REP. NO. 543, 98th Cong., 2d Sess. 5, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 409; *see supra* note 90.

to unpaid sellers.²²¹ The statute is achieving its intended goal. It is unlikely that lending institutions would be able to persuade Congress to exempt them from existing bankruptcy priorities and to place their claims ahead of those valid PACA claimants.

VII. CONCLUSION

The trust provisions of PACA are providing unpaid produce sellers with an effective remedy. It is the floating character of the trust which supplies the bite of the statute and allows sellers to recover the dissipated trust assets even from third party payees. Congress contemplated effecting a practice of prompt and full payment to be made by the buyer, and courts have enforced the claims of PACA creditors against produce buyers and third party lending institutions. Because courts will support recovery of trust assets by the unpaid supplier from the produce related assets, proceeds, and inventories of the buyer, and because working capital loans may become less available due to lending institutions' apprehensions about buyers' credit worthiness, the pinch of the statute will be felt where it was intended to be, by the delinquent produce buyer.

221. *Id.* at 4, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 407.