Packers and Stockyards Act Amended - Additional Protection for Unpaid Cash Sellers of Livestock

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Overview

The Packers and Stockyards Act (PSA) of 1921 provides protection for cash sellers of livestock to parties that the PSA covers. However, many times a livestock seller may sell to a buyer that the PSA does not apply to. A new law enacted in late 2020 as part of a massive spending bill addresses the issue by amending the PSA to provide a statutory trust for unpaid cash sellers of livestock to a livestock "dealer."

The recent creation of a livestock dealer trust – it's the topic of today's post.

The PSA

The PSA was enacted with the purpose of ensuring fair competition in and trade practices involving livestock marketing, meat and poultry. *7 U.S.C. §§181-229. See also Armour & Company v. United States, 402 F.2d 712 (7th Cir. 1968).* The scope of the PSA is quite broad, vesting in the U.S. Secretary of Agriculture (Secretary) wide discretion to investigate and regulate all activities connected with livestock marketing. *See, e.g., Rice v. Wilcox, 630 F.2d 586 (8th Cir. 1980).*

What happens when a livestock packer, market agency or a livestock dealer fails to pay for livestock that it buys from a livestock seller? Under the PSA, two provisions come into play - the "prompt payment rule and the creation of a statutory trust.

PSA Rules Governing Payment For Livestock – Longstanding Rules

Prompt payment rule. The PSA provides for failure to make prompt and full payment for "livestock." Livestock is defined to include "cattle, sheep, swine, horses, mules, or goats—whether live or dead." *7 U.S.C. § 182(4).* Generally, to *not* be deemed to be engaged in an "unfair practice" under the PSA, a packer must make full payment of the livestock's purchase price "before the close of the next business day following the purchase of livestock and transfer of possession thereof." *7 U.S.C. §§228b(a) and (c).* A packer subject to the prompt payment rule is defined as "any person 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 acting as a wholesale broker, dealer, or distributor in commerce." *7 U.S.C. §191.* When livestock is purchased for slaughter, payment must be made to the seller or the seller's representative at the point of transfer or the funds must be wired to the seller's account by the close of the next business day. *Id.* If the sale is based on carcass weight, or is a grade/yield sale, the same rule applies once the purchase amount has been determined. *Id.* If the seller (or the seller's agent) is not present to receive payment at the point of sale, the packer is to either wire the funds to the seller and put a check in the mail for the full amount by the close of the next business day. *Id.*

The prompt payment requirement can be waived by written agreement that is entered into before the purchase or sale of livestock. *7 U.S.C. §228(b)(b).* The regulations provide a format for the waiver. *9 C.F.R. §201.200(a).* The agreement must be disclosed in the business records of the buyer and the seller, and on the accounts or other documents that the buyer issues relating to the transaction. *7 U.S.C. §228b(b).* But, if the prompt payment requirement is waived, the seller will lose any interest the seller has in the statutory trust (discussed below). *7 U.S.C. §196(c).*

The prompt payment rule also applies to “market agencies” and “dealers” in addition to packers (as defined above). A “market agency” is any person “engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services.” *7 U.S.C. §201(c).* Simply denoting “commission” on an invoice does not, by itself, indicate that the sale was on a commission basis. It’s the nature of the business relationship of the parties and the surrounding facts and circumstances that are determinative. *See, e.g., Ferguson v. United States Department of Agriculture, 911 F.2d 1273 (8th Cir. 1990).* A “dealer” is “any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.” *7 U.S.C. §201(d).* In *Kelly v. United States, 202 F.2d 838 (10th Cir. 1953),* the court said that a person can be a “dealer” even if the buying and selling of livestock is not the person’s only business.

A violation of the prompt payment rule constitutes an “unfair practice” under the PSA. *7 U.S.C. §228b(c).* The same is true for the issuance of an insufficient funds check and the failure to pay when due. *7 U.S.C. §213(a); 7 U.S.C. §228(b).*

The inability to make prompt payment is sometimes tied to the financial condition of the buyer. Consequently, all market agencies are prohibited from operating while insolvent – when current liabilities exceed current assets. *7 U.S.C. §204. See also United States v. Ocala Livestock Market, Inc., 861 F. Supp. 2d 1328 (M.D. Fla. 2012).*

Statutory packer trust. For packers with average annual purchases of livestock exceeding $500,000, the PSA establishes a statutory trust for the benefit of unpaid cash sellers. A “cash sale” is any sale where the seller does not expressly extend credit to the packer. *7 U.S.C. §196(a); Kunkel v. Sprague National Bank, 128 F.3d 636 (8th Cir. 1997).* The provision extends to “all inventories of, or receivables or proceeds from meat, meat food products, or livestock products derived therefrom….” *7 U.S.C. §196(b).* The funds must be held in the trust for the benefit of al unpaid cash sellers of livestock until full payment has been received by the unpaid seller. *Id.*

If a packer files bankruptcy, assets contained in the statutory trust are not part of the bankruptcy estate. *11 U.S.C. §541(d).* This means that the unpaid cash sellers of livestock do not have to compete with the bankrupt debtor’s secured creditors for the assets contained in the trust. *See, e.g., Rogers and King, Collier Farm Bankruptcy Guide §105[1].* Claims for payment from the statutory trust will defeat a properly perfected Uniform Commercial Code lien. *See, e.g., In re Gotham Provision Company, 669 F.2d 1000 (5th Cir. 1982).* Likewise, a bank creditor of a packer is not able to setoff funds held in the statutory trust. *See, e.g., In re Jack-Rich, Inc., 176 B.R. 476 (Bankr. C.D. Ill. 1994).* Also, payment from a statutory trust to livestock sellers are not recoverable as a preference item in bankruptcy. But, what constitutes cash collateral can present issues.

An unpaid cash seller can make a claim against trust assets by providing notice to the Secretary within 30 days of the final date for making prompt payment under 7 U.S.C. §228(b) or within 15 business days of being notified that the seller’s check has been dishonored, whichever is later. *7 U.S.C. §196(b); see also 9 C.F.R. §203.15.*

The statutory trust requirement does not apply to livestock purchases by market agencies and dealers. However, payments that a livestock buyer makes to a market agency for sales on commission are considered to be trust funds that must be deposited into a custodial account. *9 C.F.R.§201.42(a), (b).* In other words, a market agency or a dealer must maintain a custodial account for trust funds. By close of the next business day after an auction, market agencies must deposit into the custodial account: (1) all proceeds collected from the auction, and (2) an amount equal to the proceeds receivable from the livestock sale that are due from the market agency; any owner, employee, or officer of the market agency; and any buyer to whom the market agency has extended credit. *7 U.S.C. §201.42(c)-(d); 9 C.F.R. §201.42(c).* In addition, a market agency must deposit an amount equal to all of the remaining proceeds receivable into the custodial account within seven days of the auction, even if some of the proceeds remain uncollected. *Id.* Funds in the custodial account can only be withdrawn to remit the net proceeds due a seller, to pay lawful charges which the market agency is required to pay, and to obtain sums due the market agency as compensation for its services. *9 C.F.R. §201.42(d).* A market agency must transmit or deliver the net proceeds received from the sale to the seller by the close of business on the day after the sale. *7 U.S.C. §228b(a); 9 C.F.R. §201.43(a).*

To make a statutory trust claim, written notice must be given to the buyer and the Grain Inspection Packers and Stockyards Administration (GIPSA). The livestock not paid for must be identified along with the date of delivery. The applicable “look-back” period is 30 days before receipt by the buyer and the Secretary.

Note: Effective November 29, 2018, GIPSA is no longer a standalone agency within the United States Department of Agriculture (USDA), but is contained within the USDA’s Agricultural Marketing Service (AMS). The USDA final rule detailing the reorganization is found at 83 FR 61309 (Nov. 29, 2018).

Amended PSA - Statutory *Dealer* Trust

Origin. H.R. 133, *The Consolidated Appropriations Act, 2021,* was signed into law in late 2020. Title VII, Subtitle B, Chapter 2, §763 of the legislation amends the PSA by creating a statutory trust for the benefit of unpaid cash sellers of livestock to a *dealer*. Examples of “unpaid cash sellers” that may receive protection from the statutory trust include *livestock producers*, *auction markets*, and *livestock dealers* selling to another livestock dealer. The PSA says a *dealer* is “any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.” *7 U.S.C. § 201(d).* Thus, a “dealer” that buys or sells livestock with their own funds, or the funds of their employer, or is acting as an agent in such a transaction is covered.

Covered transactions. Under the new provision, all cash purchases (any sale where the seller doesn’t extend credit to the buyer) of livestock by a dealer with average annual purchases of $100,000 or more, and all inventories of, or receivables or proceeds from the livestock purchased in a cash sale transaction must be held by the dealer in trust until the unpaid cash sellers have been paid in full. “Payment in full” does not include an unpaid cash seller that receives a payment instrument that is dishonored. Indeed, payment is not considered to have been made if a payment instrument that is given in exchange for the livestock is dishonored. Thus, if the dealer does not pay for livestock at the time of delivery, the dealer must maintain a trust with certain assets until they satisfy the unpaid purchase of livestock.

What’s in the trust? Generally, the *trust assets* include the livestock that the dealer purchases as well as any earnings from the resale of the livestock. But a dealer need not segregate trust assets for each seller. Instead, the trust consists of commingled livestock-related assets, and all of the trust assets are subject to claims of an unpaid cash seller to the extent of the seller’s claim.

Priority rule. Unpaid cash sellers have first priority as to trust assets. If the dealer files bankruptcy, the trust assets are *not* included in the dealer’s bankruptcy estate. A buyer of livestock subject to the dealer trust receives good title to the livestock if the livestock are received in exchange for the payment of new value, and the livestock are received in good faith without notice that the transfer is a breach of trust. Also, a transfer of livestock that is subject to a dealer trust is not “for value” if the transfer is in satisfaction of an antecedent debt or to a secured party in accordance with a security agreement. Presumably, payment from a dealer trust to livestock sellers is also not recoverable as a preference item in bankruptcy. But what constitutes cash collateral can present issues.

Securing the trust's benefit. An unpaid cash seller can lose the benefit of the trust by not giving notice to the dealer in writing of the seller's claim on the trust and properly filing the notice with the USDA Secretary within 30 days after payment was due if a payment instrument has not been received, or within 15 business days after the date on which the seller receives the notice that the payment instrument promptly presented for payment has been dishonored. Generally, a dealer's payment is due before the close of the next business day after the purchase and transfer of possession of livestock. *7 U.S.C. §228b*. When a dealer receives the notice of the seller's intent to preserve the trust's benefits, the dealer has 15 business days to give notice to all persons who have a recorded security interest in or lien on the livestock held in the trust.

Enforcement. Enforcement of a dealer trust lies with the U.S. Secretary of Agriculture. Whenever the Secretary believes that a dealer has failed to comply with the dealer trust provisions or that action would otherwise be in the best interest of an unpaid cash seller, the Secretary is to either appoint an independent trustee to preserve the trust assets and enforce the trust or file suit in the federal district court in the jurisdiction of the dealer's location. In the alternative, an unpaid cash seller can sue to enforce the trust.

Conclusion

The PSA is a major piece of legislation significantly regulating livestock sales involving covered entities. It provides a level of protection for livestock sellers in terms of ensuring payment. In addition, it is a good practice for lenders that finance PSA-covered entities to ensure that these entities promptly pay for all livestock purchased. Now, the PSA statutory trust rules cover "dealers" in livestock and provide additional protection for unpaid cash sellers of livestock. The dealer statutory trust provision is applicable to covered transactions occurring on and after date of enactment. Lenders should take note.