

Protection for Sellers of Perishable Agricultural Commodities: Reparation Proceedings and the Statutory Trust Under the Perishable Agricultural Commodities Act*

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INTRODUCTION

In 1930, Congress enacted the Perishable Agricultural Commodities Act¹ (PACA) to offer special protection to sellers of highly perishable commodities. These commodities are often shipped long distances on the basis of verbal transactions, and the opportunity for fraudulent practices and unscrupulous conduct is high. PACA's major purpose is to suppress unfair and fraudulent practices in the marketing of these commodities and to promote the orderly flow of perishable commodities in interstate commerce.

PACA prohibits various types of unfair conduct by commission merchants, dealers, and brokers and provides practical remedies to small farmers and growers who must deal with the "sharp practices" of the "financially irresponsible and unscrupulous."² Conduct prohibited by PACA includes: failure to pay fully; rejecting produce without reasonable cause; failure to pay promptly; failure to make good delivery without reasonable cause; failure to account truly and correctly; discarding, dumping, or destroying produce on consignment without rea-

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¹ Ch. 436, 46 Stat. 531 (codified as amended at 7 U.S.C. §§499a-499s (1988)).

² *Chidsey v. Guerin*, 443 F.2d 584, 587 (6th Cir. 1971); *Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524 (3d Cir. 1950).

sonable cause; shipping misbranded or misrepresented produce as to grade, quality, weight, or state of origin; and altering inspection certificates or making false or misleading statements.³ PACA issues often concern whether a broker, dealer, or commission merchant engaged in conduct that falls within one or more of these prohibited unfair trade practices.⁴

The PACA Branch of the U.S. Department of Agriculture's (USDA) Fruit and Vegetable Division, Agricultural Marketing Service, administers the Act.⁵ Most administrative cases under PACA are either disciplinary cases or reparation proceedings for money damages between commodity buyers and sellers. Disciplinary cases ordinarily involve license revocation or suspension proceedings.⁶ Reparation cases involve a wide range of disputes. The reparation procedure provides an informal and inexpensive method to adjudicate disputes and an alternative forum for producers who suffer losses resulting from PACA violations.⁷

In 1984, Congress amended PACA to create a statutory trust in all inventories of food or other products derived from perishable agricultural commodities to benefit unpaid suppliers or sellers of perishable agricultural commodities or their agents.⁸ This trust applies until full payment for the commodities has been received.⁹ This provision protects unpaid suppliers, sellers, and their agents when commission merchants, dealers, or brokers encumber or give lenders a security interest in these commodities or in the inventories of products derived

³ 7 U.S.C. § 499b (1988).

⁴ Administrative proceedings often identify particular practices that are unfair under PACA. For example, in *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370 (5th Cir. 1980), the court did not consider the use of post dated checks as prompt payment, especially where several checks were returned for insufficient funds. In *Cove Valley Packers, Inc. v. Pilgrim Fruit Co.*, 297 F. Supp. 200, 202 (D. Mass. 1969), the buyer's rejection of a perishable agricultural commodities shipment without reasonable cause rendered the buyer liable for damages.

⁵ For the delegation of the Secretary of Agriculture's regulatory functions, see 7 U.S.C. § 450c (1988). PACA regulations are found at 7 C.F.R. Part 46, 47 (1989) (Rules of Practice). Formal adjudicatory proceedings are governed by 7 C.F.R. §§ 1.130-.151 (1989).

⁶ See 7 U.S.C. § 499h (1988).

⁷ See *id.* § 499e (1988). This section imposes liability for damages resulting from PACA violations and specifies that the alternative administrative remedy does not abridge or alter remedies available at common law or by other statutes. *Id.*

⁸ Pub. L. No. 98-273, 98 Stat. 165 (1984) (codified as amended at 7 U.S.C. § 499c(c) (1980)).

⁹ 7 U.S.C. § 499e(c)(2) (1988).

from these commodities.¹⁰

This Article reviews the regulation of transactions involving perishable agricultural commodities with particular attention to remedies available to unpaid sellers through the reparation procedure or under the statutory trust. The combination of these remedies with statutory prompt payment requirements provides important tools for enforcing payment obligations. Use of the statutory trust as the remedy of choice will no doubt increase as sellers become more familiar with its operational effect.

I. REGULATORY APPROACH

The basic regulatory approach of PACA is through the licensing of commission merchants, dealers, and brokers who engage in transactions involving perishable agricultural commodities. The Act defines a "commission merchant" as any person who engages in receiving any perishable agricultural commodity for sale, on commission, or for or on behalf of another.¹¹ The Act covers these persons regardless of the volume of their business.¹² However, both "dealers" and "brokers" must meet "invoice value" tests for certain transactions.¹³ For example, PACA considers a person engaged in the business of buying and selling perishable agricultural commodities in "wholesale or jobbing quantities" a dealer.¹⁴ However, if that person buys solely for retail sale, the Act classifies the person as a dealer only when the "invoice value" of purchases exceeds \$230,000 in a calendar year.¹⁵ In addition, PACA does not cover a person who buys commodities (except potatoes) for canning or processing within the state where the commodities are grown unless the product is frozen, packed in ice, or consists of cherries in brine.¹⁶ Also, selling commodities which a person raised does not make that person a dealer.¹⁷

A similar rule applies to persons the Act defines as brokers. A broker is a person engaged in the business of negotiating sales and purchases of perishable agricultural commodities for or on behalf of the vendor or

¹⁰ *Id.* § 499e(c)(1).

¹¹ *Id.* § 499a(5).

¹² *Id.*

¹³ *Id.* § 499a(6)-(7).

¹⁴ *Id.* § 499a(6).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

purchaser.¹⁸ However, a person does not qualify as a broker if the person acts as an independent agent in negotiating sales for the vendor and the only sales involve frozen fruits and vegetables with an "invoice value" under \$230,000 in any calendar year.¹⁹ Of course, for the Act to cover commission merchants, dealers, and brokers, all of their activities must involve interstate or foreign commerce.²⁰

PACA does not cover some transactions. For example, PACA jurisdiction does not include claims resting on transportation contracts. In *Grand Prairie Produce Brokerage, Inc. v. Royal Packing Co.*,²¹ the Secretary of Agriculture did not consider an operator a "broker" when the operator did not negotiate either sales or purchases when the crops were sold.²²

A. Licensing

Under PACA, any person who wishes to act as a dealer, commission merchant, or broker in the interstate commerce of perishable agricultural commodities must secure a license from the Secretary of Agriculture.²³ The threat of license revocation deters licensed persons from engaging in activities that cause losses to farm producers.

1. Refusal of License

A person cannot legally engage in business as a commission merchant, dealer, or broker without obtaining a license from the USDA's PACA Branch and paying the appropriate licensing fee.²⁴ Business may be conducted under more than one trade name or under a different name without obtaining a new license.²⁵ However, if the use of a trade name would deceive, mislead, or confuse the public, the Secretary may disapprove the name.²⁶

¹⁸ *Id.* § 499a(7).

¹⁹ *Id.*

²⁰ *Id.* § 499a; *see also* *Iwata v. Western Fruit Growers, Inc.*, 90 F.2d 575 (9th Cir. 1937) (stating that for cause of action to exist under PACA, complaint must assert that defendant was commission merchant, dealer, or broker, and that transaction involved interstate or foreign commerce); *Consolidated Citrus Co. v. Goldstein*, 214 F. Supp. 823, 824-27 (E.D. Pa. 1963) (distinguishing *Iwata* by inferring status of commission merchant, dealer, or broker and involvement of interstate or foreign commerce).

²¹ 34 Agric. Dec. 1580 (1975).

²² *Id.* at 1581; *see also* *United States v. Bourlon*, 574 F.2d 202 (5th Cir. 1978).

²³ 7 U.S.C. § 499c(a), (b) (1988).

²⁴ *Id.*

²⁵ *Id.* § 499c(c).

²⁶ *Id.*

The Secretary must refuse to issue a license to an applicant upon finding that the applicant or any person who is or was responsibly connected with the applicant:

- (1) has had a license revoked within two years prior to the application's date or has a suspended license;
- (2) has been found, after notice and opportunity for hearing, to have flagrantly or repeatedly violated the Act within two years prior to the application's date;
- (3) within two years prior to the application's date, has been found guilty in a federal court for violating PACA provisions that relate to the prevention of destruction and dumping of farm produce; or
- (4) has failed, except in the case of bankruptcy and subject to a right of appeal, to pay a reparation order issued within two years prior to the application's date.²⁷

In addition, the Act provides for license suspension upon Act violations and for license revocation upon flagrant or repeated violations.²⁸

The Secretary also may refuse to issue a license to an applicant, or any corporation or partnership that is an applicant, if they, or an officer or holder of more than ten percent of the corporation's stock, or any general partner of the partnership, has within the past three years, been adjudged or discharged as a bankrupt.²⁹ The Secretary also may refuse a license to an applicant who was a general partner of a partnership, or an officer or holder of more than ten percent of stock of a corporation, adjudged or discharged as bankrupt.³⁰ Furthermore, the Secretary may base license refusals on other circumstances of the bankruptcy.³¹ This provision is an unusual exception to bankruptcy law which ordinarily prohibits any discrimination against those who have availed themselves of relief in bankruptcy.³²

In addition, the Secretary may find the applicant unfit to have a license if the applicant has engaged in practices prohibited by the Act, has been convicted of a felony, or has submitted a false or misleading application.³³ The same applies to a general partner, officer, or holder of more than ten percent of the applicant's stock.³⁴

²⁷ *Id.* § 499d(b).

²⁸ *Id.* § 499h.

²⁹ *Id.* § 499d(e).

³⁰ *Id.*

³¹ *Id.*

³² 11 U.S.C. § 525 (1988).

³³ 7 U.S.C. § 499d(d) (1988).

³⁴ *Id.*

2. Prohibition of Employment of Those "Responsibly Connected"

The Act prohibits a licensee from employing any person who has committed flagrant or repeated violations of PACA or who has not paid a reparation award.³⁵ This prohibition extends to anyone "responsibly connected" with such persons.³⁶ "Responsibly connected" means affiliated or connected as a partner in a partnership or as an officer, director, or holder of more than ten percent of the stock of a corporation or association.³⁷ Under this provision, the Agricultural Marketing Service initially determines whether a person is "responsibly connected."³⁸ This finding usually follows a disciplinary proceeding against the partnership, corporation, or association.³⁹ After the PACA Regulatory Branch notifies the person of the initial determination finding the person "responsibly connected," that determination may be reviewed if requested within thirty days of notification.⁴⁰ Also, a person may appeal the determination, and the Administrator will appoint a Presiding Officer to hold a hearing.⁴¹ This decision may be reviewed by filing an appeal directly in the United States Court of Appeals within sixty days after the final order has been issued.⁴²

Various circuit courts have reviewed the definition of "responsibly connected" with mixed results. Some have used a *per se* standard, which means that the agency can decide based on the apparent affiliation or connection between the individual and the entity. For example, the Third Circuit upheld an order which prevented a licensee from employing a person who was "responsibly connected" with a company that had an outstanding unpaid reparations award.⁴³ The court agreed that the person was "responsibly connected" because the person was the company treasurer and a board member and owned more than ten percent of the company's outstanding shares of stock.⁴⁴ The Eighth Circuit⁴⁵ and the Second Circuit have used the same analysis.⁴⁶ On the

³⁵ *Id.* § 499h(b).

³⁶ *Id.*

³⁷ *Id.* § 499a.

³⁸ 7 C.F.R. § 47.47, 47.49 (1989).

³⁹ *Id.* § 47.49(a), (b).

⁴⁰ *Id.* § 47.49(c).

⁴¹ *Id.* §§ 47.47(d)-47.68.

⁴² 28 U.S.C. §§ 2342-2344 (1982).

⁴³ *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966).

⁴⁴ *Id.* at 492, 494.

⁴⁵ *Zimmerman v. Manley*, 782 F.2d 1047 (8th Cir. 1985); *Pupillo v. United States*, 755 F.2d 638 (8th Cir. 1985) (finding petitioner "responsibly connected" using *per se* exclusionary standards because petitioner signed documents filed with State of Missouri

other hand, the District of Columbia Circuit does not follow the *per se* standard. It applies a rebuttable presumption that a person is "responsibly connected" with a licensee if the person is affiliated as an officer. The court may allow a former officer to prove that any office held was nominal.⁴⁷ This distinction in approaches between the circuits has some significance since a petitioner may file an appeal in the circuit in which the petitioner resides, has a principal office, or in the District of Columbia Circuit.⁴⁸

3. Suspension or Revocation

To invoke the authority to suspend or revoke a license the Secretary must determine that an Act violation has occurred.⁴⁹ However, the license is automatically terminated on its anniversary date if the licensee fails to pay the annual renewal fee.⁵⁰ Also, the license terminates automatically if the licensee has been discharged as a bankrupt⁵¹ or if a required bond, if any, is terminated without approval of the Secretary.⁵²

The license is automatically suspended five days after the Secretary enters a reparation order unless the licensee satisfies the order or files an appeal.⁵³ Suspension also may occur if a licensee fails to provide an increase in bond after notification that certain violations or a failure to pay a reparation award require such an increase.⁵⁴

The Secretary also may revoke or suspend licenses without a hearing in other circumstances. For example, refusal to permit a record inspection,⁵⁵ violation of prompt payment provisions coupled with refusal to permit record inspection or to furnish a surety bond,⁵⁶ or a guilty finding for violations related to fraudulent inspection certificates allow such

and stated he was an officer on PACA renewal applications license).

⁴⁶ *Zwick v. Freeman*, 373 F.2d 110 (2d Cir. 1967).

⁴⁷ *See Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975); *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601 (D.C. Cir. 1987); *Martino v. United States Dep't of Agric.*, 801 F.2d 1410 (D.C. Cir. 1987); *Minotto v. United States Dep't of Agric.*, 711 F.2d 406 (D.C. Cir. 1983).

⁴⁸ 28 U.S.C. § 2343 (1982).

⁴⁹ 7 U.S.C. § 499h(a) (1988).

⁵⁰ *Id.* § 499d(a).

⁵¹ *Id.*

⁵² *Id.* U.S.C. § 499d(c).

⁵³ *Id.* § 499g(d).

⁵⁴ *Id.* § 499d(c).

⁵⁵ *Id.* § 499m(a).

⁵⁶ *Id.* § 499m(b).

license suspension or revocation.⁵⁷

In other circumstances, suspension or termination may result for violation of the Act's unfair conduct prohibitions,⁵⁸ for flagrant or repeated violations of those prohibitions,⁵⁹ for continued use of a trade name which the Secretary has disapproved,⁶⁰ for failure to keep accounts and records,⁶¹ for refusal to allow inspection of produce,⁶² for continuing to employ a person subject to employment restrictions,⁶³ for false or misleading statements, or for misrepresenting, concealing or withholding facts.⁶⁴ The Act provides a specific complaint and investigation procedure for these violations.⁶⁵ In addition, PACA specifically requires notice and an opportunity for a hearing upon a finding of "flagrant or repeated" violations.⁶⁶ The regulations require notice and hearing for nonautomatic license suspensions or revocations.⁶⁷ The procedures involve a hearing before an administrative law judge under the USDA's Uniform Rules of Practice.⁶⁸ The administrative law judge's initial decision is final unless the licensee files an appeal to the judicial officer within thirty-five days after service of the decision.⁶⁹ Otherwise, the administrative law judge's decision becomes final on the thirty-fifth day after service.⁷⁰ A licensee will not receive judicial review in a federal court of appeals unless the initial decision is first appealed to the judicial officer.⁷¹ The petitioner files an appeal in the court of appeals for the circuit in which the petitioner resides, has the principal office, or in the District of Columbia Circuit.⁷²

The court of appeals will not overrule the Secretary's suspension of a license for PACA violations if the suspension was conducted in accordance with constitutional and statutory standards and was not "unwar-

⁵⁷ *Id.* § 499h(a).

⁵⁸ *Id.*

⁵⁹ *Id.* § 499d(b), (c).

⁶⁰ *Id.* § 499c(c).

⁶¹ *Id.* § 499i.

⁶² *Id.* § 499m(a).

⁶³ *Id.* § 499h(b).

⁶⁴ *Id.* § 499h(c).

⁶⁵ *Id.* § 499f.

⁶⁶ *Id.* § 499h(b).

⁶⁷ 7 C.F.R. § 46.35 (1989).

⁶⁸ *Id.* § 1.130-.151.

⁶⁹ *Id.* § 1.145(a).

⁷⁰ *Id.* § 1.142(c).

⁷¹ *Id.* § 1.142(c).

⁷² 28 U.S.C. § 2343 (1988); 7 C.F.R. § 1.145(i) (1989).

ranted in law without justification in fact."⁷³

B. Record and Account Keeping Requirements

Enforcement of PACA also occurs through record and account keeping requirements. The Act requires licensed parties to keep records, accounts, and memoranda that fully and correctly disclose all transactions involved in the business. The failure of a licensee to keep the required records may result in license suspension.⁷⁴ Apparently, the Secretary may examine the records at any time. In *Cusimano v. Block*,⁷⁵ the Fifth Circuit upheld an unannounced, warrantless search of a dealer's records against a challenge that it violated the dealer's fourth amendment rights. The court stated that licensees have no reasonable expectation of privacy in this area because of the pervasive government regulation.

The Act also empowers the Secretary to employ and license inspectors who may inspect and certify the class, quality, and condition of commodity shipments. Inspectors may carry out these inspections whether or not a complaint is filed under the Act. The inspection may provide information for a license suspension or other disciplinary actions.⁷⁶

C. Disciplinary Actions

The Secretary has the authority to investigate complaints and to proceed with appropriate actions, either in a disciplinary or a reparation proceeding, in addition to any license suspension or revocation actions that result from the investigation.⁷⁷ In *Finer Foods Sales Co. v. Block*,⁷⁸ the court found that an informal complaint or a reparation complaint did not need to precede a disciplinary complaint. Moreover, a hearing to determine the violator's willfulness was not necessary before instituting the disciplinary proceedings.

Under PACA, administrative disciplinary actions include warning letters, monetary penalties in misbranding and misrepresentation cases,

⁷³ *J. Acevedo & Sons v. United States*, 524 F.2d 977 (5th Cir. 1975); see also *Eastern Produce Co. v. Benson*, 278 F.2d 606 (3d Cir. 1960); *Melvin Beene Produce Co. v. Agricultural Mktg. Serv.*, 728 F.2d 347 (6th Cir. 1984).

⁷⁴ 7 U.S.C. § 499i (1988).

⁷⁵ 692 F.2d 1025 (5th Cir. 1982).

⁷⁶ 7 C.F.R. § 499n (1989).

⁷⁷ 7 U.S.C. § 499f (1988).

⁷⁸ 708 F.2d 774 (D.C. Cir. 1983).

and license suspension or termination in numerous situations.⁷⁹ For minor violations, the Secretary may issue a warning letter instead of instituting formal disciplinary proceedings. The Secretary must send warning letters before license suspension or revocation, except in cases of automatic termination or suspension⁸⁰ or in cases in which the violating conduct is willful.⁸¹ The PACA Regulatory Branch uses warning letters when misrepresentation or misbranding is alleged.⁸² Under the interpretation of "willful," however, a complainant may later institute a formal complaint for the same violation. A violation is willful if the violator intentionally commits a prohibited act, irrespective of evil motive or reliance on erroneous advice. "Willful" also may refer to merely careless or negligent conduct if the violator acts with careless disregard of statutory requirements.⁸³

Formal disciplinary proceedings may evolve either from reparation actions, from a complaint by industry or state officials, or from a department investigation. Disciplinary orders (not cease and desist orders) may include suspending the license, revoking the license, or a finding of flagrant or repeated violation.⁸⁴ The Secretary also may issue disciplinary orders if a person who is responsibly connected to the licensee commits the PACA violation. Disciplinary actions are handled in accordance with the USDA's Uniform Rules of Practice.⁸⁵

II. REPARATION PROCEEDINGS

PACA establishes a reparation forum for claims that involve Act violations with consequent loss to the complainant.⁸⁶

A. Jurisdiction

The Agricultural Marketing Service has jurisdiction in reparation actions if: (1) the matter involves a perishable agricultural commodity,⁸⁷

⁷⁹ 7 C.F.R. § 46.45 (1989) (warning letters and penalties); 7 U.S.C. §§ 499c, 499d, 499h, 499i, 499m (1988) (license suspension or revocation).

⁸⁰ 7 U.S.C. §§ 499d, 499g(d) (1988).

⁸¹ 5 U.S.C. § 558(c) (1988).

⁸² 7 C.F.R. § 46.45(e)(3) (1989).

⁸³ *In re Shatkin*, 34 Agric. Dec. 296 (1975).

⁸⁴ See 7 U.S.C. §§ 499c, 499d, 499h, 499i, 499m (1988) (listing various circumstances that may result in suspension or revocation).

⁸⁵ 7 C.F.R. §§ 1.130-.151 (1989).

⁸⁶ 7 U.S.C. §§ 499e-499g (1988).

⁸⁷ *Id.* § 499a(4).

(2) the matter involves interstate commerce,⁸⁸ (3) the matter is subject to licenses or is a licensee under the Act,⁸⁹ and (4) a petition has been filed within nine months from the time the cause of action accrues.⁹⁰

The first of these requirements simply considers whether the dispute involves a perishable agricultural commodity. The Agricultural Marketing Service issues a list of commodities covered by PACA based on the definition of "perishable agricultural commodity" as:

- (a) any of the following, whether or not frozen or packed in ice: fresh fruits and fresh vegetables of every kind and character; and
- (b) includes cherries in brine as defined by the Secretary in accordance with trade usages.⁹¹

By regulatory definition "fresh fruits and vegetables" are:

[A]ll produce in fresh form generally considered as perishable fruits and vegetables, whether or not packed in ice or held in common or cold storage, but does not include those perishable fruits and vegetables which have been manufactured into articles of food of a different kind or character. The effects of the following operations shall not be considered as changing a commodity into a food of a different kind or character: Water or steam blanching, chopping, color adding, curing, cutting, dicing, drying for the removal of surface moisture; fumigating, gassing, heating for insect control, ripening and coloring; removal of seed, pits, stems, calyx, husk, pods, rind, skin, peel, et cetera; polishing, precooling, refrigerating, shredding, slicing, trimming, washing with or without chemicals; waxing, adding of sugar or other sweetening agents; adding ascorbic acid or other agents used to retard oxidation; mixing of several kinds of sliced, chopped, or diced fruits or vegetables for packaging in any type of containers; or comparable methods of preparation.⁹²

Whether a transaction involves interstate commerce is determined by a "current of commerce" concept. This concept applies when the commodity and/or products of the commodity are sent from one state with the expectation that they will end their transit in another state. It also applies when sales are for shipment to another state or for processing within the state and the products are shipped outside the state. The Secretary has held that the concept includes purchases from firms within the state that received commodities from other states.⁹³ In addition, the Act's definition of interstate commerce includes shipment between points within the same state if the shipment passes through any

⁸⁸ *Id.* § 499a(3),(8).

⁸⁹ *Id.* § 499a.

⁹⁰ *Id.* § 499f(a).

⁹¹ *Id.* § 499a(4).

⁹² 7 C.F.R. § 46.2(u) (1989).

⁹³ *In re* C.B. Foods, Inc., 43 Agric. Dec. 489 (1981).

place outside that state.⁹⁴ One court has construed this to include shipments in inter-island transportation between the islands of Hawaii.⁹⁵

The third jurisdictional issue (matters subject to license or a licensee under the Act) requires that the complainant allege that a person has violated the Act's unfair conduct provisions.⁹⁶ As a basic jurisdictional question, however, the party alleged to have violated the Act must be licensed or subject to license under the Act.⁹⁷

The last of the four jurisdictional requirements (the nine month statute of limitations) does not limit the USDA's adjudicatory process, but limits the time within which a complainant must bring an action. The cause of action accrues when the event occurs, not when it is discovered.⁹⁸ This limitation also applies to counterclaims or affirmative defenses which are not the subject of the original complaint.⁹⁹ The Agricultural Marketing Service can adjudicate terms of contracts which were made before the complaint was filed if the complainant files within the statutory period after the action accrues.¹⁰⁰

B. Procedure for Complaint

PACA procedures permit any interested person to file a reparation complaint. If the complaint contains a request for damages it must be filed within nine months of when the cause of action accrues.¹⁰¹ The proceeding's informal nature is illustrated by the fact that the complaint may be by telegram, letter, or by a preliminary statement of facts setting forth the essential details of the transaction.¹⁰² The Agricultural Marketing Service's Fruit and Vegetable Division will conduct an investigation, and if the situation warrants, will try to amicably or informally adjust the matter.¹⁰³ If this method fails, the person who filed the informal complaint may file a formal complaint setting forth the same information, including a statement of the damages claimed.¹⁰⁴ The Di-

⁹⁴ 7 U.S.C. § 499a(3) (1988).

⁹⁵ *United States v. Produce Hawaii, Inc.*, 716 F. Supp. 461 (D. Haw. 1989).

⁹⁶ 7 U.S.C. § 499b (1988).

⁹⁷ *Branch v. Mission Shippers, Inc.*, 35 Agric. Dec. 726 (1976).

⁹⁸ *Maggio, Inc. v. First Nat'l Stores*, 39 Agric. Dec. 1179 (1980).

⁹⁹ *Kaplan's Fruit & Produce Co. v. Jim Weatherford Co.*, 37 Agric. Dec. 812 (1978).

¹⁰⁰ *Cooper v. Caro & Longo Wholesale Produce Co.*, 40 Agric. Dec. 454 (1981).

¹⁰¹ 7 C.F.R. § 47.3. (1989).

¹⁰² *Id.* § 47.3(a)(2).

¹⁰³ *Id.* § 47.3(b).

¹⁰⁴ *Id.* § 47.6.

vision will serve a copy on the respondent¹⁰⁵ and serve both parties with copies of any investigative report.¹⁰⁶ Within twenty days the respondent must file an answer.¹⁰⁷ The Division then docket the matter.¹⁰⁸

C. Hearing

If the amount in controversy is \$15,000 or less, the Division will not hold an oral hearing unless the Division deems it necessary or desirable.¹⁰⁹ The Division can grant an oral hearing upon application of either party if it appears proper to the agency.¹¹⁰ In many cases, a shortened procedure is available and serves in lieu of an oral hearing.¹¹¹ In the shortened procedure, the Division considers as evidence the pleadings, the report of the investigation, and written proof in support of any claim in the form of verified statements or depositions.¹¹² If the parties consent, they may use this shortened procedure when the claim exceeds \$15,000.¹¹³

When the amount in controversy exceeds \$15,000, any party may request an oral hearing on the facts. Failure to file such a request in a timely fashion constitutes a waiver of the oral hearing, and the matter may be decided upon a record formed under the shortened procedure.¹¹⁴ The regulations provide detailed guidelines for the development of the proposed orders,¹¹⁵ final decisions,¹¹⁶ and rehearing matters.¹¹⁷

D. Appeals and Enforcement

A party to a reparation order may appeal the order to a federal district court within thirty days from the date of the order's entry.¹¹⁸ The district court hears the case in a trial *de novo*. This provision preserves the procedure's constitutionality by allowing a jury trial.¹¹⁹ However,

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 47.7.

¹⁰⁷ *Id.* § 47.8.

¹⁰⁸ *Id.* § 47.10.

¹⁰⁹ *Id.* § 47.15.

¹¹⁰ *Id.*

¹¹¹ *Id.* § 47.20.

¹¹² *Id.* § 47.20(a).

¹¹³ *Id.* § 47.20(b).

¹¹⁴ *Id.* § 47.19.

¹¹⁵ *Id.* § 47.19.

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 47.24.

¹¹⁸ 7 U.S.C. § 499g(c) (1988).

¹¹⁹ *Potato Sales, Inc. v. Perfection Produce*, 38 Agric. Dec. 273 (1979).

the findings of fact and orders are *prima facie* evidence of the facts stated.¹²⁰ The agency's findings of fact will prevail upon judicial review unless the court determines that the preponderance of evidence overcomes these findings.¹²¹

If the opposing party does not appeal or pay the reparation order within the time specified in the order, the complainant may file suit in a federal district court to enforce the order.¹²² The court treats these suits like other civil suits for damages. As in the case of appeals, the findings of fact and orders are *prima facie* evidence of the facts stated.

The complainants can enforce the reparation order only against parties to the reparation proceeding. Agency findings would not be *prima facie* evidence against those not a party to the proceeding.¹²³ When a court affirms a reparation order on appeal, the prevailing party is entitled to reasonable costs and attorney fees.¹²⁴

E. Nature of Reparation Proceeding

The reparation provision does not repeal the law of sales, and rights provided by state laws still apply.¹²⁵ In other words, reparation provides an additional remedy to those provided under other applicable statutes or under the common law.¹²⁶ Once a choice of forum has been made, however, the party is limited to the remedies available in that forum. In addition, the remedies are not cumulative. For example, the Agricultural Marketing Service may not proceed on a reparation order once a court enters a decision on the subject matter.¹²⁷

¹²⁰ 7 U.S.C. § 499g(c) (1988).

¹²¹ Consolidated Citrus Co. v. Goldstein, 214 F. Supp. 823 (D.C. Pa. 1963); California Fruit Exchange v. Henry, 89 F. Supp. 580 (D.C. Pa. 1950), *aff'd*, 184 F.2d 517 (3d Cir. 1950); Barker-Miller Distrib. Co. v. Berman, 8 F. Supp. 60 (W.D.N.Y. 1934).

¹²² 7 U.S.C. § 499g(b) (1988).

¹²³ Swanee Bee Acres, Inc. v. Fruit Hill, Inc., 597 F. Supp. 322 (N.D. Ill. 1984).

¹²⁴ Growers Mktg. Serv. v. Dino Produce, Inc., 38 Agric. Dec. 1599 (1979); C.F. Smith, Inc. v. Bushala, 232 F. Supp. 178 (N.D. Cal. 1964); 7 U.S.C. § 499g (1988); *see also* W.J. Westcott Co. v. Yonk Rubin & Son, 122 F. Supp. 888 (E.D. Pa. 1954)

¹²⁵ *See* A.J. Conroy, Inc. v. Weyl-Zuckerman & Co., 39 F. Supp. 784 (N.D. Cal. 1941); California Fruit Exchange v. Henry, 89 F. Supp. 580 (W.D. Pa. 1950), *aff'd*, 184 F.2d 517 (3d Cir. 1950); Cohen v. Frima Prod. Co., 181 F.2d 324 (5th Cir. 1950).

¹²⁶ Rothenberg v. H. Rothstein & Sons, 183 F.2d 524 (3d Cir. 1950).

¹²⁷ Adams Bros. Produce Co. v. Peeples, 37 Agric. Dec. 1216 (1978).

III. STATUTORY TRUST

In 1984, Congress amended PACA to create a statutory trust for the benefit of unpaid suppliers or sellers of perishable agricultural commodities. This trust applies to the commodities themselves, to all inventories of food or other products derived from perishable agricultural commodities, and to receivables or proceeds derived from the sale of the commodities or the products.¹²⁸ Congress designed this trust from a concept first adopted for sales of livestock to packers under the Packers and Stockyards Act.¹²⁹ Congress recently extended the idea to sales of poultry to live poultry dealers in the Poultry Producers Financial Protection Act of 1987.¹³⁰ The trust protects the unpaid suppliers, sellers, and their agents in cases where lenders hold a security interest in the inventories of commission merchants, dealers, or brokers. Trust assets are preserved in a nonsegregated "floating" trust.¹³¹ The legislation vests the federal district courts with jurisdiction to entertain actions to enforce payment from the trust and authorizes the Secretary to restrain dissipation of trust assets.¹³²

Frequently, bankruptcy courts will hear these actions because the insolvent debtor will have filed a bankruptcy petition.¹³³ In such cases, the seller's claims are elevated above secured creditors, ahead of other priority and general creditors, and ahead of administrative costs and expenses in bankruptcy. The trust assets are not part of the estate in bankruptcy.¹³⁴

A. *Notice to Preserve Trust Benefits*

To obtain trust benefits the unpaid supplier, seller, or agent must give written notice to the commission merchant, dealer, or broker within thirty days after the specified time for payment has elapsed.¹³⁵ They also must give the Secretary notice of the intent to preserve trust benefits.¹³⁶

¹²⁸ 7 U.S.C. § 499e(c)(2) (1988).

¹²⁹ Pub. L. No. 94-410, sec. 8, § 206, 90 Stat. 1249, 1251 (1976) (codified as amended at 7 U.S.C. § 1916 (1988)).

¹³⁰ 7 U.S.C. § 197 (1988).

¹³¹ 7 C.F.R. § 46.46(c) (1989).

¹³² 7 U.S.C. § 499e(c)(4) (1988).

¹³³ See, e.g., *In re Monterey House, Inc.*, 71 Bankr. 244 (Bankr. S.D. Tex. 1986).

¹³⁴ *In re Fresh Approach, Inc.*, 51 Bankr. 412 (Bankr. N.D. Tex. 1985); *In re Super Spud, Inc.*, 77 Bankr. 930 (Bankr. M.D. Fla. 1987).

¹³⁵ 7 U.S.C. § 499e(c)(3) (1988).

¹³⁶ *Id.* § 499e(c)(3).

The Secretary promulgates regulations prescribing the time period within which claimants must receive payment. PACA's "unfair conduct" provisions make the failure to make full payment "promptly" an Act violation.¹³⁷ The Act provides no further definition, but the regulations provide specificity with regard to a variety of transactions.¹³⁸ For many transactions, "full payment promptly" is defined as within ten days of acceptance.¹³⁹ If a contract involves payment at times different than those provided for in the regulations, the parties must have this agreement in writing *before* entering into the transaction. In addition, the parties must maintain a copy of the agreement in their records. The party asserting the existence of such an agreement has the burden of proving it.¹⁴⁰ The statutory trust regulations refer to these prompt accounting and prompt payment requirements but specify that for trust benefit eligibility the maximum time for payment to which a seller, supplier, or agent can agree is thirty days after the receipt and acceptance of the commodities.¹⁴¹

The notice must state that it is a notice of intent to preserve trust benefits. The notice must give the name and address of the trust beneficiary, the seller-supplier, commission merchant or agent, and the debtor. It also must include the date of the transaction, commodity, contract terms, invoice, price, payment due-date, and any past due and unpaid amounts. If the problem arises from a dishonored payment instrument, the notice must include the date that the claimant received notice of the dishonored instrument.¹⁴²

Parties must strictly comply with the notice provisions. For example, in *In re D.K.M.B., Inc.*,¹⁴³ the court considered the notice insufficient because it failed to include information on the transaction dates, the commodity involved, contract terms, the price or payment due-date, or the invoice. The notice included only delivery receipts reflecting the transaction date and the gross price for all items delivered. Oral notice is not sufficient, nor is notice only to USDA, even if the debtor had actual knowledge of the intent to preserve trust benefits. In *In re Marvin Properties*,¹⁴⁴ the court relied on case law developed under the trust

¹³⁷ *Id.* § 499b(4).

¹³⁸ 7 C.F.R. § 46.2(aa) (1989).

¹³⁹ *See, e.g.*, 7 C.F.R. § 46.2(aa)(5) (1989) (circumstances requiring payments within 10 days of acceptance).

¹⁴⁰ *Id.* § 46.2(aa)(11).

¹⁴¹ *Id.* § 46.46(f)(2).

¹⁴² *Id.* § 46.46(g)(3).

¹⁴³ 95 Bankr. 774 (Bankr. D. Colo. 1989).

¹⁴⁴ 76 Bankr. 150 (Bankr. 9th Cir. 1987), *aff'd*, 854 F.2d 1183 (9th Cir. 1988).

provisions of the Packers and Stockyards Act to strictly construe PACA's notice requirement. Actual notice is insufficient to preserve trust benefits in the absence of the required filing of notice.¹⁴⁵

Suppliers, sellers, or agents may file notice upon delivery of the commodities, even before the payment due-date.¹⁴⁶ The statutory language might seem to imply that notice could be filed only *after* the payment due-date. However, the trust arises upon delivery and continues until the claim is satisfied or until the trust beneficiary fails to take steps to preserve the trust benefits. Therefore, invalidating trust notices filed before the payment due-date would serve no purpose.¹⁴⁷ As stated in *In re W. L. Bradley Co.*, "the statutory use of the word 'after,' marks the beginning of the thirty day period and does not prohibit an early filing."¹⁴⁸

Trust claimants do not need to seek relief from the automatic stay in bankruptcy when filing notice. In *In re Monterey House, Inc.*,¹⁴⁹ the debtor argued that the filing of notice violated the automatic stay provisions of the Bankruptcy Code. The court rejected the argument because the trust fund is not property of the debtor's estate. The statute required the trust claimants to file the notice of intent to preserve trust benefits. Failure to do so creates unperfected claims,¹⁵⁰ and the statute allows no exceptions.¹⁵¹ On the other hand, the debtor's filing of a bankruptcy petition with the automatic stay does not toll the period for filing the notice.¹⁵² The filing of the notice "perfects" the trust claim, but that claim relates back to the date of delivery. For this reason, the trust claim defeats any intervening claimant, such as a trustee in bankruptcy. The Bankruptcy Code does not prevent any act to perfect an interest in property if that interest would prevail over a trustee in bankruptcy.¹⁵³

Parties may waive the protection of the statutory trust provisions if agreed to in writing prior to the time any contracts are negotiated. The waiver must be separate and distinct from any agency contract.¹⁵⁴

¹⁴⁵ *Id.* at 153 (relying upon *In re Gotham Provision Co.*, 669 F.2d 1000, 1013 (5th Cir. 1982)).

¹⁴⁶ *In re W.L. Bradley Co.*, 75 Bankr. 505 (Bankr. E.D. Pa. 1987).

¹⁴⁷ *Id.* at 511.

¹⁴⁸ *Id.* at 512.

¹⁴⁹ 71 Bankr. 244 (Bankr. S.D. Tex. 1986).

¹⁵⁰ *Id.* at 248.

¹⁵¹ *In re Prange Foods, Corp.*, 63 Bankr. 211 (Bankr. W.D. Mich. 1986).

¹⁵² *Id.* at 217.

¹⁵³ *Id.* (referring to Bankruptcy Code § 362(b)(3)).

¹⁵⁴ 7 C.F.R. § 46.46(d)(2) (1989).

B. Tracing of Assets

Commingling of trust assets with nonproduce related assets does not require the trust beneficiaries to trace the assets. The debtor has the burden to identify nontrust property.¹⁵⁵ Congress contemplated that commingling of produce related assets from various sellers would occur in the typical business. In addition, the debtor is likely to commingle other assets with trust assets. The concept of a "floating" trust allows the trust to attach to all produce-related assets of the debtor. As the court stated in *In re Gotham Provision Co.*, the only burden on the trust claimant is to prove the amount of the claim and the existence of a floating pool of assets into which produce-related assets have been commingled.¹⁵⁶

Trust funds may be recovered from a secured creditor¹⁵⁷ or from third parties who knew or should have known that the assets were transferred to them in breach of the trust.¹⁵⁸ However, dissipated trust funds used to pay antecedent debts in the ordinary course of business may not be traced to third parties who had no knowledge of the character of the funds received.¹⁵⁹

C. Interest, Fees, and Costs

One unresolved issue concerning the PACA statutory trust is whether courts may award interest, fees, and costs to the successful trust claimant. The statute and the regulations are silent on this point, but some courts have assessed all or some of these expenses against the debtor. In *In re Monterey House, Inc.*,¹⁶⁰ the court considered assessment of prejudgment interest, postjudgment interest, and attorney fees proper under PACA trust cases. However, in *DeBruyn Produce Co. v. Victor Foods, Inc.*,¹⁶¹ the court granted prejudgment interest, but determined that PACA trust provisions did not authorize attorney fees. In *In re Milton Poulos, Inc.*,¹⁶² the court denied interest, fees, and costs

¹⁵⁵ *In re Hancock-Nelson Mercantile Co.*, 95 Bankr. 982 (Bankr. D. Minn. 1989); *In re W.L. Bradley Co.*, 75 Bankr. 505 (Bankr. E.D. Pa. 1987); see also *In re Frosty Morn Meats, Inc.*, 7 Bankr. 988 (M.D. Tenn. 1980).

¹⁵⁶ *In re Gotham Provision Co.*, 669 F.2d 1000, 1011 (5th Cir. 1982).

¹⁵⁷ *In re Fresh Approach, Inc.*, 51 Bankr. 412 (Bankr. N.D. Tex. 1985).

¹⁵⁸ *Lyng v. Sam Compton Produce Co.*, Cir. 3-86-759 (N.D. Tenn. 1987); see also *In re Harmon*, 11 Bankr. 162 (Bankr. N.D. Tex. 1980).

¹⁵⁹ *In re Tanner*, 77 Bankr. 897 (Bankr. N.D. Ala. 1987).

¹⁶⁰ 71 Bankr. 244 (Bankr. S.D. Tex. 1986).

¹⁶¹ 674 F. Supp. 1405 (E.D. Mo. 1987).

¹⁶² 94 Bankr. 648 (Bankr. C.D. Cal. 1988).

because to do so would "unfairly deplete the bankruptcy estate at the expense of all other creditors."¹⁶³

The U.S. Bankruptcy Appellate Panel of the Ninth Circuit affirmed the lower court's decision in *In re Milton Poulos, Inc.*¹⁶⁴ The appellate panel found that the lower court did not abuse its discretion when considering the "overall equities" of the case. The appellate panel noted that Congress had expressly authorized attorney fees in over two hundred other federal causes of action. The court found that the absence of an express statutory authorization indicated congressional intent that the trust beneficiary did not automatically receive attorney fees. The court also contrasted the explicit provision for attorney fees in the reparation procedure with the absence of such a provision in the statutory trust procedures. This contrast also supported the conclusion that Congress did not intend such awards.¹⁶⁵

D. Action by USDA

The USDA's role in enforcement of the trust provisions under PACA raises interesting issues. The Act gives USDA explicit authority to take actions to avoid dissipation of trust assets and to recover assets transferred to a third party.¹⁶⁶ In addition, the Act requires that the Secretary receive notice of the intent to preserve trust benefits.¹⁶⁷ Apparently, the purpose of the notice provision is to allow the agency to take action, when necessary, to prevent dissipation of trust assets. The details required in the notice insure that the agency has sufficient information to facilitate such action in eligible transactions.¹⁶⁸

The appropriate degree of USDA involvement in determining a trust claim's validity is unclear. During the public comment period on the proposed regulations, one commentator asked if the USDA would make determinations of contract liability when disputes arose over contract performance. The agency's response did not directly address this question, but indicated that any dispute could be resolved without adversely affecting a claim against trust assets if complainants filed notice on

¹⁶³ *Id.*

¹⁶⁴ *In re Milton Poulos, Inc.*, 107 Bankr. 716 (Bankr. 9th Cir. 1989).

¹⁶⁵ *Id.*

¹⁶⁶ 7 U.S.C. § 499e(c)(4) (1989); *see also* *Lyng v. Pellegrino & Sons, Inc.*, 694 F. Supp. 976 (N.D. Mass. 1988); *In re Nagelberg & Co.*, 84 Bankr. 19 (Bankr. S.D.N.Y. 1988).

¹⁶⁷ 7 C.F.R. § 46.46(g)(2) (1989).

¹⁶⁸ 49 Fed. Reg. 45,735 (1984).

time.¹⁶⁹ One court has placed some reliance on USDA's determination of which parties had properly perfected trust claims.¹⁷⁰

CONCLUSION

The combination of the prompt payment requirement, the reparation procedure, and the statutory trust provides powerful tools for sellers of livestock, poultry, and perishable agricultural commodities. Congress has recognized the disadvantage that sellers face in collecting payment from purchasers of these commodities and has given these sellers special protection. This special protection came first in the availability of the reparation procedure as an alternative to litigation.

The concept of providing an administrative remedy for those harmed by the action of others is not unique to PACA. Procedures for reparation first appeared in federal legislation in the Interstate Commerce Act¹⁷¹ and later in the Shipping Act.¹⁷² Recent revisions to the Interstate Commerce Act no longer refer to "reparation," but the concept remains embodied in administrative procedures that allow the Interstate Commerce Commission to award damages.¹⁷³

The concept of providing an alternative remedy through a reparation procedure was included in the Packers and Stockyards Act for those who have complaints against a stockyard, market agency, or dealer.¹⁷⁴ The Commodity Exchange Act provides a similar procedure for individuals who have claims against persons registered under this Exchange Act.¹⁷⁵ These statutory programs, along with the provision for reparation under PACA,¹⁷⁶ have a common theme that provides those complaining of violations a means to recover damages through federal administrative proceedings rather than by litigation. Congress apparently intended to create a procedure for more expeditious and less costly adjudication of such disputes.

While the reparation procedure provides an alternative forum, it

¹⁶⁹ *Id.* at 45,736.

¹⁷⁰ *See In re Milton Poulos, Inc.*, 107 Bankr. 716 (Bankr. 9th Cir. 1989).

¹⁷¹ Ch. 104, § 15, 24 Stat. 379, 384 (1887) (codified as amended at 49 U.S.C. § 11705(b) (1982)).

¹⁷² Ch. 451, § 22, 39 Stat. 728, 736 (1916) (codified as amended at 46 U.S.C. § 821 (1982 & Supp. V. 1987)).

¹⁷³ 49 C.F.R. § 1130.2 (1989).

¹⁷⁴ Ch. 64, § 309, 42 Stat. 159, 165 (1921) (codified as amended at 7 U.S.C. § 210 (1988)).

¹⁷⁵ Pub. L. No. 93-463, sec. 106, § 14, 88 Stat. 1389, 1393 (1974) (codified as amended at 7 U.S.C. § 18 (1988)).

¹⁷⁶ 7 U.S.C. § 499g (1988).

does not fully protect against risks associated with slow-pay or no-pay practices. Three problem areas have been identified in the marketing of fruits and vegetables which have added an "abnormal marketing risk" for sellers.¹⁷⁷ These problems reflect recent changes in the industry's financial picture.

Climbing overhead costs, including the cost of debt servicing, are reflected by a marked increase in delayed payments for produce. Also, an increase in hidden security agreements which encumber buyers' assets results in the diversion of money owed for produce away from suppliers. Finally, business failures and bankruptcy losses with no possibility of meaningful recovery have shown a steady increase. These factors combine to prejudice sellers' ability to obtain prompt payment for produce.¹⁷⁸

For these reasons, Congress decided to extend the statutory trust concept, originally adopted in the Packers and Stockyards Act, to sales of perishable agricultural commodities. Attorneys advising sellers in these situations should use this effective tool to achieve the greatest possible protection for their seller-clients. At the same time, those who advise lenders should be aware of these legislative programs' effects in structuring financing arrangements for purchasers of these commodities.

If this procedure results in successful protection for farmer-sellers of the covered commodities, Congress also may extend the concept to other transactions. For example, Congress might consider similar protection for sellers of grain or other major crops if Congress concludes that grain elevator insolvencies continue to pose a burden on sellers of these commodities. The experience of sellers of livestock, poultry, and perishable agricultural commodities in successfully using these provisions may determine the appropriateness of similar protection for sellers of other agricultural commodities.

¹⁷⁷ 49 Fed. Reg. 45,737 (1984).

¹⁷⁸ *Id.*

