

Providing Notice Under the Perishable Agricultural Commodities Act: Get it Exactly Right, or Risk Not Getting Paid

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A recent decision by the District Court for the Eastern District of North Carolina demonstrates just how important it is for parties asserting rights under the Perishable Agricultural Commodities Act (PACA) to provide proper notice. Failing to correctly provide notice means that the creditor is not entitled to the PACA trust fund protections. In most cases, that will make the difference between getting paid in full and getting paid cents on the dollar.

The case, *In re Bissett Produce, Inc.*, 2015 WL 868029 (E.D.N.C. Feb. 2, 2015), involved Bissett Produce, Inc., a licensed broker of perishable agricultural goods. Bissett Produce filed for Ch. 11 bankruptcy on February 4, 2013. Several sweet potato farmers who had previously hired Bissett Produce as their agent subsequently filed suit seeking enforcement of a statutory PACA trust in their favor. A PACA trust gives sellers of perishable agricultural commodities first-priority security interests in the commodities. Under PACA, buyers or agents of perishable commodities must hold payments in trust for the benefit of all unpaid suppliers until full payment has been received. The statute protects vulnerable, unsecured farmers from catastrophic loss when irresponsible brokers get into financial difficulties. For a detailed discussion of PACA trusts, see *Farmer Favoritism: Statutory Protection for Creditors in Agricultural Bankruptcy Cases*.

Bissett Produce filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. Specifically, Bissett Produce claimed that the plaintiffs failed to provide the statutorily required notice sufficient to perfect their claim to the trust assets. The bankruptcy court granted the motion on May 21, 2014, and the plaintiffs appealed.

The district court began its analysis by summarizing the principal-agent relationship and the nature of the transactions between Bissett Produce and the plaintiffs. Bissett Produce received wholesale quantities of sweet potatoes from plaintiffs for resale. Bissett Produce would then sell the sweet potatoes to a third party and invoice the purchaser on plaintiffs' behalf. Finally, Bissett Produce would collect the proceeds and distribute them to the plaintiffs. At the time of its bankruptcy petition, Bissett Produce owed plaintiffs in excess of one million dollars.

The court then summarized PACA and its notice requirements. Beneficiaries of a PACA trust must perfect their interest by providing written notice of their intent to preserve the benefit of the trust. PACA trusts may only be enforced if perfected within the time allotted by the statute and each plaintiff here failed to provide the requisite notice.

The court structured the remainder of its opinion around each of the plaintiffs' claims. First, the plaintiffs argued that the notice requirement did not apply to them because they were not "sellers" or "suppliers," but rather "growers." The court rejected this argument because it was not supported by the plain language of the statute. Even if the court had agreed with the plaintiffs and classified them as "growers," they would not have been entitled to recover the trust assets because "growers" are not a protected class under PACA.

Next, the plaintiffs argued that Bissett Produce was required to perfect plaintiffs' trust rights against third-party buyers, and thus there was no need to perfect their own rights against Bissett Produce. Again, the court rejected this argument because it assumed too much and was not supported by the plain language of the statute. The court added that the plaintiffs did not cite any case law in support of their interpretation, and the court was unwilling to add language to the statute as written.

Thirdly, the plaintiffs argued that it was impossible to provide effective notice to agents because growers do not charge a price at the time the agent took possession of the commodities. The court rejected this argument because the regulations only required commodity prices to be included in the notice statement "if appropriate." The court conceded that Congress' primary intent was to protect growers' rights to trust proceeds, but concluded that the statute as written was not at odds with that intent since prices only need to be included in the notice if appropriate.

Finally, the plaintiffs argued that Bissett Produce was not entitled to notice because PACA only required agents *give* notice, not *receive* notice. The court rejected this argument, concluding that Bissett Produce was also acting as a "broker" as defined under PACA because it "engaged in the business of negotiating sales.... of produce in commerce for or on behalf of the vendor." Additionally, plaintiffs stipulated that Bissett Produce was a PACA licensee, which necessarily qualified them as a commission merchant, broker, or dealer. All of these classifications are entitled to receive notice under PACA.

In conclusion, the district court rejected all of the plaintiffs' claims and concluded that Bissett Produce was entitled to receive notice. Upon *de novo* review of the conclusions of law, the district court affirmed the bankruptcy court's decision and granted Bissett Produce's motion to dismiss because the plaintiffs failed to provide the requisite notice under PACA. Ultimately, the *Bissett Produce* case shows how potentially confusing – and how important – proper notice under PACA can be.

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