



July 2020

## Consider the Consequences of Failing to Pay for Produce Under the Perishable Agricultural Commodities Act

By Jason B. Jendrewski

The hospitality industry has been hit hard by the COVID-19 pandemic. The economic impact has put hospitality companies, especially restaurants, under enormous economic strain. The closure or limited operation of food service providers also has presented challenges to suppliers, especially in the agricultural industry.

Growers and distributors of produce have experienced issues collecting payments from their customers, which include restaurants, hotels and other food service businesses. Purchasers of produce should be aware that their failure to timely pay their suppliers in full (generally payment is required within 10 days of acceptance of the goods purchased) could result in claims under the Perishable Agricultural Commodities Act (PACA). On the other hand, sellers of produce should be aware that initially entering into an agreement allowing a purchaser more than 30 days to make payment for produce, such as an accommodation due to the COVID-19 pandemic, could affect their eligibility for trust benefits under PACA.

### The Perishable Agricultural Commodities Act

PACA is a federal law that was enacted in 1930 to regulate buyers and sellers of “perishable agricultural commodities,” such as fresh and frozen fruits and vegetables. Among other things, failing to promptly pay the negotiated

price of produce in compliance with agreed-upon terms is considered an unfair trade practice prohibited by PACA. Restaurants may be subject to PACA if they purchase 2,000 pounds or more of produce in any day and more than \$230,000 worth of produce in a calendar year (in which case they are required to be licensed by the U.S. Department of Agriculture (USDA)). However, even if a restaurant does not purchase this volume of produce, it still could be subject to PACA if it elects to secure a license.

PACA could have significant consequences for restaurants and other produce buyers because it imposes a statutory trust to protect unpaid sellers of produce. Accordingly, buyers of produce have a duty to hold their produce-related assets in trust until full payment is made. These assets include not only the produce itself, but also any products derived from that produce (such as meals) and any proceeds from the sale of the produce or related products. Additionally, real property and equipment may be considered assets within the PACA trust if, for example, the produce buyer uses trust funds to purchase or maintain real property or to pay for debts secured by its equipment. In the event that a restaurant or other produce buyer files for bankruptcy or becomes insolvent, produce suppliers would have priority status over these assets, which, at least initially, are not available for general distribution to other creditors.

Generally, produce sellers are required to provide notice of their intent to preserve their PACA trust benefits within 30 days from the date that payment was due or a payment was dishonored, unless appropriate notice was provided on the underlying invoice for the commodities at issue. Accordingly, restaurants or other produce purchasers who are delinquent in their payment obligations should expect to receive such notices from their vendors or written demand letters from their vendors' counsel threatening to take action if payment is not immediately made. Indeed, New York City hospitality establishments have received demand letters for purported PACA violations.

### **PACA Noncompliance Risks**

Failure to comply with PACA may result in an investigation by the USDA or a federal court action (several complaints were filed against New York City restaurants within the past month). Federal courts have the authority to award injunctive relief and freeze the produce buyer's assets under certain circumstances. Moreover, principals of the produce buyer, including its officers, directors and members, may be held personally liable to the produce supplier if they fail to preserve the trust assets.

In recent [guidance](#), the USDA acknowledges the impact that the COVID-19 pandemic is having on the agricultural industry. However, the pandemic does not necessarily change the obligations of buyers and sellers of produce under PACA, and there is no pandemic or other natural disaster exception to PACA. For example, the USDA cautions that a produce seller would automatically lose its PACA trust rights if it agrees up front to payment for produce beyond 30 days. Instead, produce sellers are advised to work out an arrangement with the produce buyer after the buyer defaults on the original payment terms and the seller has preserved its PACA trust rights.

For more information about this alert, please contact Jason B. Jendrewski at [jjendrewski@foxrothschild.com](mailto:jjendrewski@foxrothschild.com) or 212.878.7952, or any member of the firm's New York Labor & Employment Group.

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