

April 2016

### *PACA Loss of Trust*

The Perishable Agricultural Commodities Act (“PACA”) provides enhanced payment protection for sellers of products, such as meat, milk and fresh produce. PACA creates a statutory trust encompassing the proceeds from the buyer’s resale of the perishable products, any funds commingled with those proceeds, and any new products purchased with those trust funds *ad infinitum*. If the purchaser fails to pay, the seller may seize and sell the trust property to satisfy the debt. The PACA trust has priority over an ordinary lien or security interest.

To be eligible for the PACA benefits, the seller may not agree pre-sale to payment terms greater than 30 days from delivery. Thus, the standard agricultural seller invoice requires payment in 30 days.

A federal court in Oregon recently decided that a seller lost the protections of a PACA trust, where the seller did not insist on the invoice terms, but consistently accepted payments after 30 days. The court determined that the course of dealing reflected an implicit agreement to accept payment more than 30 days after delivery, which waived the PACA protections.

*Spada Properties v. Unified Grocers, Inc.*, 121 F.Supp.3d 1070 (D. Or. 2015).

### *Trademark Not Intellectual Property*

The bankruptcy statute permits a debtor to reject a license agreement that is burdensome. However, where the debtor is the licensor and the agreement is to license intellectual property, the licensee has the option to retain its license rights.

A New Hampshire bankruptcy judge has determined that trademark rights do not get this protection as “intellectual property”, even where the license agreement

defines the trademark as intellectual property, together with the copyrights, patents and technology being licensed. The court concluded that the bundle of rights in the license agreement could be bifurcated, with the licensee retaining those, such as copyrights, defined by Congress as intellectual property, but not the others, such as trademarks. *In re Tempnology, LLC*, 541 B.R. 1 (Bankr. D.N.H. 2015).

### *Lien’s Labour’s Lost\**

As a general rule, liens pass through bankruptcy unaffected, unless some action is taken in the bankruptcy case. For example, the court may void a lien where the secured creditor’s claim has been disallowed.

A first mortgagee filed a proof of claim in a consumer debtor’s case, but did not defend the claim (probably due to negligence of the mortgage servicer) when the debtor sought to disallow the claim. After the claim was disallowed, the debtor successfully sought an order voiding the mortgage lien. A federal appeals court in California upheld the lien avoidance, because the lender had failed to assert its rights. *HSBC Bank USA v. Blendheim (In re Blendheim)*, 803 F.3d 477 (9<sup>th</sup> Cir. 2015).

\*Apologies to W. Shakespeare



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