

Injunctive Relief Under the 1984 Trust Amendments to the Perishable Agricultural Commodities Act: A Necessary Means of Trust Enforcement

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INTRODUCTION

In 1984, Congress amended the Perishable Agricultural Commodities Act of 1930 (PACA). The amendment creates a statutory trust whereby buyers of perishable produce must hold the purchased produce, or proceeds therefrom, in trust for the benefit of the seller, until the buyer makes full payment for the produce.¹ Patterned after the trust provisions set forth in the Packers and Stockyards Act (PSA),² the statute gives qualifying produce creditors a trust claim which is valid and enforceable whether or not the debtor has filed a petition in bankruptcy.³ Further, PACA trust interests are superior to those of the

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¹ The 1984 amendment states:

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.

Pub. L. No. 98-273, 98 Stat. 165 (codified as amended at 7 U.S.C. § 499e(c)(1) (1988)).

² 7 U.S.C. §§ 181-229 (1988).

³ *In re Milton Poulos, Inc.*, 94 Bankr. 648, 652 (Bankr. C.D. Cal. 1988), *aff'd.*, 107 Bankr. 715 (Bankr. 9th Cir. 1989).

buyer's secured and preferred creditors. Accordingly, PACA beneficiaries stand at "the head of the line" when it comes to distribution of assets held in trust by the debtor.⁴

While the PACA trust represents a potent weapon for produce shippers, the trust provisions are not automatic or self-enforcing. Shippers must institute legal action to enforce the trust. Typically, produce suppliers invoke protection under the PACA trust when they believe that the buyer is in financial difficulty. Then, as is the case with most creditors, the PACA trust claimant attempts to enforce its trust rights in a manner calculated to return her money as quickly and as cost-efficiently as possible.

The method of enforcement that the PACA trust claimant selects depends on whether the produce purchaser has filed a petition in bankruptcy. If the debtor has initiated bankruptcy proceedings, the trust creditor must file an adversarial complaint with the bankruptcy court⁵ or a motion for relief from stay and turnover of trust assets.⁶ Because the trust assets are not considered part of the bankruptcy estate, trust beneficiaries have argued that they are entitled to a prompt turnover of assets.

If the delinquent purchaser has not filed a petition in bankruptcy, the trust creditor may file an administrative complaint for reparation with the United States Department of Agriculture (USDA)⁷ or an action to enforce the PACA trust in the appropriate federal district court.⁸ If there is any reason to believe that the debtor has been or is dissipating trust assets, or is insolvent, the trust beneficiary may seek an injunction against the debtor in federal court.

I. IS INJUNCTIVE RELIEF AVAILABLE TO PRIVATE LITIGANTS UNDER THE PACA TRUST?

The PACA trust provisions state in pertinent part:

- (4) The several district courts of the United States are vested with jurisdiction to specifically entertain (i) actions by trust beneficiaries to enforce payment from the trust, and (ii) actions by the Secretary [of Agriculture]

⁴ *De Bruyn Produce Co. v. Victor Foods, Inc.*, 674 F. Supp. 1405, 1409 (E.D. Mo. 1987); *In re Super Spud, Inc.*, 77 Bankr. 930, 931 (Bankr. M.D. Fla. 1987).

⁵ *See In re Prange Foods, Corp.*, 63 Bankr. 211 (Bankr. W.D. Mich. 1986); *see also In re G & L Packing Co.*, 20 Bankr. 789 (Bankr. N.D.N.Y. 1982).

⁶ *In re W. L. Bradley Co.*, 75 Bankr. 505, 506 (Bankr. E.D. Pa. 1987); *In re Fresh Approach, Inc.*, 51 Bankr. 412, 418 (Bankr. N.D. Tex. 1985).

⁷ 7 U.S.C. § 499(g) (1988).

⁸ *Id.* § 499e(c)(4).

to prevent and restrain dissipation of the trust.⁹

Several courts have wrestled with the question of whether this language confers a right upon individual trust claimants to seek injunctive relief in federal court. While most jurisdictions have answered the question affirmatively, no definitive resolution has emerged.

As early as 1980, a Pennsylvania district court interpreted the trust provisions of the PSA to allow injunctive relief to an agricultural association acting on behalf of several PSA trust claimants. In *Pennsylvania Agricultural Cooperative Marketing Association v. Ezra Martin Co.*,¹⁰ the association brought a complaint to recover trust assets. The court granted a temporary restraining order and a preliminary injunction restraining the defendant from dissipating funds from an identified bank account. The court also required the defendant to maintain a minimum balance of \$30,000 in the account until the trust beneficiaries were fully paid their trust principal, prejudgment interest, and court costs.

In later decisions, courts have had difficulty in determining whether the Secretary of Agriculture's authority to restrain dissipation of trust assets and a trust beneficiary's right to enforce payment from the trust are mutually exclusive remedies. Courts have disagreed on whether an individual trust claimant may restrain dissipation of trust assets in addition to enforcing payment from the trust. The Secretary of Agriculture, however, may bring actions to enforce payment *as well* as prevent dissipation of the trust.

For example, in *Lyng v. Frydman*,¹¹ the Secretary filed an action against the corporate debtor, its shareholders, officers, directors, and the debtor's bank on behalf of several unpaid PACA trust beneficiaries who sought preservation and recovery of trust assets. The bank challenged the Secretary's authority to collect trust funds, arguing that the Secretary's jurisdiction is limited to restraining dissipation only. The court rejected the bank's contention. The court stated that the strict construction urged by the bank would render the statute ineffectual and would permit dealers to avoid their trust obligations simply by transferring trust assets to shareholders, officers or secured lenders.¹²

⁹ *Id.*

¹⁰ 495 F. Supp. 565, 566 (M.D. Pa. 1980).

¹¹ No. C86-121OY (N.D. Ohio filed Mar. 23, 1987).

¹² Significantly, the court also observed that "[u]npaid suppliers may *also* bring an action in district court to enforce payment from the trust." *Id.* at 4 (emphasis added); *see also* *Lyng v. Sam Compton Produce Co.*, No. Civ. 3-866-759, slip op. at 3 (E.D. Tenn. Feb. 24, 1987) (holding that Secretary may enforce trust because without this

Several courts have upheld their authority to grant private trust claimants injunctive relief that restrains the dissipation of trust assets and that requires the debtor to segregate and preserve trust assets.¹³ In sharp contrast, some district courts have expressed grave doubts as to whether the PACA authorizes courts to grant affirmative injunctive relief to private litigants alleging rights under the trust.¹⁴ In *DeBruyn Produce Co. v. Victor Foods, Inc.*, the court granted the debtor's motion to rescind a temporary restraining order that required the debtor, among other things, to establish a bank account containing funds equal to the full amount of plaintiff's PACA claim. The court analyzed the statute's language, legislative history, and case precedent and concluded that the statute automatically created a trust. Therefore, the court did not need to order the defendant to create a new trust res and to deposit the res into a bank account to enforce plaintiff's trust claim.¹⁵ The court noted that the buyer would preserve the PACA trust assets by making appropriate bookkeeping entries to identify assets included in the trust's corpus.¹⁶

While the *DeBruyn* court declined to issue affirmative injunctive relief to the trust creditor, the court did not rule out all forms of injunctive relief for claimants under the PACA trust:

authority legislation would be meaningless).

¹³ *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 109 (2d Cir. 1987); *J.R. Brooks & Son, Inc. v. Norman's Country Mkt.*, 98 Bankr. 47, 50 (Bankr. N.D. Fla. 1989). In accord are several unpublished district court orders granting emergency injunctive relief sought by PACA beneficiaries: *Finest Fruits, Inc. v. Freshville Produce Distrib.*, No. 86-Civ.-7621-DNE (S.D.N.Y. filed Oct. 23, 1986) (ordering defendants to deposit trust amount claimed in interest bearing bank account until further order); *Carlsbad Produce, Inc. v. Ocean Produce, Inc.*, No. 87-02175-RMT (C.D. Cal. Apr. 7, 1987) (barring defendants from dissipating PACA trust assets and ordering defendants to deposit trust amounts with court pending determination of hearing to show cause); *Meyer Tomatoes v. Santos Produce Co.*, No. SA-88-CA-357 (W.D. Tex. Apr. 29, 1988) (restraining defendant from dissipating trust assets and precluding defendant from paying creditors until full trust fund amount paid to plaintiff or deposited with court); *Central Cal. Tomato Growers Coop., Inc. v. ACR Fresh Food Sys., Inc.*, Nos. 89-201-E, 89-213-E (S.D. Iowa filed Apr. 4, 1989) (ordering defendants to deposit with the court assets sufficient to satisfy plaintiffs' trust claims); *Meyer Tomatoes v. Arkansas River Produce, Inc.*, No. 89-5095 (W.D. Ark. filed Aug. 14, 1989) (ordering defendants to tender immediate accounting to plaintiff, to remit amount owing to trust account of plaintiff's counsel, and restraining future dissipation of trust).

¹⁴ *DeBruyn Produce Co. v. Victor Foods, Inc.*, 674 F. Supp. 1405, 1407 (E.D. Mo. 1987); *accord* *Fresh W. Mktg. v. M. & L. Food Center, Inc.*, 707 F. Supp. 515 (S.D. Fla. 1989).

¹⁵ *DeBruyn*, 674 F. Supp. at 1409.

¹⁶ *Id.*

At best, upon a showing that defendant is dissipating the assets of the statutory trust and is not making the appropriate bookkeeping entries to identify what assets are part of the trust, plaintiff *might* be entitled to an order in the nature of a TRO or preliminary injunction requiring defendant not to dissipate the assets of the statutory trust.¹⁷

While *DeBruyn* does not represent a major victory for PACA creditors seeking speedy judicial relief, *Frio Ice v. Sunfruit, Inc.*¹⁸ is the most serious setback. In *Frio Ice*, the Florida district court refused to grant the plaintiff's requested relief: an order compelling the defendant to place the alleged trust amount into a separate bank account. The court also held that a trust creditor had no standing to prevent dissipation of the trust res.¹⁹

The *Frio Ice* court held that the primary purpose of the PACA trust amendments is to protect PACA creditors if a purchaser goes bankrupt by elevating the unpaid produce creditor's claim against the debtor to a priority status.²⁰ The court found that this relief, coupled with the PACA claimant's right to pursue an action for damages with the Secretary or in federal district court, are the statute's exclusive remedies.

The Florida district court rejected the opinions in *De Bruyn*,²¹ *Fresh Western Marketing*,²² and *Dole Fresh Fruit Co.*²³ These cases would permit some form of injunctive relief to individual PACA claimants upon a proper showing.²⁴ Noting the district court's limited jurisdiction, the *Frio Ice* court strictly construed the jurisdictional provisions of 7 U.S.C. § 499e(c)(4).²⁵ After a literal review of the statutory language and legislative history of the 1984 PACA amendments, the court concluded that *only* the Secretary may bring an action for injunctive relief to restrain trust dissipation.²⁶ Unfortunately, a restrictive reading of the PACA trust provisions, such as the one advocated in *Frio Ice*, may end effective, speedy, and cost-efficient relief for PACA creditors.²⁷ Produce

¹⁷ *Id.* at 1409-10 (citing *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 108 (2d Cir. 1987)) (emphasis added).

¹⁸ 724 F. Supp. 1373 (S.D. Fla. 1989).

¹⁹ *Id.* at 1378-79.

²⁰ *Id.* at 1377.

²¹ *DeBruyn*, 674 F. Supp. at 1405.

²² 707 F. Supp. 515 (S.D. Fla. 1989).

²³ 821 F.2d 106 (2d Cir. 1987).

²⁴ *Frio Ice*, 724 F. Supp. at 1378.

²⁵ *Id.*

²⁶ *Id.* at 1379-80.

²⁷ Since the Secretary's jurisdiction has not been judicially limited to filing actions to restrain trust dissipation, logic compels the conclusion that PACA creditors are not constrained to pursue only collection proceedings under PACA.

suppliers may need to engage in protracted federal litigation for their money damage claims with no assurance that the defendant will preserve sufficient trust assets to satisfy a judgment. A creditor could end up in a worse condition in terms of litigation fees, than if no action had been taken.

Similarly, if a trust creditor must enlist the assistance of the Secretary of Agriculture to file an action for injunctive relief, the Secretary likely will not institute the proceeding within a short time period, assuming that the Secretary elects to pursue the action. Because the passage of time gives debtors ample opportunity to partially or completely dissipate trust assets, the time necessary to permit the Secretary to evaluate the claim and to decide to act on the claim may render an action for injunctive relief pointless.

Indeed, the PACA amendment's legislative history suggests a clear Congressional intent to create a speedy solution to the unpaid produce shipper's dilemma:

When a business is in financial difficulty, security interest holders move quickly to collect on their money because they are aware of the plight of the borrower. Suppliers of produce cannot protect their interests because they may lack the necessary information and are usually many miles away. Once funds are dissipated, it is all but impossible to effect recovery.²⁸

Accordingly, unless PACA creditors correctly anticipate that government attorneys from the USDA will take immediate action to preserve their trust claims (an unrealistic expectation), the creditors' only means to obtain meaningful relief is to pursue injunctive orders as private litigants.²⁹

If the statutory trust is to remain an effective weapon for unpaid produce suppliers, courts must interpret the PACA amendment so as to accomplish its purpose. As Judge Ford aptly observed in *In re Fresh Approach, Inc.*:

The clear language of PACA Section 499e and the corresponding legislative history dispel any reasonable doubt as to the Congressional intent involved. The PACA trust was designed to protect unpaid sellers of produce. It is well settled that a statute is to be construed to effectuate its purpose.³⁰

²⁸ H.R. REP. NO. 98-543, 98th Cong., 2d Sess. 7, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 405, 410-11.

²⁹ The use of prejudgment attachment may be a viable alternative remedy, as the *Frio Ice* decision suggests. *Frio Ice*, 724 F. Supp. at 1379. However, prejudgment attachments is not available in all states, and the statutory prerequisites vary from state to state.

³⁰ 57 Bankr. 412, 421 (Bankr. N.D. Tex. 1985).

In sum, the question of whether injunctive relief is available to private produce suppliers under PACA is far from resolved. The majority of courts considering the issue have concluded that this relief is appropriate under the PACA. However, most of these decisions and orders are unpublished. In those instances in which private PACA claimants, or the Secretary acting on behalf of trust claimants, have successfully obtained injunctive relief under PACA, courts have served the Act's purpose. As a practical matter, unless the Secretary has the resources and inclination to file for injunctive orders on behalf of each PACA claimant who seeks such relief, produce suppliers must remain free to institute their own actions to prevent dissipation of the trust and to seek other, available affirmative relief. Otherwise, courts would deprive the PACA amendments of perhaps the most consequential protections devised for unpaid produce suppliers.

II. PREREQUISITES FOR INJUNCTIVE RELIEF UNDER PACA

Assuming that a PACA claimant may bring an action for injunctive relief, the next question must focus on the level of factual proof necessary to warrant relief. The trial court has discretion to determine the sufficiency of plaintiff's evidence.³¹ This discretion varies from jurisdiction to jurisdiction and from judge to judge.

Courts that have evaluated a produce supplier's request for injunctive relief under PACA often apply traditional requirements for injunctive relief.³² The equitable criteria that suppliers must show include: (1) a substantial likelihood of success on the merits; (2) a danger of irreparable harm to plaintiff absent the requested relief; (3) whether the balance of hardships between the parties tips in plaintiff's favor; and (4) whether an injunction will further the public interest.

A. *Likelihood of Success on the Merits*

A PACA claimant may show likelihood of success on the merits by demonstrating eligibility for trust protection.³³ In addition, the trust no-

³¹ *County of Santa Barbara v. Hickel*, 426 F.2d 164, 168 (9th Cir. 1970).

³² *Meyer Tomatoes v. Santos Produce Co.*, slip op. at 2-5; *My Fruit v. Pacific Sun Mktg.*, No.89-833-FR, slip op. at 1 (D. Ore. filed Aug. 17, 1989); *Hull Co. v. Hansen's Foods, Inc.*, Civ. 3-89-286, slip op. (D. Minn. filed May 25, 1989).

³³ The amendment states that:

The unpaid supplier, seller, or agent shall lose the benefits of the 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

tices that the produce supplier relies on as evidence of qualification for trust benefits must contain information related to each produce transaction.³⁴

In applying to the court for injunctive relief, the PACA claimant commonly makes her required showing based on the pleadings, declarations, exhibits, and legal arguments submitted to the court. A PACA claimant can fail to qualify for trust protection in countless ways. The trial court may acknowledge these shortcomings *sua sponte*, or the debtor's counsel may point out the shortcomings. Frequent examples of defects that result in the loss of trust benefits, and consequently the right to injunctive relief under PACA, include the following: (1) trust notices not timely filed,³⁵ (2) trust notices not received by produce debtor,³⁶ and (3) trust notices lacking the necessary information.³⁷

B. Irreparable Harm

Because injunctive relief is an extraordinary and immediate remedy granted without a full hearing, the supplier will not obtain an injunction absent a showing that she will suffer irreparable injury without

expiration of the time prescribed by which payment must be made, as set forth in the regulations issued by the Secretary, (ii) after expiration of such other time 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 transactions and the terms of payment shall be disclosed on invoices, accounting and other documents relating to the transaction.

7 U.S.C. § 499e(c)(3) (1988).

³⁴ 7 C.F.R. § 46.46 (1989). The regulation requires that the notice include a statement of intent to preserve trust benefits and must include the name and address of both the trust claimant and the debtor. The notice must also include: the date of the transaction; the commodity; the contract terms; invoice number; price; date payment was due, or if appropriate, the date claimant received notice that a payment instrument has been dishonored; and the amount past due and unpaid. *Id.*

³⁵ See *In re Prange Foods Corp.*, 63 Bankr. 211, 216 (Bankr. W.D. Mich. 1986).

³⁶ *In re Marvin Properties, Inc.*, 76 Bankr. 150, 152 (Bankr. 9th Cir. 1987), *aff'd*, 854 F.2d 1183 (9th Cir. 1988).

³⁷ *In re D.K.M.B. Inc.*, 95 Bankr. 774, 779 (Bankr. D. Colo. 1989). Strict compliance with the notice requirements ordinarily is required, but minor omissions of information from the face of the notice may not operate to defeat trust benefits in view of substantial compliance with requirements. *Tom Lange Co. v. Lombardo Fruit & Produce*, 107 Bankr. 654, 661-62 (Bankr. M.D. Fla. 1989).

such relief.³⁸ This raises an intriguing question for the enforcement of PACA trust rights: does prospective financial loss constitute irreparable harm? If one characterizes a PACA enforcement proceeding as essentially an action for money damages, most legal scholars would agree that injunctive relief would not be appropriate. However, if the supplier can show that the buyer is insolvent, unable to respond fully in damages, or that the supplier has no available remedy by which she can later recover money damages, a court may deem a preliminary injunction necessary to shield the supplier from irreparable damage.³⁹

In *Meyer Tomatoes v. Santos Produce Co.*,⁴⁰ Judge Garcia's analysis distinguishes PACA trust cases from other preliminary injunction actions. The court acknowledged the risk of granting preliminary injunctive relief to one creditor in the face of the buyer's insolvency. An injunction could give the supplier an unfair preference in the distribution of assets. Nevertheless, the court determined that a PACA trust creditor must be afforded speedy relief. Citing the Congressional intent underlying the PACA trust, Judge Garcia found that produce creditors would be irreparably harmed if they were unable to collect from their buyers:

The fact that Congress saw fit to establish a trust as to perishable agricultural commodities and their proceeds indicates that Congress believed that the monetary loss suffered by an unpaid supplier of such commodities would be significantly detrimental. . . . This [c]ourt is convinced that, despite the apparent existence of only monetary damages, preliminary injunctive relief in this case is appropriate to preserve trust assets and to allow the uninterrupted flow of perishable agricultural commodities.⁴¹

Thus, a presumption of irreparable injury may be gleaned from the expressed legislative intent of the Act, provided that a PACA claimant makes some showing of the buyer's insolvency or inability to satisfy the trust claim or of the buyer's dissipation of trust assets. Absent a showing of dissipation of trust assets, several district courts have declined to grant injunctive relief to PACA trust beneficiaries.⁴²

³⁸ *Dollar Rent A Car, Inc. v. Traveler's Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985).

³⁹ *Meyer Tomato v. Santos Produce Co.*, No. SA-88-CA-357, slip op. at 3 (W.D. Tex. 1988); *Enterprise Int'l v. Corporacion Estatal Petrolera*, 762 F.2d 464, 473 (5th Cir. 1985); *Drobbin v. Nicolet Instrument Corp.*, 631 F. Supp. 860, 912 (S.D.N.Y. 1986); *Teamsters Freight Local Union No. 480 v. Southern Forwarding Co.*, 424 F. Supp. 11, 13 (M.D. Tenn. 1976). *But cf.* *American Hosp. Supply Corp. v. Hospital Prod. Ltd.*, 780 F.2d 589, 596 (7th Cir. 1986) (reasoning that use of defendant's insolvency as reason to grant injunction may give plaintiff a preference in asset distribution).

⁴⁰ *Meyer Tomatoes*, slip op. at 4.

⁴¹ *Id.*

⁴² *My Fruit v. Pacific Sun Mktg.*, Civ. No. 89-833-FR, slip op. at 8 (D. Or. Aug.

C. Balance of Hardships

Courts often cite the balance of hardships analysis as a factor in determining whether injunctive relief is justified. However, only a few courts that have considered PACA trust motions have expressly evaluated the hardships which would inure to each party with and without issuance of the requested relief. One notable exception is *My Fruit v. Pacific Sun Marketing*.⁴³ In *My Fruit*, the court observed that in addition to a failure to provide a sufficient showing of trust dissipation, the plaintiff failed to demonstrate "that the balance of hardships tip[ped] in its favor."⁴⁴ The court seemed unsympathetic to the plight of the unpaid produce supplier. The court stated:

The injunctive relief requested by My Fruit would put Pacific Sun out of business and would seriously injure Rivas' and Madderonm's ability to conduct their personal affairs. My Fruit on the other hand, alleges generally that it would be a hardship if it were not paid the funds it claims it is owed.⁴⁵

The *My Fruit* analysis is difficult to reconcile with the express purpose of the PACA trust amendments. Had the plaintiff in *My Fruit* made a satisfactory showing of trust dissipation, then whether the defendant was forced out of business as a result of the injunction should have made no difference. In considering the adverse impact that enforcement of the PACA trust would have on a debtor, courts should focus on the remedial purposes of the Act's trust amendments. Clearly, Congress sought to eliminate the proliferation of unpaid obligations to produce suppliers.

The reasoning set forth in *In re Fresh Approach, Inc.*⁴⁶ is particularly instructive:

It must be remembered that PACA was not enacted to protect those in Debtor's shoes, but rather to prevent the chaos and disruption in the flow of perishable agricultural commodities sure to result from an industry-wide proliferation of unpaid obligations. While in isolation this may seem a harsh course to follow, in the macroeconomic sense PACA serves to en-

17, 1989) (denying injunction because plaintiff failed to show irreparable harm of dissipation of trust assets); *Hull Co. v. Hansen's Foods, Inc.*, Civ. 3-89-286, slip op. at 4 (D. Minn. May 25, 1989) (denying preliminary injunction because plaintiff failed to show danger of irreparable harm and probability of success on merits); *Fresh W. Mktg. v. M & L Food Center, Inc.*, 707 F. Supp. 515, 516 (S.D. Fla. 1989) (holding requested relief not warranted because no evidence of dissipation presented).

⁴³ *My Fruit*, slip op. at 1.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.*

⁴⁶ 51 Bankr. 412 (Bankr. N.D. Tex. 1985).

sure continuity of payment and therefore survival of the industry. *Congress has plainly decided it would be less disastrous to risk liquidation of a single purchaser than to threaten the entire production chain with insolvency.* It is not the function of this [c]ourt to pass upon the wisdom of that decision.⁴⁷

Indeed, upon a showing that the produce purchaser was dissipating the trust res in contravention of the statute, a denial of immediate injunctive relief would reward the wrongdoer and result in precisely the sort of irreparable hardship to the produce seller that Congress sought to eliminate.

Although courts generally refuse to disturb the status quo between the parties prior to a full adversarial hearing, courts can alleviate this concern by requiring the plaintiff to post a sufficient bond for the defendant's protection prior to the issuance of the injunction. Moreover, the injunctive order serves merely to safeguard assets that by statute are presumed to be held in trust for the benefit of the PACA creditor and may not be dissipated by the purchaser. Thus, injunctive relief does no more than preserve the statutorily prescribed status quo.

D. Public Interest

Section 499e(c)(1) of the trust amendment specifically provides that the PACA trust legislation "is intended to remedy such burden on commerce *and to protect the public interest.*"⁴⁸ Consequently, a court's failure to grant some form of injunctive protection to a PACA claimant in an appropriate case disserves the public interest because of the potential chaos and disruption which inevitably will result within the produce industry.⁴⁹

CONCLUSION

Congress enacted the 1984 amendments to the PACA to assist in ensuring a healthy cash flow to produce sellers and thereby to protect the public interest. In the five years since Congress created the statutory trust, the judiciary has assisted in fulfilling these Congressional goals when it has acted swiftly to enforce the trust rights of qualified PACA beneficiaries.

If other circuits adopt the rationale of *Frio Ice*,⁵⁰ PACA trust benefi-

⁴⁷ *Id.* at 420 (emphasis added).

⁴⁸ 7 U.S.C. § 499e (1988) (emphasis added).

⁴⁹ *Meyer Tomatoes v. Santos Produce Co.*, No. SA-88-CA-357, slip op. at 5 (W.D. Tex. Apr. 29, 1988).

⁵⁰ 724 F. Supp. 1373 (S.D. Fla. 1989).

ciaries will be seriously impeded in their ability to collect trust assets from debtors that have not filed for bankruptcy protection. Restricting injunctive relief under the statutory trust to instances in which the Secretary of Agriculture files a lawsuit would effectively eliminate a majority of injunctions granted under the PACA trust.

Without the ability to seek an order to prevent a debtor's dissipation of assets, the debtor may continue to dissipate trust funds with impunity until nothing remains for the trust beneficiary to collect. If private trust claimants must rely on the Secretary to institute injunctive proceedings on their behalf, the inevitable time lag before the Secretary takes any action may prove fatal to their ultimate ability to recover trust assets. Consequently, the better approach would provide private PACA litigants with injunctive relief upon proof of trust dissipation.

Moreover, injunctive orders that compel defendants to segregate trust funds or to establish bank accounts into which the trust assets must be deposited provide a simple and effective safeguard that courts can monitor. Without this protection, trust claimants cannot ensure defendants' compliance absent time-consuming discovery and additional court motions.

The application of traditional equitable criteria to emergency injunctive relief under PACA will prevent the granting of extraordinary relief in inappropriate cases. If a trust beneficiary makes a convincing showing that she will likely succeed on the merits, will be irreparably damaged without immediate relief, that the balance of hardships tips in her favor, and that the relief sought will further the public interest, no court should refuse to issue a protective order.