

It Takes a Combination

By
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Be aware of the potential gaps in your
Perishable Agricultural Commodities Act protection



LEGAL—EASE

Today's economic conditions make it all the more critical for produce buyers to pay for the produce they purchase. In many cases, the strongest weapon in the produce seller's arsenal is the statutory trust provided by the Perishable Agricultural Commodities Act (PACA).



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Under PACA, a statutory trust is created when produce is sold in interstate commerce. Consequently, the buyer acts as a trustee, holding the produce and the monetary proceeds from the resale of the produce in trust, for the benefit of the seller, until the seller is fully paid. Since a failure to pay is a breach of the trust, not merely a breach of contract, and a breach of the fiduciary duties of the trustee, a produce seller that properly preserves its trust rights is entitled to a "super-priority" over even secured creditors. The trust also establishes a basis for holding those individuals in a position to control the corporate buyer personally liable for the unpaid sum. What's more, the PACA trustee's obligations are typically not dischargeable in a Chapter 7 bankruptcy.

Key Elements

In many cases, the strongest weapon in the produce seller's arsenal is the statutory trust provided by the PACA. However, there are gaps in PACA's protection—two of these gaps are discussed in this article:

🔑 Recovering legal costs: there is no statutory provision that permits recovery of attorneys' fees when seeking enforcement of the PACA trust.

🔑 Statute of limitations: PACA does not provide a statute of limitations for pursuing trust actions; however, the courts may rely on state law to impose a limitation on trust actions against individual trustees.

To learn more about each key element, look for the 🔑 throughout the article.

By changing the nature of the transaction from contractual to the fiduciary, Congress gave unpaid produce sellers a serious set of teeth to take a bite out of delinquent buyers' assets. "Congress intended PACA to protect small farmers and growers who were vulnerable to the practices of financially irresponsible buyers." *Pacific International Marketing, Inc. v. A&B Produce, Inc.*, 462 F.3d 279, 282 (3rd Cir. 2006) quoting *Idahoan Fresh v.*

Advantage Produce, Inc., 157 F.3d 197, 202 (3rd Cir. 1998))

Other articles have touched on what kinds of produce and buyers PACA covers, and what a seller needs to do to preserve its PACA rights. This article takes a look at two potential gaps in your PACA protection—recovery of attorneys' fees and statutes of limitation—along with how courts handle the gaps when issues arise, and how PACA could be updated to ensure consistent enforcement across the board.

Recovery of Legal Costs and Fees

One of the biggest challenges in pursuing a valid PACA claim in court is the legal costs. While larger companies have the resources to absorb the legal costs of a lawsuit, smaller companies face a far more difficult time. Frequently, the smaller produce seller will have a number of small, unpaid receivables from different customers. Although the dollar amount of each claim may be low, such claims are nonetheless significant given the percentage of gross revenue each claim represents. Yet,

the low dollar amount of each individual account may make it financially impractical to seek the needed legal help.

🔑 Presently, PACA only specifically provides for the recovery of attorneys' fees when going to court to enforce a reparations order already issued by the United States Department of Agriculture (USDA) through its formal grievance procedure (7 U.S.C. §499g(b)). There is no statutory provision that permits the recovery of attorneys' fees when seeking enforcement of the PACA trust directly from the courts.

Some courts have set limited precedent. For example, a growing wave of Appellate Court decisions across the country follow the terms of the parties' contract to permit an unpaid produce seller to recover some or all of its attorneys' fees. But, as illustrated below, relying on the contracts of the individual creditors creates uncertainty, increases litigation expenses, and fails to benefit all beneficiaries of the PACA trust in a uniform manner.

Attorneys' Fees by Contract

Frequently, additional terms contained on a produce seller's invoice become a part

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of the sales contract. Once a contractual right to attorneys' fees is established, they become "sums owing in connection with" perishable agricultural commodities transactions under PACA and are entitled to the same trust protection as the produce itself (7 U.S.C. §499e(c)(2)). See *e.g. Coosemans Specialties, Inc. v. Jack Gargiulo*, 485 F.3d 701 (2nd Cir. 2007) citing *Country Best v. Christopher Ranch LLC*, 361 F.3d 629, 632 (11th Cir. 2004); *Middle*

POINT OF FACT:

The Second, Third, Ninth, and Eleventh Appellate Court Circuits cover the following states: (Second) New York, Vermont, and Connecticut; (Third) Pennsylvania, New Jersey, and Delaware; (Ninth) Arizona, California, Nevada, Oregon, Idaho, Montana, and Washington; (Eleventh) Alabama, Georgia, and Florida.

Mountain Land & Produce v. Sound Commodities, 307 F.3d 1220, 1222-25 (9th Cir. 2002); See also *Pacific International Marketing*, 462 F.3d at 286). Thus, if the seller pays its attorneys \$10,000 to recover \$30,000 in produce, the ultimate PACA claim and judgment against the buyer would be \$40,000.

These decisions, however, are only binding in the Second, Third, Ninth, and Eleventh Circuits. Further, these decisions leave open for argument whether or not payment of attorneys' fees was in fact an agreed-upon part of the parties' contract, and creates an additional round of litigation and legal fees which would be unnecessary if a statutory right to recover fees was in place. In 2007, the U.S. Court of Appeals for the Second Circuit decided such an issue in *Coosemans*, 485 F.3d at 708-709.

In *Coosemans*, the defendant alleged that the attorneys' fees provision on the plaintiff's invoices was never discussed or agreed to, and therefore was an unenforceable additional term (*Coosemans*, 485 F.3d at 708). The Second Circuit applied New York law, which states that "additional terms are to be construed as proposals for addition to the contract (N.Y. UCC §2-207(2))." However, when the parties are merchants, the additional terms become part of the parties' contract unless: (1) the offer to purchase produce expressly limits acceptance to the terms of the offer, (2) the additional terms materially alter the offer, or (3) notice of an objection to additional terms was given within a reasonable time (*Id.*). The *Coosemans* defendant alleged the attorneys' fee provision "materially altered" the terms of their contract with the plaintiff, which under New York law means the provision would result in "surprise" or hardship if made part of the contract without the express awareness of the defendant (*Coosemans*, at 708 citing *Bayway Ref. Co v. Oxygenated Mktg & Trading A.G.*, 215 F.3d 219, 223-224 (2nd Cir. 2000); N.Y. UCC §2-207 cmt. 4). Many states have adopted similar versions of the Uniform Commercial Code.

"Surprise" includes both subjective and objective elements—namely, what a party actually knew or should have known (*Id.*). Fortunately for the produce seller,

the Second Circuit found that the defendant buyer failed to provide evidence that would demonstrate any surprise over the attorneys' fee provision in the plaintiff seller's invoices (*Coosemans*, at 708). Since there was a contractual right to fees, the attorneys' fees became part of the PACA trust (*Id.* at 709).

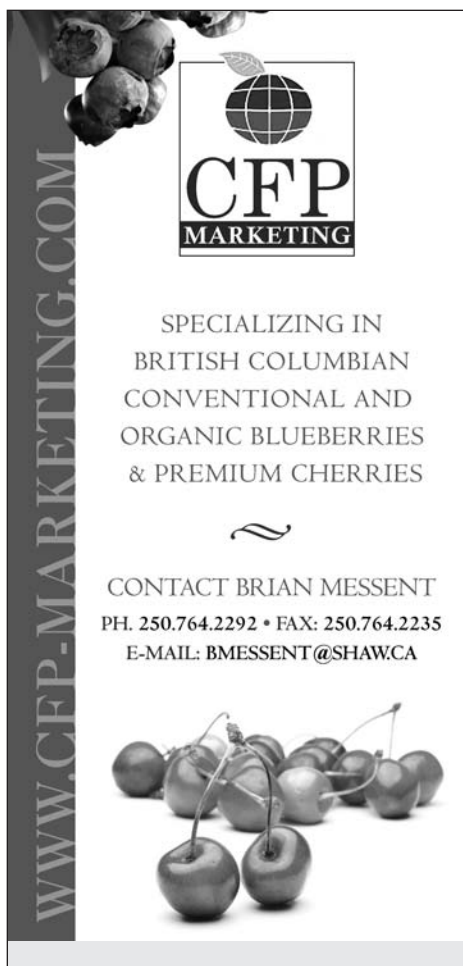
The *Coosemans* case illustrates the need for uniformity when holding a delinquent buyer liable for the attorneys' fees the seller incurred while trying to enforce the PACA trust. If the PACA statute mandated that the delinquent buyer must pay legal fees in a trust enforcement action, the *Coosemans* plaintiff could have avoided the various motions in District Court on this issue, as well as the appeal. The litigation contesting the terms of the parties' contract could have been avoided. Moreover, a statutory attorneys' fees provision could be applied uniformly across the country.

As it stands today, however, attorneys' fees must be considered a potential gap in your PACA protection. A second potential gap is discussed below.


Statutes of Limitation

Under PACA, perishable agricultural commodities are held in trust by the buyer until the seller is fully paid (7 USC 499e(c)(2)). Logically, the trust should remain until the seller is paid, no matter how long that takes, and the failure to pay, and continued use of PACA trust funds for non-PACA purposes, should be considered continuing violations of the trust that toll, or postpone, any statute of limitations. However, the PACA statute itself does not address this matter, thus leaving it to the interpretation of the courts.

🔑 In 2005, the U.S. Court of Appeals for the Third Circuit limited the time to pursue PACA claims against an individual (*Weis-Buy Services, Inc. v. Paglia*, 411 F.3d 415 (3rd Cir. 2005)). In *Weis-Buy*, the appellate court determined that because PACA failed to supply a statute of limitations, it should apply the statute of limitations for a breach of fiduciary duty from state law—Pennsylvania, in this particular case (*Id.* at 422). Pennsylvania law requires a breach of fiduciary duty claim to be



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brought within two years of when the claim accrues (*Id.*). The claim accrues and the limitation period begins to run when the “trustee openly and unequivocally violates his duties (*Id.*).” In plain English, this means when a buyer fails to pay on time, its supplier has two years to pursue a PACA claim against the individuals who control the buyer company. While the *Weis-Buy* case is not controlling outside of the Third Circuit, it highlights the need for a national standard. Some courts in other jurisdictions may choose to accept the argument that the use of PACA assets for non-PACA purposes constitutes a continuing violation that does not have any time limitation. However, application of the *Weis-Buy* court’s ruling can lead to very different results in different parts of the country. For example: in Tennessee, the statute of limitations for a breach of fiduciary duty claim is one year. In Virginia it is two years, while in New York it can range from three to six years

depending on the basis of the claim. In Illinois, the statute of limitations can be five years.


Typically, an unpaid seller would sue the principals and corporation at the same time, but these lawsuits can occur at different times if the principals are unknown or if the corporation is in bankruptcy, as was the situation in the *Weis-Buy* case. In the bankruptcy, more often than not, suit would have to be brought against the principals separately in District Court since bankruptcy courts may not have jurisdiction to adjudicate PACA claims against non-bankrupt debtors. Unpaid suppliers may be reluctant to immediately pursue their claims simultaneously in two separate courts when it is possible that the bankrupt corporation will have sufficient assets to satisfy all or a large part of the PACA claim.


It is understandable that produce sellers, especially the small or low-volume seller, would seek to avoid the increased legal bills that go along with fighting on two fronts. However, if an unpaid seller is not careful and is unaware of the applicable statute of limitations in the buyer’s home

state, the individual liability claims against a buyer’s principals could be barred. For now, unpaid suppliers of all sizes are going to have to keep track of the limitations periods in each and every state they do business in—something that would not be necessary if a federal standard were in place.




Conclusion

PACA remains a strong weapon in the unpaid supplier’s arsenal, but could be updated to even better meet its objective to protect small farmers and growers. Just as PACA permits the recovery of attorneys’ fees when enforcing a USDA reparations order in court, PACA could be updated to provide for the recovery of attorneys’ fees when pursuing a trust enforcement action in court. Such an amendment would provide a unified standard for the entire country, and relieve the industry from the additional litigation burden currently required solely to prove a supplier’s right to recover its legal fees. A mandatory imposition of legal fees on a delinquent buyer would make equal the consequences of not paying, no matter the size of the seller. Small suppliers would be more apt to seek legal help and buyers would be more apt to settle, allowing the suppliers to pay their own bills and thereby improve the financial stability of the industry.

Additionally, Congress could amend PACA to specifically state there is no time limitation to a PACA claim against either the buyer or its principals, or at least set a specific and reasonable time period. The current situation causes different results across the country and can easily lead to confusion, which could ultimately cost a multi-state supplier large amounts of money when its claim against a bankrupt buyer’s principals is barred. Hopefully, the gaps in PACA’s “teeth” can eventually be filled; in the meantime, awareness of these gaps is critical to securing your rights when a buyer fails to pay. 




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