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## USDA AMS Fruit and Vegetable Program

*Presents...*



**Perishable Agricultural Commodities Act  
(PACA)—Trust Provision**

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[www.ams.usda.gov/paca](http://www.ams.usda.gov/paca)

Help buyers and sellers market their fresh and processed fruits, vegetables and other specialty crops.  
We:

- Develop U. S. Grade Standards
- Grade and inspect product
- Collect and disseminate Market News reports and information
- Partner with industry boards and committees to help overcome marketing barriers
- Administer the Specialty Crop Block Grant Program
- Facilitate fair trade and dispute resolution through enforcement of the Perishable Agricultural Commodities Act (PACA)

[www.ams.usda.gov/fv](http://www.ams.usda.gov/fv)



# Today's Speakers

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Speaker



Josephine Jenkins



# Perishable Agricultural Commodities Act (PACA) and the PACA Trust Provision



## The PACA Trust -- An Important Tool



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The PACA Trust provides growers and other fruit and vegetable sellers the ability to claim **priority status** in the case of a business failure by a produce buyer.



# In Cases Of ...

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 Business Failure

 Bankruptcy

 Failure-to-pay



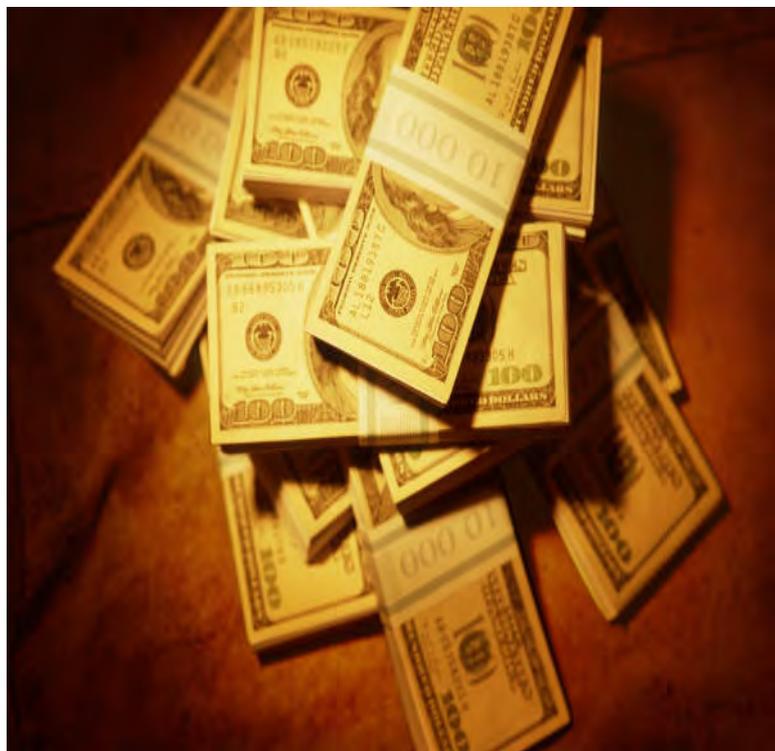
# Trust Assets Include...

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- fruit and vegetable inventories
- products derived from fresh and frozen fruits and vegetables
- all receivables or proceeds from the sale of fruits and vegetables

# Benefits

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Hundreds of  
millions of dollars  
paid to fruit and  
vegetable sellers

*(Since 1984)*



# Major Cases

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Fleming Companies, Inc.	\$43 million
Winn Dixie Stores, Inc.	\$30 million (est.)
AmeriServe Food Distribution	\$26.7 million
Fresh America Corp.	\$13.8 million
Grand Union	\$10 million
Zema Foods, LLC	\$9 million
Dixie Produce Packaging	\$4.7 million (est.)
Demma FruitCo.	\$4.6 million
Sun World	\$4.7 million (est.)
Continental Processors	\$4.5 million

# Growers

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Many growers are unfamiliar with this law and lose out when a bankrupt firm's assets are distributed.



**Don't  
be one  
of  
them!**





# Two Methods



# METHOD 1

Non-licensed entities may file a written “Notice of Intent to Preserve Trust Benefits.”





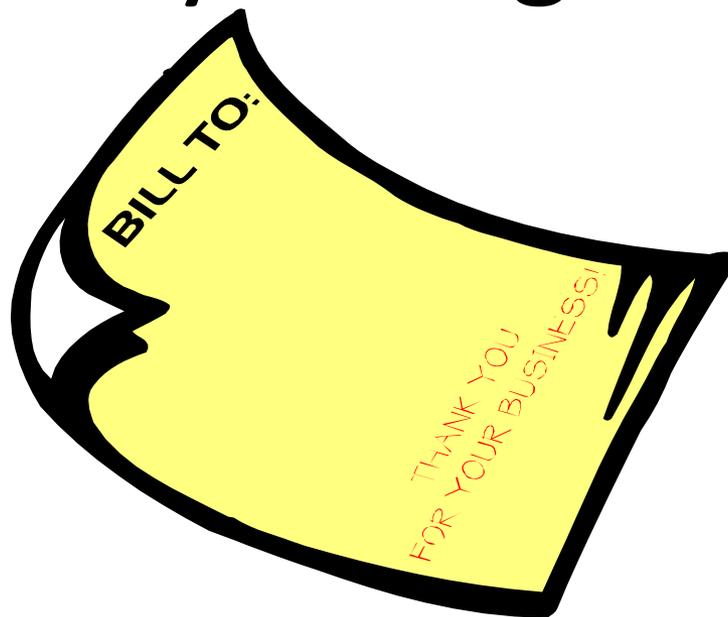
# The “Notice Of Intent To Preserve Trust Benefits” Should Include ...

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- The names and addresses of the seller and the debtor;
- The date of the transaction, commodity, invoice price, and terms of payment; and
- The amount past due and unpaid.

## METHOD 2

Licensed Entities may include statutory language on invoice or customary billing instrument.





# Statutory Wording

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*“The perishable agricultural commodities listed on this invoice are sold subject to statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930(7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.”*

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# Payment Terms

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The agreed-upon payment terms cannot exceed 30 days from the **date of acceptance** to qualify for trust protection.



# Post Default Agreements

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If there is a default in payment, a seller, supplier or agent who has met the PACA Trust eligibility requirement will not forfeit its Trust rights by accepting a partial payment or agreeing in any manner to a schedule for payment of the past due amount.

# Growers

A grower selling only its own produce may obtain a PACA license.



## Foreign Entities Are Also Protected

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Foreign Entities may preserve their trust rights by filing a written “Notice of Intent to Preserve Trust” with the debtor firm.





# Remember

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- A. The Trust applies to all purchases of perishable agricultural commodities.
- B. The debtor does not have to be a PACA licensee to be subject to trust enforcement, but must be operating in subject quantities.
- C. A company's insolvency or bankruptcy does not affect its liability.



# PACA & Bankruptcy

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PACA enforcement is not stayed by a bankruptcy filing.

PACA Trust claims are not property of the debtor's estate.

PACA disciplinary action can be taken against a debtor that fails to pay PACA Trust claims.

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# PACA Trust Enforcement

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Trust beneficiaries may file in the

1) U.S. District Courts

Or

2) U.S. Bankruptcy Courts



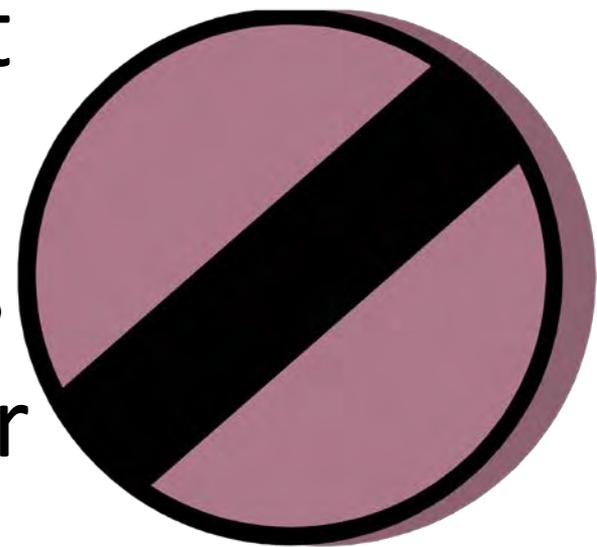
Qualified trust participants remain trust beneficiaries until they have been paid in full.



# Consequences

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Failure to pay the PACA Trust or dissipation of PACA Trust assets could result in serious sanctions on both the debtor company and its responsibly connected principals.





# Freeborn & Peters LLP

## Food Industry Team



Speaker

Jason Klinowski

# PACA Trust Compliance & Litigation...



Enforcement of PACA  
Trust Rights



Recovery of PACA Trust  
Assets



Regulatory Matters





# Perishable Agricultural Commodities Act (“PACA”)...

Congress enacted the PACA in 1930 to provide:

- a comprehensive scheme for the regulation of traders of fresh fruit and vegetables
- to encourage fair trading practices in the marketing of perishable commodities by suppressing unfair and fraudulent business practices in marketing of fresh and frozen fruits and vegetables...
- to provide a scheme for collecting damages from any buyer or seller who fails to live up to his contractual obligations.

Stated another way, the PACA “*provides a code of fair play . . . and an aid to agricultural traders in enforcing their contracts.*”



# PACA – Amended in 1984...

- Congress added Section 499e(c) to the PACA to **impress a trust in favor of the sellers** on the inventories of commodities, the products derived therefrom, and the proceeds of the sale of such commodities and products.
- Section 499e(c) imposes an express, non-segregated “floating” statutory trust on the perishable commodities and their derivatives in which **a produce buyer as trustee holds its produce-related assets in trust as a fiduciary until full payment is made to the unpaid seller/trust beneficiary.**



# PACA Trust Requirements...

- Through the PACA trust, the sellers of perishable commodities maintain a right to recover against the purchasers that is superior to all other creditors, including secured creditors.
- PACA requires the produce buyer to maintain trust assets so that such assets are freely available to satisfy all outstanding obligations to sellers of produce.
- Any act or omission which is inconsistent with the buyer's responsibility to maintain trust assets, including any act which results in the diversion of trust assets or which prejudices the ability of unpaid sellers to recover money owed, is unlawful.



# PACA Trust Liability...

- A PACA trust in effect imposes liability on a trustee, whether a corporation or a controlling person of that corporation, who uses the trust assets for any purpose other than repayment of the supplier.
- This includes use of the proceeds from the sale of perishables for legitimate business expenditures, such as payment of rent, payroll, or utilities.
- The officers of a corporation responsible for its financial dealings are personally liable to PACA trust creditors for any dissipation of the PACA trust assets by virtue of their directing the corporate trustee to breach its fiduciary duties.



# Scope of the PACA Trust...

- The initial establishment of the trust occurs upon the commencement of the buyer's buying and selling of Produce and exists continuously throughout the life of the buyer's business until all the produce sellers are paid in full.
- Any assets purchased while the trust is in existence will be assumed to be purchased with trust assets and will, therefore, become part of the trust fund available to satisfy the claims of the qualified unpaid sellers.
- When trust assets are commingled with funds not subject to the trust, the trust is impressed upon the entire commingled fund for the benefit of the trust beneficiaries.



# What Assets are in the PACA Trust?

Under the express language of the PACA statute, the trust is composed of the:

- [p]erishable agricultural commodities received by... [the debtor] in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products.

The House Report which accompanied the legislation stated as follows:

- [t]he trust impressed by section 5(c)(2) is a non-segregated “floating trust” made up of all a firm's commodity related liquid assets, under which there may be commingling of trust assets. Under this provision there is no necessity to specifically identify all of the trust assets through each step of the accrual and disposal process. Since commingling is contemplated, all trust assets would be subject to the claims of unpaid suppliers... to the extent of the amount owed to them.



# Purpose of the PACA Trust...

- The PACA was designed to insure that a produce buyer's secured lender and other third parties do not receive and retain proceeds from the sale of Produce **when the Debtor's Produce suppliers have not been paid.**
- The USDA has recognized that Congress intended unpaid sellers to **recover trust assets that are transferred to third parties** including secured lenders.
- The regulation promulgated by the Secretary of Agriculture to implement the statutory trust clearly delineates a **single, undifferentiated trust** for the benefit of all sellers and suppliers.



# How to Use the PACA Trust...

- **Obtain Injunctive Relief**
  - Preventing dissipation of the trust is a key purpose of the PACA.
  - Preventing transfer of trust assets often may be the only means by which a Federal Court can prevent dissipation of the trust.
  - Upon a showing the trust is being dissipated or threatened with dissipation, a District Court should require the maintenance of trust assets and direct the PACA debtor to escrow its proceeds from produce sales, identify its receivables, and inventory its assets.



# How to Use the PACA Trust...

- TRO Practicalities

- An injunction is needed when the known facts show the buyer is experiencing severe financial problems or that the buyer is dissipating trust assets.
- A TRO can usually be obtained in a couple of business days.
- Obtaining an injunction requires a skilled PACA attorney and is something that only a court of law may issue.
- A TRO will freeze everything in time and allow assets to be identified and preserved for the trust beneficiaries.



# How to Use the PACA Trust...

- **Obtain a Money Judgment**

- Show the Debtor's failure to maintain sufficient assets to pay outstanding obligations.
- Show the Debtor's failure to make prompt payment (**violation of payment terms**).
- Show the Debtor's breach of contract (**unpaid invoices**).
- Show a breach of fiduciary duty (**personal liability**).
- Show an interference with your receipt of trust assets (**personal & third party liability**)



# How to Use the PACA Trust...

- Obtain Super Priority in Bankruptcy Proceedings

The PACA's underlying legislative intent is clearly shown in the statute itself, wherein Congress expressly stated that:

- “[i]t is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which [produce debtors] who have not made payment for perishable agricultural commodities purchased... encumber or give lenders a security interest in, such commodities, or... 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.”



# How to Use the PACA Trust...

- **PACA in Bankruptcy Proceedings**
- Prompt action is required when a buyer files for bankruptcy.
- A knowledgeable PACA attorney can act swiftly to assess a case and to ensure the PACA trust beneficiaries are paid first.
- This is possible because PACA trust assets are not property of a bankruptcy estate and prompt efforts are needed to make sure both the Court and the Debtor understand this fact.



# How to Use the PACA Trust...

- **Recover Cost of Private Litigation**

- In 2004, the 11<sup>th</sup> Circuit Court of Appeals held that “had Congress intended to limit PACA claims solely to the price of the commodities, it could have inserted language reflecting that limitation in 7 U.S.C. §499e(c)(2). Instead, it chose to allow **‘full payment of the sums owing in connection with [commodities] transactions.’** This unambiguously encompasses not only the price of the commodities but also the additional related expenses. Such **related expenses include attorney fees and interest** that buyers and sellers bargained for in their contracts.”
- All sums owing in connection with the transactions are entitled to the **same priority level as the commodities** themselves.



# Financing Your PACA Trust Rights

- **PACA is not a tax.**
- **PACA is not government funded.**
- **PACA is privately financed by the industry.**
- **Congressionally mandated licensing and dispute resolution fees fund the PACA Division.**



# United States - Canada

Speaker



Karla Whalen

## Regulatory Cooperation Council (RCC)

### What Is It?





# Regulatory Cooperation Council

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- President Obama and Prime Minister Harper announcements:
  - February 4, 2011: Announced the forum
  - December 7, 2011: Established the action plan and related areas of collaboration and specific projects
- Regulatory Cooperation Council (RCC) Focus:
  - Agriculture and food
  - Transportation
  - Health, Personal care products, workplace chemicals; and the environment



# Regulatory Cooperation Council

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- Reduce regulatory burdens on cross-border trade
- Improve trade, economic and business conditions and opportunities. (29 initiatives)
- Develop mechanisms for permanent systemic regulatory alignment
- Managed by the U.S. Office of Management and Budget and the Canadian Privy Council Office



# Regulatory Cooperation Council

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- USDA provides information via two websites:
  - [www.fas.usda.gov](http://www.fas.usda.gov)
  - [www.trade.gov/rcc](http://www.trade.gov/rcc)
- Sending and receiving updates from the email address:
  - [RCC-BTB@one.usda.gov](mailto:RCC-BTB@one.usda.gov)



# Regulatory Cooperation Council

## Active Participants

### Government Agencies

- Agricultural Marketing Service (AMS)
  - PACA Division (PACA)
- Canadian Food Inspection Agency (CFIA)
  - Agriculture AgFood Canada (AAFC)

### Industry Associations

- The Canadian Horticultural Council
- The Canadian Produce Marketing Association
- The Dispute Resolution Corporation
- The Produce Marketing Association
- United Fresh
- Western Growers
- Others



# Regulatory Cooperation Council

## Financial Protection for Produce

- About five international/industry meetings
- Numerous reports available upon request
- AMS and AAFC have worked towards seeking comparable tools to mitigate financial risk in the sale of fresh fruits and vegetables in Canada



# Regulatory Cooperation Council

## Two priorities:

- 1) “Deemed Trust” that will allow for priority payments in the case of bankruptcy or simple insolvency/non-payment
- 2) Unified licensing system
- Canada’s final decision on whether it’s willing and able to implement changes is anticipated by end of March 2013.

# Questions

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