

# TITLE ALERT

**Title Alert 2016-07**

**June 30, 2016**

**PA - STANDARD**

**Statutory Trusts Imposed by the Perishable Agricultural Commodities Act ("PACA") and by the Packers and Stockyards Act ("PSA")**

**Purpose:** To provide guidance and establish requirements for transactions in which the assets of a party to that transaction may be subject to a statutory trust imposed by PACA and/or PSA.

**Background:** PACA (7 U.S.C. §§ 499a, *et seq.*) and PSA (7 U.S.C. §§ 181, *et seq.*) (together, the "Statutes") are federal statutes that create a trust (the "Trust"). The Trust is the equivalent of a "super lien" favoring unpaid producers/suppliers of defined commodities that attaches to the proceeds and receivables generated by the sale of those commodities. "Proceeds" can include land and buildings bought with the funds from the sale of the commodities and the products derived from those commodities. The Trust is automatically created and continues in favor of the supplier/producer and all subsequent producers from the moment the products are first delivered to the dealer or other reseller of the commodities until payment has been made. Unfortunately, determining when the products were delivered by the first producer/supplier and whether and when full payment to all producer/suppliers occurred can be extremely difficult.

Typically, no documents are recorded in the Public Records<sup>1</sup> to create or disclose the existence of the Trust. A purchaser can, therefore, unintentionally take Title subject to the Trust. Likewise, a mortgage or deed of trust securing a loan to a dealer or other reseller of the commodities may not attach to the Title to the Land subject to the Trust.

PACA applies to the sale of perishable agricultural commodities in the form of produce, such as fresh fruit or vegetables. PACA risk in a transaction can be identified by knowledge of the use of the Land or the business in which a party is engaged, such as:

- food and produce wholesalers, produce storage, grocery wholesalers, food service firms, produce dealers, food distribution facilities;
- food processing facilities, produce packing facilities, canners;
- supermarkets and grocery stores; and
- restaurants, assisted living facilities, wineries, distilleries, and breweries.

PSA applies to the sale of poultry, poultry products, livestock and meat products. PSA risk in a transaction can also be identified by knowledge of the use of the Land or the business in which a party is engaged, such as:

- poultry farms;
- livestock or swine farms/producers;
- meatpacking/poultry packing facilities; and
- supermarkets and grocery stores.

<sup>1</sup> Capitalized terms that are not otherwise defined in this Title Alert have the same meaning as in the ALTA 2006 policies.

PRACTICE TIP: The name of the company involved in the transaction might suggest that PACA or PSA applies: For example, if the name contains the word "food," "produce," "packing," "distributor," "processor," "farm," "ranch," "feedlot," or any variation thereof, you should be alerted to the possibility that PACA or PSA applies.

**Standard:** If your transaction involves a party whose assets may be subject to a PACA and/or PSA Trust, you must contact Penn Attorneys and we will assist you in determining whether PACA or PSA risk is implicated by your transaction and, if so, how that risk will be addressed.

If the Company determines that a PACA/PSA risk is present, the following Schedule B Exception may be required in any title insurance policy:

Any claim that the Title is subject to a trust or lien created under the Perishable Agricultural Commodities Act (7 U.S.C. §§ 499a, *et seq.*), the Packers and Stockyards Act (7 U.S.C. §§ 181, *et seq.*) or under similar federal or state laws.

This Title Alert only addresses PACA and PSA. Please note, however, that a number of state legislatures have enacted laws establishing similar rights in favor of agricultural producers, sellers, or other parties with regard to food products not covered by either PACA or PSA.<sup>2</sup> A comprehensive state-by-state analysis of these laws is beyond the scope of this Title Alert. If you have a transaction where a reseller of other food products is involved with the Land, contact us to determine if a separate, specific exception dealing with the particular state law is required.

If you have any questions, please feel free to contact us.

Republication of First American's Corporate Underwriting Department Communication NA-2016-010-Standard. Replaces and Supersedes NA-2012-007-Standard issued July 27, 2012. First American Title Insurance Company makes no express or implied warranty respecting the information presented and assumes no responsibility for errors or omissions.

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**NOTE:** This Title Alert is intended solely for the employees of Penn Attorneys/Ohio Bar Title Insurance Company and its Approved Attorneys, is not to be distributed to third parties, and any reliance by any other person or entity is unauthorized. This Title Alert is intended solely for the purpose of underwriting policies of Ohio Bar Title Insurance Company.

**NOTE TO APPROVED ATTORNEYS:** Under the Approved Attorney system, the scope of our relationship is limited to the functions of underwriting and the issuance of title insurance policies on your behalf and does not include closing or escrow services. We sometimes provide information and recommendations with regard to your closing or escrow business as a courtesy to you. Moreover, some communications, depending on whether noncompliance could impact on liability under our policies or closing protection letters, should be considered directives. This Title Alert is being provided to you with those considerations in mind.

\* \* \* \* This Title Alert should become a permanent part of your records to assure compliance with its requirements. \* \* \* \*

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<sup>2</sup> See, e.g., N.Y. Agric. & Mkts. Law § 250-a; Tex. Agric. Code Ann. § 181.002 (the so-called "Texas Milk Statute").