The Perishable Agricultural Commodities Act of 1930 (PACA)

- Originally enacted in the 1930s to protect farmers.
- Priority to sellers who were frequently cheated or last in line if the wholesaler later filed bankruptcy.
  - Floating trust added in 1984 amendment.
- “Commodities” has been interpreted to include frozen goods.
  - Any processing that merely preserves the food and doesn’t change its essential nature.
  - E.g., drying or removing pits ok; coating with oil for easy frying, not ok.
- Notice required (between creditor and debtor) to preserve the PACA trust rights.
Who is subject to PACA?

- Dealer: person who buys/sells large quantities of a PAC in excess of $230,000 in one calendar year.
- Commission Merchant: party who receives a PAC for sale on commission.
- Broker: party negotiating sales and purchases of PACs for or on behalf of the seller or buyer.
- These parties must be licensed. Sellers may, but need not be, licensed.

PACA Trust: Preserving Rights

- Sellers must preserve their rights in trust assets to have the benefit of the PACA trust.
- If licensed, they can simply include a mandated passage in their invoices.
- If not licensed, sellers must send a “notice of intent to preserve trust benefits” with certain information within 30 days of payment being due or receiving notice of a check being dishonored.
The PACA Trust

The PACA trust requires all commission merchants, dealers, or brokers to hold all perishable commodities purchased on short-term credit, as well as sales proceeds, in trust for the benefit of unpaid sellers until full payment is made. Importantly, the trust automatically arises in favor of a produce seller upon delivery of produce. PACA trusts are governed by traditional principles of trust law, and property subject to the trust is excluded from property of the bankruptcy estate. Because of PACA, the PACA trust beneficiaries are granted statutory priority in repayment, even senior to secured creditors.


Packers and Stockyards Act of 1921 (PASA)

- Originally enacted to combat anti-competitive practices by the five largest meat packers.
- Generally applies to packers, swine contractors, stockyard owners, market agencies, dealers, live poultry dealers, and other persons engaged in the processing/wholesale purchasing of livestock.
PASA Trust: 
Preserving Rights

• Unpaid cash seller must give notice to the Secretary of Agriculture within 40 days of non-payment or 15 days of dishonored check to preserve trust rights.
• Cash seller is a seller who does not expressly extend credit to buyer.

PASA Trust

• Only packers with average annual purchases greater than $500,000 and live poultry dealers with average annual sales greater than $100,000 must maintain a statutory trust for the benefit of unpaid cash sellers or poultry growers.
• Packers must hold “all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom.” 7 U.S.C. 196(b).
  Similarly, Live Poultry Dealers must hold “all inventories of, or receivables or proceeds from such live poultry or poultry products derived therefrom[.]” 7 U.S.C. 197(b).
• Under PACA (and PASA), real estate is not typically an asset of the PACA trust. Only the produce, products derived from that produce, and receivables or proceeds of that produce are assets of the trust. Therefore, the PACA trust is not a lien against real property according to the statutory construction.

• However, there was a case in 2013 in New York state court (on a motion to dismiss, no less) holding that a PACA trust created a lien on real estate senior to the foreclosing lender’s interest.
  – Not furthered by any federal courts expressly thus far

Case Study: 
**Chiquita Fresh N. America v. Fierman Produce Exch., Inc.**

• 2016 WL 4098546 (E.D. NY 2016)

• Or, “There’s always money in the banana stand.”
Facts

- Chiquita Fresh N. America, LLC, Dole Fresh Fruit Company, S. Katzman Produce Inc. and Katzman Berry Corp. (“Suppliers”) all supplied produce to Long Island Banana Corp. and Suffolk Banana Co., Inc. (“Wholesalers”).
- Wholesalers were registered PACA entities.
- (Thomas J. Hoey was the principal of both Wholesalers. He was also a defendant, but was incarcerated on pending criminal charges and subsequently filed bankruptcy such that only Wholesalers were affected by this case.)
- Suppliers attempted to recover assets of the statutorily-established PACA trust.

Facts

- Brook Enterprises Ltd. (also a defendant) (“Brook”) was a related entity to Wholesalers with common principals, but its sole purpose was owning real estate.
- Brook owned real property known as 596 Merrick Road. This property was never used in the course of business of Wholesaler, and Brook was not engaged in the banana business.
- 596 Merrick was acquired in the 1980s with $300,000 cash and a purchase money mortgage for the remaining balance (around $600,000). The PMM was subsequently paid off prior to the sale of the property.
- “Banana money” was used to pay the purchase money mortgage off over time.
Facts

• The 596 Merrick property was on the market and sold during the course of the PACA litigation.
• Proceeds were distributed to multiple payees, including the principals of Wholesalers and third parties.

Issues

• Whether property owned by a non-regulated entity paid for with funds resulting from the sale of PACA-regulated produce was an asset of the PACA trust;
• And therefore, whether the proceeds of the sale of the property were subject to clawback as a PACA trust asset.
Holding

• Yes, the value of the 596 Merrick property paid for with proceeds from sale of PACA produce constituted a PACA trust asset (i.e. the value of the purchase money mortgage, including interest paid).

• And yes, to the extent proceeds of the sale of the PACA trust asset were not held by innocent purchasers, the proceeds from the sale were in a constructive trust for the benefit of the Suppliers.
  – Interestingly, the court found a woman who was attorney-in-fact for Thomas J. Hoey was a third party from whom assets could not be recovered. She held the majority of the proceeds in an account in her individual name.

Rationale

• Three-prong test for whether property was an asset of the PACA trust from In re Kornblum & Co., 81 F.3d 280, 284 (2d Cir. 1996): defendants must prove the property is NOT a PACA asset by proving:
  1. That no PACA trust existed when the relevant property was purchased,
  2. That even though a PACA trust existed when the relevant property was purchased, that the property was not purchased with PACA trust assets; OR
  3. That although a PACA trust existed when the relevant property was purchased and the property was purchased with PACA trust assets, PACA buyer thereafter paid all unpaid sellers in full prior to the transactions involving the PACA creditors, thereby terminating the PACA trust.
Relevance to Title Insurance

- In this case, the real property was determined to be a trust asset because it was purchased with the proceeds of the produce via the purchase money mortgage.
- However, because the property was sold, and there was no mortgage on the property at time of sale (and no default under any mortgage), the court did not reach the issue of whether the claims of the PACA creditors against the property would prime those of the mortgage holder on the property.
- There is protection for bona fide purchasers for value without knowledge. However, a lender to an entity covered by PACA or PASA could easily be charged with constructive notice of a PACA/PASA trust. In this case, the borrower entity was not a PACA-registered entity, so the lender might have succeeded on claiming no knowledge. The purchaser in this instance likely would be a BFP, as the seller entity (nor the property) was directly used in PACA-regulated business.

Relevance to Title Insurance

- Risks for an Owner’s Policy
- Risks for a Loan Policy
• Is your buyer or borrower a registered PASA or PACA entity?
• PACA: https://www.ams.usda.gov/rules-regulations/paca
  – You can select “Search PACA Licenses” to look for your entity
  – There is also a link at the bottom of the page for the current book of PACA Licensees
• PASA: https://gipsa.usda.gov/psp/psp.aspx
  – In the regulated entities section, you can click through and get an Excel sheet listing the current registered entities
  – List may be out of date, and not all parties subject to the trust are required to be registered.

Additional Resources

• The National Ag Law Center, www.nationalaglawcenter.org, has excellent articles on both PACA and PASA.
• www.gipsa.usda.gov has great resources on PASA, as they administer the program.
• www.ams.usda.gov has similar resources on PACA, as they administer that program.