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Federal Prompt Payment Requirements and the Statutory Trust

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In the early 1980's national attention focused on the plight of farmers who lost significant amounts of income in grain elevator insolvencies. Farmers who had sold grain to such elevators or had stored grain in the facilities often found themselves unable to recover neither the grain nor the payment for any grain sold. Similar problems had previously been common in sales of livestock to meat packers and were frequently seen in sales of perishable agricultural commodities to brokers, dealers or commission merchants. While the number of such occurrences has diminished, the problem has not disappeared.¹ Grain elevator failures continue to occur and they have been joined by failures of other purchasers of agricultural commodities. The most recent examples have been in the dairy sector with the failure of major milk processors. For example, Finevest Foods, parent company of Pet Milk Co., filed for bankruptcy in 1991.²

Since farmers market primarily through a system which involves sale to entities which may rapidly pass the commodities on to others or which may process the raw commodities for sale to consumers, the possibilities for recovery of the commodities themselves are limited in cases of insolvency of the purchasing entity. Even with grain elevators which have storage capacity, the grain from an individual farmer is usually co-mingled with the grain of others or may be transported for export or for consumptive uses soon after a sale has occurred. At best, the farmer may be faced with a situation where the amount of grain on hand may be insufficient to cover all demands.

The problem is that unpaid sellers in these situations are treated as unsecured creditors, absent special legislation to the contrary. Further, if the commodities become a part of the inventory of the merchant, the inventory financier of that entity will be a secured creditor and take first with regard to any such inventory or proceeds from the sale of the inventory. This precise problem was the focus of the 1976 ruling in *In re Samuels & Co., Inc.*³ In that case, farmers who had delivered livestock to a packer were subject to the priority position of inventory financiers as to livestock still in possession of the debtor, meat products from

the processed livestock, and proceeds from the sale of processed meat. A similar problem results when goods are delivered on "sale or return." The Uniform Commercial Code (UCC) provides that if goods are delivered primarily for resale they are considered as a "sale or return," a consignment transaction. Even though the title does not pass to the buyer,⁴ the goods are subject to the claims of the buyer's creditors. A recent example is provided by *In re Miller*⁵ in which fescue seed delivered by farmers to a debtor seed company for cleaning, bagging and storage were deemed to be held for ultimate sale, even though there was evidence that the seed company was given no explicit authority to sell the seed. The court held the transaction to be on a "sale or return" basis and, therefore, subject to creditors' liens because the farmers had not complied with notice provisions of the UCC. The creditors had no basis to know of the consignment arrangement and the goods appeared to be a part of the regular inventory of the consignor.

The UCC provisions relating to a right to reclaim are of little real benefit to farmers in these situations. The provisions of UCC Section 2-702(2) allow a right to reclaim goods if a demand is made within ten days of delivery in those situations where a seller discovers that the buyer is insolvent. This period may be extended when misrepresentation of solvency has been made in writing to the particular seller. However, this limited right is of little value to the unpaid seller of most agricultural commodities. First, the insolvency may not become apparent within the ten day period. Second, for commodities such as milk, perishable commodities, or other similar commodities, the farmer might be unable to find an alternative buyer quickly enough. Third, for commodities, such as meat, where processing has occurred the goods as sold no longer exist. And, last, the right may be subject to provisions of the Bankruptcy Code and if the purchaser files bankruptcy a court might deny or delay the exercise of the right. Since the right to reclaim offers little to farmer-sellers their only remaining hope may be to recover all or part during the bankruptcy proceeding.

As a result of these problems Congress amended the federal Packers and Stockyards Act (PSA) to provide a statutory trust for the benefit of the unpaid cash sellers in such situations.⁶ Similar rights have been extended to sellers of poultry⁷ and unpaid cash sellers of perishable agricultural commodities.⁸ No similar rights exist regarding the sellers of other agricultural commodities not within the narrow confines of the specific federal legislation. Nor do the rights under the statutory trust apply to contract producers of any products except live poultry since the contract arrangements are not considered cash sales but are credit transactions not covered by the trust provisions.

Until the beginning of the statutory trust as a possible remedy for certain sellers other attempts had been made to provide partial relief for the sellers of

agricultural commodities trapped in these unfortunate circumstances. Federal bankruptcy law was modified to place sellers of grain in a higher level priority position but only to the extent of \$2,000.⁹ Indemnity funds have been created under state law in a few states which provide a source of funds for payment of losses in cases of grain elevator failure.¹⁰ Some states have tried to create special rights by changes in "title" legislation which would benefit unpaid sellers although the primary beneficiaries are those who have stored grain at the facility.¹¹ Efforts have been made at both the federal and state levels to strengthen oversight and regulation of warehouses. The problem is that much of this legislation is specific to particular commodities or specific to particular types of entities with whom farmers deal. Most commodities are not covered and many transactions do not fall within the confines of the protective legislation.

This article will review the major efforts that have been made to provide some protection to sellers of agricultural commodities, the nature and extent of the remedies and the shortcomings of these attempts. Second, the article will focus on the statutory trust concept and its application under existing law to covered commodities. Then, the article will explore the possibilities of extending the trust concept to other commodities and other types of transactions. Potential conflicts with other statutory programs will be evaluated.

Previous Efforts at Providing Protection

Both state and federal efforts have been directed toward legislative solutions to the problem, at least for certain commodities or for certain types of transactions. During the early 1980's as grain elevator failures continued, considerable attention focused on the problem of unpaid cash sellers. Attention also focused on the similar plight of those who had stored grain in these facilities.

Federal Warehouse Regulation. Grain warehouses have the option of seeking a federal license under the U. S. Warehouse Act or of obtaining a state license.¹² Those that obtain a federal license are regulated by the Agricultural Stabilization and Conservation Service (ASCS) rules on warehouses.¹³ These rules are supplemented by rules applicable to those warehouses that serve as contract warehouses with the Commodity Credit Corporation (CCC) for the storage of government owned stocks or for stocks on which the government has extended loans under the provisions of the price and income support system for farmers.¹⁴ These warehouse regulations apply to the storage of commodities only. Regulation of the dealer function is left to the states.

Following the controversies surrounding grain elevator failures of the early 1980's the ASCS proposed stricter regulations to govern the conduct of warehouses. The initial proposals extended some regulatory oversight to the dealer

transactions of warehouses but after opposition surfaced that element of the proposed rules was never adopted.¹⁵ The new rules, as adopted by the agency, affect both functions of an elevator although the effect on dealer transactions is merely incidental to storage regulation.

State Regulation of Grain Dealers. Since grain dealer regulation is not covered by the U. S. Warehouse Act, most states have enacted some type of regulatory program for elevators involved in the buying and selling of grain and other commodities. This legislation may be coordinated with or may be separate from storage warehouse regulation at the state level. Since some warehouses choose not to seek a federal license, state law usually provides for regulation of the storage function of those warehouses not licensed by the federal program.

Grain dealer regulations often are enforced through a licensing program.¹⁶ The typical program will require a license of dealers, and sometimes bargaining agents, in order for the warehouse to engage in business. Financial requirements, inspections, reporting and record keeping requirements are an important part of most programs. In some cases credit-sale transactions may be specifically regulated. Naturally, the effectiveness of such legislation depends upon the aggressiveness of the relevant state agencies in enforcement. If the legislation is little more than a revenue measure it will have little preventive effect. It will also offer little protection to those farmer-sellers who remain unpaid at the time of insolvency.

Grain Indemnity Funds. Some states have gone one step more and have set-up special funds for the indemnification of depositors or sellers who transfer grain to a licensed facility. Losses in cases of insolvency may be wholly or partially offset with funds from this source upon proper claim. These funds are established in the state treasury and consist of moneys collected from a per-bushel fee on commodities handled by storage or sales facilities.¹⁷

Title Legislation. A few states attempted to revise title legislation to give additional protection to the farmer who transfers physical possession of grain or other commodities to a dealer or warehouse.¹⁸ Most of the statutes are designed to offer additional protection to the farmer who stores grain or other commodities and offer little help to the unpaid seller. These statutes are complicated by the interrelationship with the UCC, and sometimes are conflicting. As a result, their effectiveness in protecting unpaid sellers is questionable.

Bankruptcy Code Revisions. Following the public debate over the level of protection which should be available to sellers of these commodities, two minor changes in the Bankruptcy Code resulted. Section 557 of the Code was added to provide for an expedited determination of grain assets. It also provides for the sale and distribution of grain proceeds where over 10,000 bushels of a

particular type of grain is involved.¹⁹ In addition, unsecured claims of grain producers up to \$2,000 per producer are given "super priority" in the proceeding.²⁰

Statutory Trust

General. Following difficulties encountered by unpaid cash sellers of livestock in reaching assets of packers to satisfy payment obligations, and the decision in *In re Samuels & Co., Inc.*²¹ in which an inventory financier took priority over the unpaid cash sellers (unsecured creditors) with claims against a packer, Congress amended the Packers and Stockyards Act in 1976. The amendment provides for "prompt payment" and established a statutory trust to benefit livestock sellers.²² This concept was extended to benefit unpaid suppliers or sellers of perishable agricultural commodities under the Perishable Agricultural Commodities Act (PACA) in 1984.²³ In the Poultry Producers Financial Protection Act of 1987 the idea was extended to sales of live poultry.²⁴ The basic idea is preserve assets in a nonsegregated "floating trust" and to give unpaid sellers or suppliers an absolute priority position with regard to trust assets.

The Statutory Trust Under the Packers and Stockyards Act. "Packers" are currently defined in the Act as persons "engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form"²⁵ This provision has been broadly construed to include not only wholesalers or slaughterers but others involved in some phase of meat marketing and distribution as well. For example, the term packer has been considered by courts to include a corporation preparing meat or meat products for sale and shipment in commerce and includes businesses that buy and resell processed meat.²⁶

In 1976, Congress amended the Packers and Stockyards Act in an attempt to assure full and prompt payment to sellers of livestock. The Act now provides that each packer, dealer or market agency must deliver to the seller of livestock (or his authorized representative) the full amount of the purchase price for the livestock before the close of the next business day following the transaction unless the parties expressly agree otherwise.²⁷ In effect, this provision entitles the seller of livestock, in transactions covered by the act, to next-day payment unless that right is knowingly waived by the seller. For an agreement which waives the right to next-day payment to be effective, it must be in writing and not be procured by deceptive means. A copy or other evidence must appear in both the dealer's and purchaser's records and be contained in documents issued by the

purchaser relating to the transaction.²⁸ Furthermore, any attempt on the part of the dealer, market agency or packer to delay the payment of those sale proceeds is deemed to be an unfair practice under the Act.²⁹

To further protect livestock sellers from insolvent packers, Congress added a statutory trust provision to the Act.³⁰ Although this section applies only to those packers whose annual purchases exceed \$500,000 and is applicable solely to cash sales, it establishes a statutory trust under which all meat inventories, receivables and proceeds are to "be held . . . in trust for the benefit of all unpaid cash sellers" until they have been paid in full for their livestock.³¹

Under the statutory trust provision, a packer holds livestock bought in cash sales and all "inventories of, or receiving products derived therefrom," in trust for the benefit of unpaid cash sellers of the livestock until full payment has been received by the seller.³² The sale of livestock constitutes a "cash sale" unless the seller has specifically signed a credit agreement to the contrary.³² The seller's acquiescence in accepting late payments for purchases is not an express extension of credit by the seller to the packer.³⁴

To receive the benefit of the trust provision, notification of a claim must be made within 30 days of the final date set for payment (if no payment is received at all) or within 15 days of learning that a payment instrument has been dishonored. The unpaid seller must notify both the packer and the Secretary of Agriculture.³⁵

The Statutory Trust for Poultry Under the Poultry Producers Financial Protection Act of 1987. The Poultry Producers Financial Protection Act of 1987 (the "Act"), an amendment to the Packers and Stockyards Act, was enacted on November 23, 1987.³⁶ It became effective on February 22, 1988. The Act's key provisions include the extension of "unlawful practices" liability to live poultry dealers and the requirement of prompt payment by dealers who purchase poultry and the establishment of a statutory trust to insure payment to growers under cash sale and poultry growing arrangements. The Act's provisions are similar to other Packers and Stockyards Act provisions that regulate purchase payment obligations of livestock dealers and handlers.³⁷

Live poultry dealers must make prompt payment for poultry. Specifically, a dealer must deliver the full payment amount due to the seller-grower before the close of the next business day following the purchase of poultry, in the case of a cash sale, or by the close of the fifteenth day following the week in which the poultry is slaughtered, in the case of poultry obtained under a poultry growing arrangement.³⁸

A poultry growing arrangement is defined as: "Any growout contract, marketing agreement, or other arrangement under which a poultry grower raises and cares for live poultry for delivery, in accord with another's instructions, for

slaughter.”³⁹ Furthermore, the following actions are to be considered “unfair practices” in violation of the Act: any attempt by a live poultry dealer to delay making payment due under the Act, or any actual delay in making payment, and any attempt made by the dealer for the purpose of, or resulting in, an extension of the normal payment period.⁴⁰

To supplement the prompt payment provisions, the Act also added a statutory trust provisions similar to the “packer trust.” The trust applies to all poultry obtained by a live poultry dealer, whether by cash purchase or by a poultry growing arrangement. The trust assets include all inventories of, or receivables or proceeds from, poultry obtained by the dealer, or the products derived therefrom. The grower-seller is protected from the risk of non-payment as an “unsecured creditor” under a cash sale because the value of the trust assets is held for the benefit of all unpaid cash sellers or poultry growers until they have received full payment.⁴¹ In addition to failure to tender payment, payment is considered not to have occurred if the cash seller or poultry grower receives a payment instrument that is dishonored.⁴²

Live poultry dealers are exempt from the statutory trust provisions if they (a) have \$100,000 or less in average annual value of live poultry, or (b) have \$100,000 or less in average annual value of live poultry obtained by purchase or by a poultry growing arrangement.⁴³

If after a hearing, the Secretary finds that a live poultry dealer has violated either the statutory trust or prompt payment provisions of the Act, he or she must issue a cease and desist order against the dealer.⁴⁴ The Secretary may also assess a civil penalty of up to \$20,000 for each such violation. However, the provisions state “in no event can the penalty assessed by the Secretary take priority over or impede the ability of the live poultry dealer to pay any unpaid cash seller or poultry grower.”⁴⁵

Statutory Trust Under the Perishable Agricultural Commodities Act. In 1984, PACA was amended to create a statutory trust for the benefit of unpaid suppliers or sellers of perishable agricultural commodities or their agents on all inventories of food or other products derived from perishable agricultural commodities. This trust applies until full payment for commodities has been received.⁴⁶ This provision is designed to protect unpaid suppliers, sellers and their agents in those circumstances where commission merchants, dealers or brokers encumber or give lenders a security interest in those commodities or in the inventories of products derived from the commodities.⁴⁷

The Secretary promulgates regulations prescribing the period within which claimants must receive payment. PACA’s “unfair conduct” provisions make the failure to make full payment “promptly” a Act violation.⁴⁸ The Act provides no further definition, but the regulations provide specificity about a variety of

transactions.⁴⁹ For many transactions, "full payment promptly" is defined as within ten days of acceptance.⁵⁰ If a contract involves payment at times different from those provided for in the regulations, the parties must have this agreement in writing *before* entering into the transaction. In addition, the parties must maintain a copy of the agreement in their records. The party asserting the existence of such an agreement has the burden of proving it.⁵¹ The statutory trust regulations refer to these prompt accounting and prompt payment requirements but specify that for trust benefit eligibility the maximum time for payment to which a seller, supplier or agent can agree is thirty days after receipt and acceptance of the commodities.⁵²

To obtain the benefit of the trust, the unpaid supplier, seller or agent must give written notice to the commission merchant, broker or dealer. Further they must file the notice with the Secretary within 30 days after the specified time for payment has elapsed.⁵³

The notice must include a statement that it is a notice of intent to preserve trust benefits. It must also include the name and address of the trust beneficiary, the seller-supplier, commission merchant or agent and the debtor. It must also include the date of the transaction, commodity, contract terms, invoice, price and the date payment was due and the amount past due and unpaid. If the problem results due to a payment instrument that has been dishonored the date of receipt of notice of this fact must be included in the notice.⁵⁴

Questions Raised by Use of the Statutory Trust Provisions

Notice. Under all these provisions parties must strictly comply with the notice provisions. For example, in *In re D.K.M.B., Inc.*,⁵⁵ the court considered the notice insufficient because it failed to include information on the transaction dates, the commodity involved, contract terms, the price or payment due-date, or the invoice. The notice included only delivery receipts reflecting the transaction date and the gross price for all items delivered. Oral notice is not sufficient, nor is notice only to USDA, even if the debtor had actual knowledge of the intent to preserve trust benefits. In *In re Marvin Properties*,⁵⁶ the court relied upon case law developed under the trust provisions of the Packers and Stockyards Act to construct the notice requirement. Actual notice is insufficient to preserve trust benefits in absence of the required filing of notice.⁵⁷

Suppliers, sellers, or agents may file notice upon delivery of the commodities, even before the payment due-date.⁵⁸ The statutory language might seem to imply that notice could be filed only *after* the payment due-date. However, the trust arises upon delivery and continues until the claim is satisfied or until the trust beneficiary fails to take steps to preserve the trust benefits. Therefore,

invalidating trust notices filed before the payment due-date would serve no purpose.⁵⁹ As stated in *In re W. L. Bradley Company, Inc.*, "the statutory use of the word 'after,' marks the beginning of the thirty day period and does not prohibit an early filing."⁶⁰

Trust claimants do not need to seek relief from the automatic stay in bankruptcy to file the notice. In *In re Monterey House, Inc.*,⁶¹ the debtor argued that the filing of notice violated the automatic stay provisions of the Bankruptcy Code. The court rejected the argument because the trust fund is not property of the debtor's estate. The statute required the trust claimants to file the notice of intent to preserve trust benefits. Failure to do so creates unperfected claims,⁶² and the statute allows no exceptions.⁶³ On the other hand, the debtor's filing of a bankruptcy petition with the automatic stay does not toll the period for filing the notice.⁶⁴ The filing of the notice "perfects" the trust claim, but that claim relates back to the date of delivery. For this reason, the trust claim defeats any intervening claimant, such as a trustee in bankruptcy. The Bankruptcy Code does not prevent any act to perfect an interest in property if that interest would prevail over a trustee in bankruptcy.

Parties may waive the protection of the statutory trust provisions if agreed to in writing before the time any contracts are negotiated. The waiver must be separate and distinct from any agency contract.⁶⁵

Tracing of Assets. Commingling of trust assets with nonproduce related assets does not require the trust beneficiaries to trace the assets. The debtor has the burden to identify nontrust property.⁶⁶ Congress contemplated that commingling of produce related assets from various sellers would occur in the typical business. In addition, the debtor is likely to commingle other assets with trust assets. A "floating" trust allows the trust to attach to all produce related assets of the debtor. As the court stated in *In re Gotham Provision Company*, the only burden on the trust claimant is to prove the amount of the claim and the existence of a floating pool of assets into which produce-related assets have been commingled.⁶⁷

Trust funds may be recovered from a secured creditor,⁶⁸ or from third parties who knew or should have known that the assets were transferred to them in breach of the trust.⁶⁹ However, dissipated trust funds used to pay antecedent debts in the ordinary course of business may not be traced to the hands of third parties who had no knowledge of the character of the funds received.⁷⁰

Interest, Fees and Costs. One issue concerning the statutory trust is whether courts may award interest, fees and costs to the successful trust claimant. The statute and the regulations are silent on this point, but some courts have assessed all or some of these expenses against the debtor. In *In Re Monterey House, Inc.*,⁷¹ the court considered assessment of prejudgment interest,

postjudgment interest, and attorney fees proper under PACA trust cases. However, in *DeBruyn Produce Co. v. Victor Foods, Inc.*,⁷² the court granted prejudgment interest, but determined that PACA trust provisions did not authorize attorney fees. In *In re Milton Poulos, Inc.*, the court denied interest, fees, and costs because to do so would "unfairly deplete the bankruptcy estate at the expense of all other creditors."⁷³

The U. S. Bankruptcy Appellate Panel of the Ninth Circuit affirmed the lower court's decision in *In re Milton Poulos, Inc.* but the part of the decision denying attorney fees was later reversed by the Ninth Circuit Court of Appeals.⁷⁴ The bankruptcy panel noted that Congress had expressly authorized attorney fees in over two hundred other federal causes of action. The court found that the absence of an express statutory authorization indicated congressional intent that the trust beneficiary did not automatically receive attorney fees. However, the Ninth Circuit reversed, finding that the attorneys who had represented the PACA Trust claimant were entitled to fees on a "common fund" theory. That is, it was their efforts which had established the common fund which would benefit all claimants and they should be entitled to their fees out of the trust fund before distribution to other claimants.

Action by USDA. The USDA's role in enforcement of the trust provisions raises interesting issues. Under PACA the Act gives USDA explicit authority to act to avoid dissipation of trust assets and to recover assets transferred to a third party.⁷⁵ In addition, the Act requires that the Secretary receive notice of the intent to preserve trust benefits.⁷⁶ Apparently, the purpose of the notice provision is to allow the agency to act, when necessary, to prevent dissipation of trust assets. The details required in the notice insure that the agency has enough information to facilitate such action in eligible transactions.⁷⁷

The proper degree of USDA involvement in determining a trust claim's validity is unclear. During the public comment period on the proposed PACA regulations, one commentator asked if the USDA would make determinations of contract liability when disputes arose over contract performance. The agency's response did not directly address this question, but indicated that any dispute could be resolved without adversely affecting a claim against trust assets if complainants filed notice on time.⁷⁸ One court has placed some reliance on USDA's determination of which parties had properly perfected trust claims.⁷⁹

Expansion of the Concept to Other Situations

The trust concept offers the possibility of providing additional protection to farmer-sellers in transactions not now covered by extended to cover additional commodities, such as milk, where similar problems have occurred. It might be

extended to cover additional transactions, for example, contract production of hogs, to make it consistent with existing provisions for poultry. The most promising use might be in those situations where the product and the marketing system are most like those in which it has been tried and proven to be effective.

Dairy. In recent months reports have surfaced of financial difficulties encountered by major milk processors and marketers. The most prominent has been the bankruptcy proceeding of Pet Milk as a subsidiary of Finevest Foods. If such insolvencies occur to any degree, farmer-sellers will no doubt face problems similar to those of grain sellers and sellers of livestock and perishable agricultural commodities. They will find themselves in the position of an unpaid cash seller and treated as an unsecured creditor in bankruptcy.

The statutory trust might offer dairy producers the added protection required in this situation. In fact, a bill was introduced in May of 1990 in Congress that would have accomplished this goal.⁸⁰ The matter was debated as part of the discussion surrounding the 1990 farm bill but was not incorporated as a part of that legislation. It will likely resurface on an independent basis.

Since milk is marketed most often through cooperatives that deal with processors on behalf of their farmer-members, it will be necessary to specify the stage at which the trust is applicable. Cooperatives typically have an agency agreement with the producers which allows them to market the milk on behalf of the producers. In other cases the agreement may call for the sale of the milk to the cooperative with resale to processors. Some determination will have to be made about whether the trust applies to the transaction between the farmer and the cooperative or only to the sale between the cooperative and the processor. Of course, in those situations where the milk is sold directly to the processor the trust can be more easily applied.

Grain. Grain transactions would appear to also offer possibilities for the use of the trust concept. Grain is ordinarily marketed through local elevators or warehouses which may either hold the grain for storage for some period before the sale is concluded or may involve price-later contracts or deferred payment contracts. These are contracts in which the grain is delivered and a contract for sale is entered but either the price or payment date is to be later determined. Such contracts have offered some financial and tax planning flexibility to producers who often use such contracts as a way of "playing the market" for a period to achieve the highest price for their products. It is in these situations that the greatest risk of non-payment may occur. If the grain warehouse commingles such grain (as it usually would) the pool of resources to which an unpaid seller can look is subject to call for various demands. These include

those of depositors who have left grain in the possession of the elevator on a bailment (storage) basis.

Any effort to extend the statutory trust to grain transactions would have to consider the nature of the marketing contracts and make specific provision for the various alternatives. In addition, the clear distinction between grain depositors and grain sellers must be drawn. State legislation regarding title to grain in hands of elevators would have to be considered as well.

Since grain warehouses may already fall within extensive regulations under the U. S. Warehouse Act or under state law some coordination of these regulatory programs and the trust would be necessary. The grain warehouse regulatory programs provide an example of the difficulty of extending the concept without attention to the "fit" with existing regulatory programs. While it would be possible to expand the statutory trust concept to the sale of grain, the question of who would administer the program would have to be resolved. With grain this poses some unusual problems because of the dual nature of warehouse regulation and because grain sales transactions are not now covered by the U. S. Warehouse Act. While the statutory trust could be appended to the warehouse regulatory program it would be difficult to administer since not all warehouses are under the federal program and of those that are, not all are engaged in the marketing of grain. And, of those warehouses that are involved in the marketing of grain, not all are licensed under the federal program.

Poultry Products. The provisions of the 1987 Poultry Producers Financial Protection Act extended the prompt payment and statutory trust provisions to live poultry sold either in cash sales or under contract production arrangements. The same protection is not extended to the sale of eggs. Egg producers often operate under contract with vertically integrated processors much the same as is true for the production of live poultry. Some direct sales to other marketers does occur. In either case, extending prompt payment rules and the statutory trust provisions should be possible. No particular aspects of the market make it less appropriate than for live poultry.

Contract Production. In the revisions of the Packers and Stockyards Act to extend the statutory trust protection to live poultry, specific provision was made to include both cash sales and sales under production contracts. Contract production has been expanding in other areas of the agricultural sector. Hog production in some areas has been extensively developed under contract arrangements. Vegetable production, especially of the specialty crops for canning and freezing, has traditionally involved contract production. In all of these situations the feasibility of extending prompt payment and statutory trust provisions to these commodities must consider the contract arrangements. No doubt some special attention must be given to the possibility of contract

provisions that might try to override the trust and payment provisions. This, however, can be addressed in the legislation or in the regulations in much the same way that similar problems involving payment due dates are now evaluated under PACA. There, even if the parties agree to a longer time for payment, the regulations do not recognize the extended period. Rather they call for payment within 10 days of acceptance and allow the parties to extend the payment period for only 30 days.

Conclusion

A persistent problem in transactions involving agricultural commodities is the loss incurred by farmers who are unable to recover neither the products nor payment for the commodities when those entities with whom they deal become insolvent. Federal prompt payment provisions coupled with the statutory trust have offered a powerful remedy in some cases to assist in the recovery of losses. This remedy could, with some adjustment, be extended to other commodities and other types of transactions to provide protection not otherwise available to farmer-sellers.

Notes

1. See e.g., "Why 'Farmer Joe' may be loser in grain company's bankruptcy" *Des Moines Register*, March 24, 1991 indicating that 493 farmers lost an estimated \$4.1 million where they had signed "price later" contracts and had turned crops over to Des Moines Grain Co., a grain merchandising firm.
2. "Bankruptcy Milks Dairy Farms: Carolinas Farmers May Lose Millions" *Charlotte Observer*, (Tuesday, March 19, 1991); "With Falling Milk Prices and a Failing Wholesaler, Dairy Farming in Union County About to Dry Up?" *Charlotte Observer*, (Sunday, March 24, 1991).
3. 526 F.2d 1238 (5th Cir. 1976).
4. U.C.C. 2-326.
5. 199 Bankr. 660 (W.D. Ark. 1990).
6. 7 U.S.C. § 196.
7. 7 U.S.C. § 181 *et seq.*
8. 7 U.S.C. § 499e.
9. 11 U.S.C. § 507(a)(5).
10. See e.g., Iowa Code ch. 543A.
11. See e.g., Kan. Stat. Ann. § 34-2107.
12. 7 U.S.C. § 241 *et seq.*

13. 7 C.F.R. Part 736.
14. 7 C.F.R. § 1421.5551 *et seq.*
15. The proposed marketing regulations, never finally adopted, appeared in 46 Fed. Reg. 30,620 (June 9, 1981).
16. *See e.g.*, Iowa Code Ch. 542.
17. Examples may be found in Illinois (Ill. Ann. Stat. Ch. 114, par. 702); Kentucky (Ky. Rev. Stat. title XXI, Ch. 251 § 251.600-.740); Tennessee (Tenn. Code Ann. § 43-32-201 to 43-32-213); Washington (Rev. Code Wash. title 22, § 22.09.405-.471); Oklahoma (Ok. Stat. Ann. Chpt. 2 § 9-20 to 9-47); South Carolina (code S.C. Ann. § 46-41-200 to 46-41-250); and Iowa (Chpts. 542, 5424, 543 and 543A).
18. The Arkansas Statute states:
Ownership of grain shall not change by reason of an owner delivering again to a public grain warehouseman, and no public grain warehouseman shall sell or encumber any grain within his possession unless the owner of the grain has by written document transferred title of the grain to the warehouseman. Notwithstanding any provision of the Uniform Commercial Code (Act 185 of 1961 § [85-1-101 *et seq.*], as amended) to the contrary, or any other law to the contrary, all sales and encumbrances of grain by a public grain warehouseman are void and convey no title unless such sales and encumbrances are supported by a written document executed by the owner specifically conveying title to the grain to the public grain warehouseman. Ark. Code Ann. § 2-17-303.
19. 11 U.S.C. § 557.
20. 11 U.S.C. § 507(a).
21. 526 F.2d 1238 (5th Cir. 1976).
22. 7 U.S.C. § 228b, 196.
23. 7 U.S.C. § 499e(c)(2).
24. 7 U.S.C. § 197.
25. 7 U.S.C. § 192.
26. *U.S. v. Jay Freeman Co.*, 473 F. Supp. 1265 (E. D. Ark. 1979).
27. 7 U.S.C. § 228b(a).
28. 7 U.S.C. § 228b(b).
29. 7 U.S.C. § 228b(c).
30. 7 U.S.C. § 196.
31. 7 U.S.C. § 196(b).
32. 7 U.S.C. § 196(b).
33. *See In re Gotham Provision Co., Inc.*, 669 F.2d 1000 (5th Cir. 1982) *cert. den.* 103 S.Ct. 129, 459 U.S. 858, 74 L.Ed. 2d 111 (1982).
34. *In re G & L Packing Co., Inc.*, 20 Bankr. 789 (Bankr. N.D.N.Y. 1982), *aff'd* 41 Bankr. 903 (N.D.N.Y. 1984).

35. 7 U.S.C. § 196(b).
36. 7 U.S.C. § 181 *et seq.*
37. *See e.g.*, 7 U.S.C. §§ 196 and 228b.
38. 7 U.S.C. § 228b-1.
39. 7 U.S.C. § 182(9).
40. 7 U.S.C. § 228b-1.
41. 7 U.S.C. § 187.
42. 7 U.S.C. § 197(c).
43. 7 U.S.C. § 197.
44. 7 U.S.C. § 228b-2.
45. 7 U.S.C. § 228b-2.
46. 7 U.S.C. § 499e(c)(2).
47. 7 U.S.C. § 499e(c)(1).
48. 7 U.S.C. § 499b(4).
49. 7 C.F.R. § 46.2(aa) (1989).
50. *See, e.g.*, 7 C.F.R. § 46.2(aa)(5)(1989) (circumstances requiring payments within 10 days of acceptance).
51. *Id.* § 46.2(aa)(11).
52. 7 C.F.R. § 46.46(f)(2).
53. 7 U.S.C. § 499e(c)(3).
54. 7 C.F.R. § 46.46.
55. 95 Bankr. 774 (Bankr. D. Colo. 1989).
56. 75 Bankr. 150 (Bankr. 9th Cir. 1987), *aff'd*, 854 F.2d 1183 (9th Cir. 1988).
57. 74 Bankr. at 153 (relying upon *In re Gotham Provision Co.*, 669 F.2d 1000, 1013 (5th Cir. 1982).
58. *In re W. L. Bradley Co.*, 75 Bankr. 505 (Bankr. E.D. Pa. 1987).
59. 75 Bankr. at 511.
60. 75 Bankr. at 512.
61. 71 Bankr. 244 (Bankr. S.D. Tex. 1986).
62. 71 Bankr. at 248.
63. *In re Prange Foods, Corp.*, 63 Bankr. 211 (Bankr. W.D. Mich. 1986).
64. Bankr. at 217.
65. 7 C.F.R. § 46.46(d)(2) (1989).
66. *In re Hancock-Nelson Mercantile Co.*, 95 Bankr. 982 (Bankr. D. Minn. 1989); *In re W. L. Bradley Co.*, 75 Bankr. 505 (Bankr. E.D. Pa. 1987); *see also In re Frosty Morn Meats, Inc.*, 7 Bankr. 988 (M.D. Tenn. 1980).
67. *In re Gotham Provision Co.*, 669 F.2d 1000, 1011 (5th Cir. 1982).
68. *In re Gotham Provision Co.*, 669 F.2d 1000, 1011 (5th Cir. 1982).

69. *Lyng v. Sam Compton Produce Co.*, Cir. 3-86-759 (N.D. Tenn. 1987); *see also In re Harmon*, 11 Bankr. 162 (Bankr. N.D. Tex. 1980).
70. *In re Tanner*, 77 Bankr. 897 (Bankr. N.D. Ala. 1987).
71. 71 Bankr. 244 (Bankr. S.D. Tex. 1986).
72. 674 F. Supp. 1405 (E.D. Mo. 1987).
73. 94 Bankr. 648 (Bankr. C.D. Cal. 1988).
74. *In re Milton Poulos, Inc.*, 107 Bankr. 716 (Bankr. 9th Cir. 1989); *In re Milton Poulos*, 1991 U.S. App. LEXIS 18043; 91 Daily Journal DAR 13294 (9th Cir., May 7, 1991) Reported as Table Case at 940 F.2d 1533, 1991 U.S. App. LEXIS 23886.
75. 7 U.S.C. § 499e(c)(4) (1989); *see also Lyng v. Pellegrino & Sons, Inc.*, 694 F. Supp. 976 (N.D. Mass. 1988); *In re Nagleberg & Co.*, 84 Bankr. 19 (Bankr. S.D.N.Y. 1988).
76. 7 C.F.R. § 46.46(g)(2) (1989).
77. 49 Fed. Reg. 45,735 (1984).
78. 49 Fed. Reg. at 45,736 (1984).
79. *See In re Milton Poulos, Inc.*, 107 Bankr. 716 (Bankr. 9th Cir. 1989).
80. HB416 would have amended the Packers and Stockyards Act to include a trust for milk producers. House Conf. Rpt. No. 101-916 (October 22, 1990) to accompany S.2830. *U.S. Code Cong. & Ad. News*, 101st Congress, Second Session (1990) 5294-5296.