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NatAgLaw@uark.edu • (479) 575-7646

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An Agricultural Law Research Article

**The Surety Relationship in the Agricultural  
Commodity Storage Context and Grain  
Indemnity Funds: A Jurisdictional Survey**

**Part 2**

by

Peter E. Karney & John F. Fatino

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After noting a split of authority among the jurisdictions,<sup>525</sup> the Minnesota Supreme Court summarized the state of the case law: “many courts have concluded that each bond should be viewed as a separate undertaking by the surety to protect against the defaults of the principal which occur during that bonding period.”<sup>526</sup>

In response to St. Paul’s argument that it should not be held liable on all three bonds because the bond protected only “against loss during the period,” the Minnesota Supreme Court rejected the argument on the same basis that the identical argument had previously been rejected in a case by the United States Court of Appeals for the Tenth Circuit.<sup>527</sup> The Tenth Circuit previously found that the surety was tied to the statute and the parties’ agreement rather than the elements of the tort of conversion at common law.<sup>528</sup> Once the statute was violated, the agreement was breached and the obligation on the bond was triggered.<sup>529</sup> As the Minnesota Supreme Court concluded, “[w]e fully agree with the court’s reasoning . . . [t]herefore, we hold that St. Paul is liable under its previous bonds for the defaults of its principal.”<sup>530</sup> At the same time, the Minnesota Supreme Court has stated that it will liberally construe “these types of surety bonds in order that they accomplish their statutory purpose of protecting persons who deal with a publicly licensed warehouseman in normal and usual transactions from sustaining loss because of the warehouseman’s defaults.”<sup>531</sup> Albeit, the result in this case appears to have been legislatively changed.<sup>532</sup>

Similarly, the Minnesota Supreme Court rejected St. Paul’s argument that the bond did not protect the seller of grain.<sup>533</sup> The court found no compelling distinction between a seller and a storer of grain. “A seller of grain places the same reliance on the warehouseman’s faithful performance of its duties as does a storer of grain. If the warehouseman defaults in its duties, we see no logical reason for excluding the seller from the protection of the bond.”<sup>534</sup>

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525. *Id.* at 215-16.

526. *Id.* at 215 (citations omitted).

527. *Id.* at 216 (citing *Gen. Ins. Co. v. Commodity Credit Corp.*, 430 F.2d 916, 918 (10th Cir. 1970)).

528. *Id.*

529. *Id.*

530. *Id.*

531. *Id.* at 217 (citations omitted).

532. MINN. STAT. ANN. §§ 223.17(8)(d), 232.22(7)(f) (West 2003 & Supp. 2006).

533. *St. Paul Ins. Co.*, 245 N.W.2d at 216-17.

534. *Id.*

## (c) Coverage for independent truckers

The Minnesota Court of Appeals has determined that when an independent trucker buys grain from various farmers and resells it to an elevator, a buyer of grain is not liable to the producer for the purchase price under Minnesota Statute section 336.2-403.<sup>535</sup> In *Schulter v. United Farmers Elevator*, the farmers did not receive payment for their grain and commenced suit on the bond of the elevator.<sup>536</sup> The elevator maintained that it was a buyer in ordinary course under Minnesota Statute section 336.2-403.<sup>537</sup> Under Minnesota law, the test of good faith is a subjective rather than an objective one.<sup>538</sup> Thus, based upon the trucker's conduct over time, he had gained a reputation in the community that would qualify him as a "merchant" within the meaning of the Uniform Commercial Code as adopted in Minnesota.<sup>539</sup> Moreover, "the elevator did a lien check on the trucker."<sup>540</sup>

As a result, the Minnesota Court of Appeals concluded that since "the transaction between the trucker and the elevator was a sale with title shifting immediately, and because the elevator acted in good faith," the provisions of Minnesota Statute section 336.2-402(2) and (3) would apply to the facts of the case.<sup>541</sup> As succinctly summarized by the Minnesota Court of Appeals, "the UCC mandates that the farmers not the elevator, bear the loss."<sup>542</sup> At the same time, the Minnesota Court of Appeals rejected the argument that the Grain Storage Act would apply because there was no evidence in the record of a "storage agreement between the elevator and the farmers."<sup>543</sup> Consequently, the trial court's grant of summary judgment was proper.<sup>544</sup>

## (d) How Chapter 223 works

The Minnesota Court of Appeals has described Minnesota Statute section 223.17 as creating two types of grain sales.<sup>545</sup> One is a cash sale where payment is required contemporaneous with the sale.<sup>546</sup>

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535. *Schulter v. United Farmers Elevator*, 479 N.W.2d 82 (Minn. Ct. App. 1991).

536. *Schulter*, 479 N.W.2d at 83-84.

537. *Id.* at 84.

538. *Id.* at 85.

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.*

543. *Id.* at 86.

544. *Id.*

545. *In re Claims Against the Grain Buyer's Bond No. 877706-08624237*, 486 N.W.2d 466, 468 (Minn. Ct. App. 1992).

546. *Grain Buyer's Bond No. 877706-08624237*, 486 N.W.2d at 468.

The other type is a voluntary extension of credit sale.<sup>547</sup> Voluntary extensions of credit will result in a loss of coverage under the grain buyer's bond.<sup>548</sup>

Therefore, in the Minnesota Court of Appeal's view, it is irrelevant whether the seller allows the buyer a grace period "because the buyer must give written confirmation of credit to the seller before the close of the next business day or the transaction fails as a credit sale."<sup>549</sup> In short, mere failure to meet the statutory test for a cash sale, does not automatically create a voluntary extension of credit with resultant loss of bond coverage.<sup>550</sup> Thus, it follows that if there is a breach of a cash sale grain contract, the grain producer must file a claim with the Commissioner within 180 days of the breach before the producer can recover on the bond.<sup>551</sup>

Moreover, the subsequent incorporation of a principal will not relieve a surety of its obligations under the bond.<sup>552</sup> To allow a surety to avoid coverage based upon the subsequent incorporation of the principal would "thwart the legislature's intent in requiring a grain buyer to obtain a bond."<sup>553</sup>

Multiple shipments are entitled to a different treatment under the Chapter. The Minnesota Court of Appeals has determined with respect to multiple shipments pursuant to Minnesota Statute section 223.17(5), that payment must be made "within ten days after each shipment, *except that* all payments are due within forty-eight hours after completion of the entire sale."<sup>554</sup>

#### (e) Delivery as a defense to surety

In the commodity storage context, like other matters involving a surety, delivery of the bond is a critical component of suretyship and can constitute a defense by the surety.<sup>555</sup> In *Larson v. National Surety Co.*, the facts demonstrated that the bond had not been delivered at the time the claim arose.<sup>556</sup> As noted by the Minnesota Supreme Court, "it is almost an elementary principle laid down in all of

547. *Id.*

548. *Id.*

549. *Id.* at 469. See also MINN. STAT. ANN. § 223.175 (West 2003) (specifying contents for written agreement).

550. *Grain Buyer's Bond No. 877706-08624237*, 486 N.W.2d at 469.

551. *Id.* at 470.

552. *In re Claim Against the Grain Buyer's Bond No. MTC 182*, 1995 Minn. App. LEXIS 825, at \*3-\*4 (Minn. Ct. App. June 20, 1995).

553. *Grain Buyer's Bond No. MTC 182*, 1995 Minn. App. LEXIS 825, at \*4 (citation omitted).

554. *In re Claim Against Grain Buyer's Bond of Mischel Grain & Seed*, 591 N.W.2d 734, 738 (Minn. Ct. App. 1999) (emphasis in original).

555. *Larson v. Nat'l Sur. Co.*, 214 N.W. 507 (Minn. 1927).

556. *Larson*, 214 N.W. at 508 (citation omitted).

the books that a bond is not 'executed' until it is delivered . . . . It takes effect only from execution, on delivery, and, until delivery, it is not a contract and is of no further value than the paper upon which it written."<sup>557</sup> Thus, because the bond issued had never been executed and delivered in accordance with the law, it never became "operative for any purpose because of its nondelivery."<sup>558</sup>

(f) Evidentiary issues

Counsel would be well-advised to remember that in those states that have an administrative-type proceeding for resolution of claims, the rules of evidence may not fully apply before an administrative body. Frequently, hearsay may be admitted in an administrative proceeding, if it is the type of evidence upon which a reasonably prudent person would rely.<sup>559</sup> The Minnesota Court of Appeals determined that an administrative law judge did not err when it allowed documentary evidence in the form of invoices and receipts to be received as evidence in support of a claim rather than live testimony.<sup>560</sup>

F. MISSOURI

1. Statutes

Missouri Revised Statute section 276.406 provides that the Director of the Missouri Department of Agriculture<sup>561</sup> shall be responsible for the approval of surety bonds required by sections 276.401-581.<sup>562</sup> Moreover, the Director may promulgate rules and regulations to accomplish the efficient and effective enforcement of the enumerated statutes.<sup>563</sup> This power includes the authority to conduct administrative hearings for the purposes of determining the liabilities of sureties on bonds that have been issued on behalf of grain dealers.<sup>564</sup>

(a) Grain dealers

Missouri law requires that a grain dealer file with the Director a surety bond.<sup>565</sup> The bond must be in favor of the State of Missouri, as

557. *Id.* at 506 (citation omitted).

558. *Id.* at 509.

559. *Grain Buyer's Bond No. MTC 182*, 1995 Minn. App. LEXIS 825, at \*8-\*9. *Cf.* IOWA CODE ANN. § 17A.14(1) (West 2005) ("A finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial").

560. *Grain Buyer's Bond No. MTC 182*, 1995 Minn. App. LEXIS 825, at \*8-\*9.

561. MO. ANN. STAT. § 276.401(3)(12), (14) (West 1993 & Supp. 2006).

562. *Id.* § 276.406(1)(3).

563. § 276.406(2)(1).

564. § 276.406(2)(8).

565. *Id.* § 276.426(1).

trustee, “for the benefit of all persons selling grain to the grain dealer . . . .”<sup>566</sup> The bond shall be conditioned upon the following factors:

1. The dealer as a buyer paying to the seller the agreed-upon purchase price of the grain purchased from the seller where title to said grain transferred from the seller to the buyer within the state of Missouri;<sup>567</sup>
2. The grain dealer’s faithful performance of his duty as a licensed grain dealer . . . .<sup>568</sup>
3. The bond required by this section shall cover the agreed-upon minimum price of any valid minimum price contract . . . .<sup>569</sup>

The fourth factor is not so much a “factor” as it is a preclusion from coverage under the bond. The statute provides that the bond shall “not cover payment for any promissory note accepted by the seller of grain.”<sup>570</sup>

Surety bonds issued under the chapter are effective from the date of issue and cannot be affected by the expiration of the license period and “continue in full force and effect until canceled.”<sup>571</sup> Unlike some jurisdictions, Missouri’s statute specifically provides that the liability of the surety cannot be accumulated:

The continuous nature of a bond, however, shall in no event be construed to allow the liability of the surety under a bond to accumulate for each successive licensed period during which the bond is in force, but shall be limited in the aggregate to the amount stated on the bond . . . [or] appropriate endorsement or rider.<sup>572</sup>

The required bond is to be kept in force at all times; failure to maintain the bond is a basis for license revocation.<sup>573</sup> Bonds may not be canceled without the prior written approval of the Director and the substitution of another bond.<sup>574</sup>

The statute also places specific requirements on the surety. Upon the Director’s written demand for payment,

the surety shall either pay over . . . the sum demanded up to the full face amount of the bond, or shall deposit the sum demanded in an interest-bearing escrow account at the highest

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566. § 276.426(2).

567. § 276.426(2)(1).

568. § 276.426(2)(2).

569. § 276.426(2)(3).

570. § 276.426(2)(4).

571. § 276.426(3).

572. *Id.*

573. § 276.426(4).

574. *Id.*

rate of interest available. When a surety pays the director upon demand, the director shall either interplead the sum in court or hold an administrative hearing for the determination of the liability of the surety, and the validity of claims against the bond, and upon the conclusion thereof, the director shall distribute the bond proceeds accordingly.<sup>575</sup>

Yet, the surety maintains the right to appeal to the circuit court following the Director's determination.<sup>576</sup> The surety's refusal to pay the sum demanded or failure to "deposit the sum demanded in a interest-bearing escrow account at the highest rate of interest available, shall be grounds for withdrawal of the surety's license and authorization to conduct business in this state . . ." with an additional penalty of twenty-five percent of the full face amount of the bond plus interest at the rate of nine percent or higher.<sup>577</sup> Nonetheless, in the event the surety pays as demanded and the Director ultimately concludes that the surety is not liable, the Director is entitled to return to the surety the sum paid (or a proration of the sum paid plus all accumulated interest).<sup>578</sup>

No bond may be canceled without notice "via certified mail" to the Director at Jefferson City, Missouri, and the terms of the bond must so state.<sup>579</sup> Cancellation of the bond does not affect the accrued liability of the surety or any liability which may accrue before the expiration of the statutory-required period prior to cancellation.<sup>580</sup> Should the surety fail to follow the statutory procedures for cancellation, "the bond shall remain in full force and effect until properly canceled."<sup>581</sup>

Moreover, failure to obtain a substitute surety in the event of notice to the Director of the surety's intent to cancel shall result in the automatic revocation of the dealer's license if a new bond is not received "within thirty days of receipt of the notice of intent to cancel."<sup>582</sup> If a substitute "bond is not received within sixty days of receipt of the notice of intent to cancel," the Director shall revoke the dealer's license and cause an inspection to take place with notice to sellers and claimants via the local news media.<sup>583</sup>

Contrary to other jurisdictions identified in these materials, Missouri recognizes the validity of a *verbal* or written surety bond binder

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575. § 276.426(6).

576. *Id.*

577. *Id.*

578. *Id.*

579. § 276.426(7).

580. *Id.*

581. *Id.*

582. § 276.426(8).

583. *Id.*

as being legally effective.<sup>584</sup> However, such agreements are not valid unless the bond meets the following conditions. First, “[t]he dealer or principal has paid, or has promised to pay the surety an agreed upon or tentatively agreed upon . . . premium” and the surety has agreed upon or “*tentatively* agreed upon premium or other consideration.”<sup>585</sup> Next, the surety must provide all of the following information: a bond number; the amount of the bond; and the bond’s effective date.<sup>586</sup> The Director is free to reject a binder depending upon the particular circumstances.<sup>587</sup>

The statute also allows for certificates of deposit and letters of credit in lieu of an actual surety bond.<sup>588</sup> When the bank acts in lieu of a surety, it is subject to similar requirements as if it were acting as a surety.<sup>589</sup> On the other hand, the statute allows a grain dealer with sufficient net worth to request relief from the Director that the dealer may only be required to post the minimum \$20,000 bond.<sup>590</sup>

A Missouri grain dealer is required to “make payment of the agreed-upon purchase price to the seller of grain upon delivery or demand of said seller or his authorized agent, unless a written grain purchase contract or valid deferred payment contract shall provide otherwise.”<sup>591</sup> Under the Missouri statute, it is contemplated that a class I dealer shall promptly document the agreed-upon purchase price of the grain and shall make payment upon demand.<sup>592</sup> In the event that a demand for payment is not made, a class I dealer has the option of entering the data onto a formal settlement sheet, which must occur within thirty days of delivery.<sup>593</sup> If an account is entered on a formal settlement sheet, “payment shall be made the earlier of demand or one hundred eighty days from delivery.”<sup>594</sup> If payment has not been made at the conclusion of the 180 day mark, a formal written contract shall be executed.<sup>595</sup>

Likewise, a class II dealer is required to document the agreed upon purchase price of grain and make payment upon demand.<sup>596</sup> A class II dealer is also required to make use of a formal settlement

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584. § 276.426(9).

585. § 276.426(9)(1) (emphasis added).

586. § 276.426(9)(2)(a)-(c).

587. § 276.426(9)(2)(d).

588. *Id.* § 276.431(1)-(2).

589. § 276.431(3).

590. *Id.* § 276.441(1).

591. *Id.* § 276.461(1).

592. § 276.461(2).

593. *Id.*

594. *Id.*

595. *Id.*

596. § 276.461(3).



sheet if no demand for payment is made.<sup>597</sup> Once the account is marked on a formal settlement sheet, payment must be made either upon demand or within 180 days of delivery, whichever first occurs.<sup>598</sup> A class II dealer is prohibited from entering into any type of credit sales contract.<sup>599</sup> Persons holding a class III, IV, V, or VI license are not to enter into any type of credit sales contract.<sup>600</sup>

While a producer may make an oral demand from a dealer, the right to recover under a surety bond shall be based only upon a written demand to the surety.<sup>601</sup> Recovery on the bond is not a person's sole remedy and does not bar a subsequent "civil action based upon rights or obligations arising under the grain purchase contract."<sup>602</sup> Deferred price contracts are not eligible for recovery from the dealer's surety bond.<sup>603</sup> Deferred price contracts must contain a statement concerning the absence of bond coverage. The written contract must specifically state that the grain dealer is "not required to carry bond on the grain for the benefit of the seller . . ."<sup>604</sup>

With respect to deferred payment contracts, a class I dealer must notify the seller that the class I dealer is required to carry a bond on the grain for the benefit of the seller only for "twelve months from the date the contract was entered into," and at the expiration of that time, "payment for the grain becomes a common claim against the dealer."<sup>605</sup> Nonetheless, should the grain dealer's license be revoked by the Director "all deferred payment agreements executed within the twelve months prior to revocation shall be deemed priced unpaid obligations as of the effective date of the revocation and as such agreements are covered by the grain dealer's bond."<sup>606</sup>

Minimum price contracts may also be entered into by a class I dealer.<sup>607</sup> However, the written agreement must provide a statement that the "specified minimum price is covered under the dealer's bond for the benefit of the seller, for, and only for, twelve months from the date the contract was entered; and that payment for any subsequent price gains, if any, is not covered by the bond."<sup>608</sup> No other type of dealer may enter into minimum price contracts.<sup>609</sup>

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597. *Id.*

598. *Id.*

599. *Id.*

600. § 276.461(4).

601. § 276.461(5).

602. § 276.461(6).

603. § 276.461(7).

604. *Id.*

605. § 276.461(8).

606. § 276.461(9).

607. § 276.461(10).

608. *Id.*

609. *Id.*

Upon revocation of a license, all claims shall be filed with the Director against the former licensee and the surety company within 120 days after the date of the revocation.<sup>610</sup> Failure to timely file a claim defeats recovery under the bond.<sup>611</sup>

If the Director believes that a dealer is insolvent or “unable to satisfy the claims of all sellers,” the Director may petition the circuit court for an *ex parte* order authorizing the Director to take control of the dealer and act as trustee.<sup>612</sup> After taking possession, the Director shall give written notice of the action to the surety and any sellers as shown by the available records.<sup>613</sup> The Director, acting as trustee, shall remain in possession “until such time as the dealer or the surety on the bond shall have satisfied the claims of all sellers” or when the circuit court orders the surrender of possession.<sup>614</sup> While in possession, the Director is not authorized to operate the dealer’s business nor is the Director liable for any claims that could have arisen from the non-operation of the dealer’s facility.<sup>615</sup>

#### (b) Warehouses

Missouri has also established the Director’s authority to act under the Missouri Grain Warehouse Law.<sup>616</sup> The Director’s authority extends to conducting hearings on the liability of sureties that have filed bonds on behalf of licensed warehouses with the Department.<sup>617</sup> Before a person may be issued a warehouse license, the person must file a bond (other than personal security) with the Director by a surety licensed to do business in Missouri.<sup>618</sup> “The bond shall be in favor of the state of Missouri for the benefit of all persons storing grain . . . conditioned upon the faithful performance of his duties as a public warehouseman relating to the storage of grain.”<sup>619</sup> Storage grain that has been priced is not covered by the warehouseman’s bond.<sup>620</sup> Grain deemed storage grain is covered by the bond.<sup>621</sup>

The statute specifically describes what are *not* defenses upon the bond.<sup>622</sup>

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610. *Id.* § 276.491(6).

611. *Id.*

612. *Id.* § 276.501(1).

613. § 276.501(4).

614. § 276.501(5).

615. *Id.*

616. MO. ANN. STAT. § 411.070 (West 2001).

617. § 411.070(2)(9).

618. *Id.* § 411.275(1).

619. *Id.*

620. *Id.*

621. *Id.*

622. § 411.275(2).

Neither the issuance of warehouse receipts by a warehouseman to himself for grain owned in whole or in part by him; the commingling of grain owned by the warehouseman with grain stored for others or any violation by a warehouseman of this chapter or of the regulations . . . is a defense . . . .<sup>623</sup>

Indeed, the bond must provide this information.<sup>624</sup> The bond issued under Chapter 411 shall become effective on the date of issue and "shall not be affected by the expiration of the license . . . ." <sup>625</sup> The bond continues in full force and effect until canceled.<sup>626</sup> A warehouse, when using multiple bonds, "shall utilize the same corporate surety for all bonds required for the operation" of multiple warehouses.<sup>627</sup>

Upon written demand by the Director for payment, the surety must either pay over the sum demanded up to the penal sum of the bond or deposit the funds in an interest bearing escrow account.<sup>628</sup> Refusal or failure to pay on the behalf of the surety can result in onerous consequences.<sup>629</sup>

Grain warehouse bonds are to contain similar provisions with respect to cancellation and substitution of bonds.<sup>630</sup> Moreover, verbal or written surety bond binders are valid, provided, however, that the documents meet the statutory test.<sup>631</sup>

Certificates of deposit and irrevocable letters of credit may be used to satisfy the requirement of a surety bond under Chapter 411.<sup>632</sup> Chapter 411 also requires a bank, when acting as the surety, to obey the written demand of the Director.<sup>633</sup>

Like the provision regarding grain dealers, the Director has similar authority, under the Grain Warehouse Law, upon learning of the insolvency of a grain warehouse.<sup>634</sup> The Director is required to give written notice of the action to the surety and "holders of record."<sup>635</sup>

Similarly, the Director is authorized to retain possession until such time as the surety satisfies all the claims of the depositors.<sup>636</sup> No

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623. *Id.*

624. *Id.*

625. § 411.275(3).

626. *Id.*

627. § 411.275(5).

628. § 411.275(7).

629. *Id.*

630. § 411.275(8)-(9).

631. § 411.275(12).

632. *Id.* § 411.277(1)-(2).

633. § 411.277(3).

634. *Id.* § 411.519.

635. § 411.519(6).

636. § 411.519(7).

liability attaches to the Director's possession nor must the Director operate the facility.<sup>637</sup>

## 2. Case law

### (a) The common law and the Missouri statutes

When a milling concern handles and stores grain products in the ordinary course of its business, it is not a warehouseman, either at common law or under the Missouri statutes, because the business is not engaged in the business of storing or receiving goods.<sup>638</sup>

As previously determined by the Supreme Court of Missouri, there is no basis for a lawsuit against the State of Missouri, the Missouri Department of Agriculture, or the Missouri Division of Grain Inspection for deficiencies purportedly committed by the State that trigger coverage under a surety's bond.<sup>639</sup> As stated by the Missouri Supreme Court, "[i]f they are suable entities at all, they partake of the state's sovereign immunity."<sup>640</sup> Moreover, the state's interest in bonding grain storage facilities is based upon a public interest in maintaining the food supply. "The statutes exist, not purely in the interest of persons in the grain trade, but principally because of the public's interest in an abundant food supply."<sup>641</sup> It therefore follows that sovereign immunity was the exact type of doctrine to bar the instant claims against the public fisc.<sup>642</sup>

Under section 411.026(22), which defines interested person, when a company is acting as a custodian of pledged grain and is thereby compensated, the company is operating a public grain warehouse within the meaning of the statute.<sup>643</sup> However, under the unique factual circumstances of *State ex rel. Kruse v. SLT Warehouse Co.*, the Missouri Court of Appeals found that the surety was insulated from claims by virtue of section 411.491.<sup>644</sup> The Missouri Court of Appeals demonstrated this conclusion by means of a hypothetical situation:

Suppose a grain dealer, after receiving grain from sundry producers, stores it in a public grain warehouse operated by a third party several miles away. A week later the grain dealer returns to the warehouse, presents the receipt, and demands the grain, which is surrendered by the warehouse. The grain

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637. *Id.*

638. *Nat'l Bank of Commerce v. Flanagan Mills & Elevator Co.*, 188 S.W. 117, 121 (Mo. 1916).

639. *State ex rel. Mo. Dep't of Agric. v. McHenry*, 687 S.W.2d 178, 180-81 (Mo. 1985).

640. *State ex rel. Mo. Dep't of Agric.*, 687 S.W.2d at 181.

641. *Id.* at 182.

642. *Id.*

643. *State ex rel. Kruse v. SLT Warehouse Co.*, 759 S.W.2d 314, 324 (Mo. Ct. App. 1988).

644. *State ex rel. Kruse*, 759 S.W.2d at 328.

dealer sells the grain but never pays the producers for it. Could it seriously be argued that the producers have any claim against the bond of the third party warehouseman? We believe the answer under § 411.491 is clearly no.<sup>645</sup>

As the warehouse never assumed any contractual obligations with the claimants nor had any dealings with the claimants, "there was never an occurrence of any condition triggering liability to any claimant under appellants' public grain warehouseman's bond."<sup>646</sup>

In another case, a corporate surety, as defendant, argued that because an elevator did not continue in business for 180 days, it had no further obligation under the bond.<sup>647</sup> The Missouri high court rejected the argument, stating: "The bond by its terms, and by reason of the statutory requirements, continues in effect until terminated in the manner prescribed by law. No such termination is shown."<sup>648</sup> As stated by the court, the circumstance, "even if established, makes no difference." Both the bond and the statute require the bond continue in effect until terminated as a matter of law.<sup>649</sup>

(b) Trial practice

In the same case, the trial court was correct in rejecting testimony proffered by the surety, as an offer of proof, that "present and former officials of the Missouri Department of Agriculture . . . had consistently construed the governing statutes in accordance with" the surety's contention.<sup>650</sup> The trial court had sustained an objection to the testimony.<sup>651</sup>

While the Missouri Court of Appeals considered the testimony under the premise that the testimony should have been received "as evidence to show the construction placed on this statute by the officials in charge of its administration," the Missouri Supreme Court agreed with the trial court.<sup>652</sup> The statute at the time did not allow the Department to serve as a tribunal for the adjudication of claims.<sup>653</sup> As "[s]tatutory and contractual rights are to be adjudicated by the courts, not by bureaucrats," the testimony was properly ex-

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645. *Id.* at 328-29.

646. *Id.* at 329.

647. *State ex rel. Neese v. IGF Ins. Co.*, 706 S.W.2d 856, 860 (Mo. 1986).

648. *State ex rel. Neese*, 706 S.W.2d at 859 (footnote omitted).

649. *Id.*

650. *Id.* at 858 (footnote omitted).

651. *Id.*

652. *Id.*

653. *Id.*

cluded.<sup>654</sup> Albeit the result here appears to have been legislatively changed with respect to warehouses.<sup>655</sup>

(c) Interest

The Missouri Supreme Court determined that claimants were entitled to interest from the time their demand was made, even if the interest would exceed the penal sum of the bond.<sup>656</sup> In the Missouri Supreme Court's view, the "surety has the use of the money until payment is made and will receive a windfall if excused from paying interest."<sup>657</sup>

(d) Attorney fees

Attorney fees are not guaranteed when a surety denies a claim. The Missouri Supreme Court has rejected the argument that claimants are entitled to attorney fees because of a surety's conduct in denying a claim.<sup>658</sup> The court found "[b]ecause of the novelty of the point and the lack of authoritative construction, we are unwilling to say that the denial of payment was 'without just cause.'"<sup>659</sup> Likewise, a surety's absence of a basis for denial of a claim will similarly not give rise to a claim for fees under the statute.<sup>660</sup>

G. NEBRASKA

1. Statutes

(a) Grain dealers

Under Nebraska law, all grain dealers in the state must be licensed by the Public Service Commission.<sup>661</sup> Nebraska also statutorily defined the required content of a grain dealer receipt.<sup>662</sup> Licensing in Nebraska includes, *inter alia*, the requirement of security that can be a bond issued by corporate surety companies.<sup>663</sup>

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654. *Id.*

655. Compare MO. ANN. STAT. § 411.070(2)(9) (West 2001) (authorizing Director of the Missouri Department of Agriculture to conduct hearings and to adjudicate claims under chapters 411 and 536), with MO. ANN. STAT. § 276.501 (West Supp. 2006) (proceedings remain before circuit court).

656. *State ex rel. Neese*, 706 S.W.2d at 859.

657. *Id.* Nonetheless, section 411.275(6) can have a dramatic impact upon a surety that fails to perform as requested by the Director.

658. *Id.* at 861.

659. *Id.*

660. *Id.*

661. NEB. REV. STAT. ANN. § 75-903 (LexisNexis 2004 & Supp. 2005). See also *id.* § 75-101.

662. *Id.* § 75-904.

663. § 75-903(4).

The bond must be payable to the Public Service Commission "for the benefit of any producer or owner within this state who filed a valid claim arising from a sale to or purchase from a grain dealer."<sup>664</sup> The "security shall be furnished on the condition that the licensee will pay for any grain purchased on demand, not later than thirty days after the date of the last shipment of any contract."<sup>665</sup> The surety's liability "shall cover purchases and sales made or arranged by the grain dealer" for the period of time in which the bond is in place.<sup>666</sup>

The bond shall be "in continuous force and effect" until terminated by the surety.<sup>667</sup> However, the surety's liability is not accumulative for successive periods.<sup>668</sup>

In the event the conditions of the security have been violated,<sup>669</sup> the Commission may demand the security be forfeited and hold the proceeds of the security in an interest-bearing trust account until all claims have been determined.<sup>670</sup> The Commission may also revoke or suspend the license for failure to comply with the Act or any regulations under the Act.<sup>671</sup>

Should claims exceed the security, the "security shall be distributed pro rata among the claimants."<sup>672</sup> If the security is not turned over in ten days, the Commission may file suit and recover the security plus interest from the date the demand for the security was made "if the court finds that *any* claim determined by the commission against the grain dealer's security was valid."<sup>673</sup>

#### (b) Warehouses

Nebraska has also adopted a Grain Warehouse Act.<sup>674</sup> Grain warehouses are subject to the jurisdiction of the Public Service Commission. The term "warehouse" means "any grain elevator, mill, grist mill, building, or receptacle in which grain is held in storage for more than ten consecutive days."<sup>675</sup>

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664. *Id.* See also § 75-101.

665. § 75-903(4).

666. *Id.*

667. *Id.*

668. *Id.*

669. *Id.* § 75-905 (defining that seller shall have no recourse against the security unless the seller demands payment within thirty days of delivery, negotiates the instrument within thirty days of issuance, and notifies the Commission within thirty days of the apparent loss).

670. *Id.* § 75-906.

671. *Id.* § 75-903.01.

672. § 75-906.

673. *Id.* (emphasis added).

674. *Id.* § 88-525.

675. *Id.* § 88-526(9).

Nebraska's statute also attempts to reach those sales that take place beyond its borders. A grain "warehouseman" is a person or entity that receives or offers to store the grain of another for consideration or receives grain for shipment to other points for storage, consignment, or resale, either in or out of the state.<sup>676</sup>

No person shall act as a warehouseman without obtaining a license.<sup>677</sup> Note that additional examinations may be performed by the Commission, and the Commission may charge for such examination only when the examination was a follow-through on "irregularities from the previous examination or if financial conditions warrant additional examinations."<sup>678</sup>

The statute provides the Commission with the authority to share data with the "United States Government or any of its agencies, including the Commodity Credit Corporation . . ."<sup>679</sup> Likewise, the Commission may enter into agreements with regulators in bordering states for examination or licensing purposes; however, the Commission "shall assume all jurisdiction over any warehouseman headquartered in Nebraska regarding . . . warehouse activity."<sup>680</sup> Yet, a warehouseman "headquartered and licensed in another state which acquires facilities in Nebraska is under the jurisdiction of the headquarter state . . ."<sup>681</sup>

As part of the application process, each applicant must submit to a criminal record background check and fingerprinting.<sup>682</sup> The application must be accompanied by an "audited or reviewed fiscal year-end financial statement" prepared as required by the statute.<sup>683</sup> The application must also reveal the "location of the warehouse to be used by the applicant, its relation to railroad trackage, its capacity, its general plan and equipment, and its ownership."<sup>684</sup> The Nebraska annual license fee is driven by the storage capacity in bushels.<sup>685</sup> Additional storage capacity cannot be added without Commission approval.<sup>686</sup> The Commission can request additional financial documents.<sup>687</sup>

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676. § 88-526(11).

677. *Id.* § 88-527(1).

678. § 88-527(2).

679. § 88-527(3).

680. § 88-527(6).

681. *Id.*

682. *Id.* § 88-528. *See also id.* § 88-528.01. A felony conviction may bar an applicant.

683. § 88-528.

684. *Id.*

685. *Id.* § 88-529.

686. *Id.* § 88-533.

687. *Id.* § 88-530.01.



Applicants are also to submit "a bond, a certificate of deposit, an irrevocable letter of credit, United States bonds or treasury notes, or other public debt obligations of the United States . . ."<sup>688</sup> The security is to be in an amount required by the Commission, but shall not be less than \$25,000, and shall run to the

State of Nebraska for the benefit of each person who stores grain in such warehouse and of each person who holds a check for purchase of grain stored in such warehouse which was issued by the warehouse licensee not more than five business days prior to the cutoff date of operation of the warehouse, which shall be the date the commission officially closes the warehouse.<sup>689</sup>

One license may be used to operate multiple facilities if certain conditions are met.<sup>690</sup> Licenses must be renewed annually.<sup>691</sup> The Commission also has the authority to set storage rates<sup>692</sup> and inspect the books and records of a licensee.<sup>693</sup>

A surety must be licensed to do business in the state.<sup>694</sup> The security is conditioned upon sufficient insurance to cover losses to the grain arising from "combustion, fire, lightning, and tornado."<sup>695</sup> Next, the security is conditioned upon delivery of grain in exchange for the receipt.<sup>696</sup> Finally, the security is conditioned upon faithful performance of all lawful provisions regarding the storage of grain.<sup>697</sup>

Like some other jurisdictions, the statute specifically addresses the cumulative nature of the security. "The liability of the surety on a bond shall not accumulate for each successive license period which the bond covers. The liability of the surety shall be limited to the amount stated on the bond or on an appropriate rider or endorsement to the bond."<sup>698</sup>

Payment for grain is to be made upon demand of the seller, unless a written or oral contract specifies otherwise.<sup>699</sup> At the time of delivery to the warehouse, each licensee is to provide a scale ticket to the owner or consignee of the grain, unless the grain arrived by water or rail.<sup>700</sup> Within fifteen days following demand, the warehouse is to is-

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688. *Id.* § 88-530.

689. *Id.*

690. *Id.* § 88-531.

691. *Id.* § 88-532.

692. *Id.* § 88-541.

693. *Id.* § 88-542.

694. § 88-530.

695. *Id.*

696. *Id.*

697. *Id.*

698. *Id.*

699. *Id.* § 88-534.

700. *Id.* § 88-535.

sue either a negotiable or nonnegotiable receipt.<sup>701</sup> Commission approval is required for the issuance of duplicate negotiable receipts in the event the document is lost (provided that a bond is delivered).<sup>702</sup> A warehouse licensee can issue receipts to itself for grain that it owns, but such receipts must be registered with the Commission.<sup>703</sup>

When presented with the receipt and payment for lawful charges, the grain represented by the receipt must be delivered immediately.<sup>704</sup> If a partial delivery of a unit represented by a receipt is made, the partial delivery must be shown upon the face of the receipt and acknowledged by the recipient.<sup>705</sup> Failure to deliver any grain within twenty-four hours of demand subjects the warehouse and the security to damages of one cent per bushel per day.<sup>706</sup> The statute sets out special rules for terminal delivery.<sup>707</sup> However, both parties have the right to terminate the storage agreement.<sup>708</sup>

In Nebraska, it is a felony to issue a warehouse receipt for grain that was not actually received.<sup>709</sup> The statute creates a presumption regarding missing grain. "If at any time there is less grain in a warehouse than outstanding receipts issued for grain, there shall be a presumption that the warehouse . . . has wrongfully removed grain . . . or has issued receipts for grain not actually received, and has violated this section."<sup>710</sup> Apparently, no reported cases exist challenging the constitutionality of the presumption. A strong argument could be made that the presumption required by the statute violates a defendant's right to due process.<sup>711</sup> The Commission is also allowed to as-

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701. *Id.* § 88-536(1).

702. *Id.* § 88-537. *See also id.* § 88-538 (requiring that the receipt be marked duplicate).

703. § 88-536(3).

704. *Id.* § 88-540.

705. *Id.*

706. *Id.*

707. *Id.*

708. *Id.* § 88-544.

709. *Id.* § 88-543. Other jurisdictions could reach the same result by means of an allegation of criminal fraud or false pretenses. *See e.g.*, IOWA CODE ANN. 714.8(1) (West 2003) (defining a criminal fraudulent practice as any person who "[m]akes, tenders or keeps for sale any warehouse receipt, bill of lading, or any other instrument purporting to represent any right to goods, with knowledge that the goods represented by such instrument do not exist"). Nebraska's statute appears to be unique among the jurisdictions under examination, as the statute actually declares the act to be a felony regardless of the value involved.

710. NEB. REV. STAT. ANN. § 88-543.

711. *See Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that a presumption instruction in a criminal trial violated the due process clause of the Fourteenth Amendment because in a criminal case the burden is on the government to prove every element of the case beyond a reasonable doubt).

sess a civil penalty,<sup>712</sup> while the warehouse is liable for all damages suffered by the violation of the Grain Warehouse Act.<sup>713</sup>

Should the need arise, the Commission also has the authority to suspend or revoke the license.<sup>714</sup> The Commission's power also allows it to close a warehouse.<sup>715</sup> As part of the liquidation authority, the Commission may distribute (either in grain or proceeds) the remaining grain to all depositors on a pro rata basis.<sup>716</sup> If a shortage exists, the Commission may require that all or part of the security be forfeited for subsequent distribution by the Commission following a hearing.<sup>717</sup> The Commission is also authorized to commence a suit in district court for the benefit of the depositors.<sup>718</sup> In any event, the depositors are paid before the licensee's claims are recognized.<sup>719</sup>

The warehouse must notify the depositors, in writing, of the amount and type of grain stored.<sup>720</sup> Failure to do so is a misdemeanor.<sup>721</sup>

## 2. Case law

### (a) Contract formation

Courts generally

will not permit a party to avoid a contract into which the party has entered on the grounds that he or she did not attend to its terms, that he or she did not read the document which was signed and supposed it was different from its terms, or that it was a mere form.<sup>722</sup>

Article Two of the Uniform Commercial Code generally governs contracts involving the sale of grain.<sup>723</sup> A contract will not fail for indefiniteness under section 2-305(1) of the Uniform Commercial Code

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712. NEB. REV. STAT. ANN. § 88-543.01 (LexisNexis Supp. 2005). Of course, counsel will want to contemplate whether the civil penalty and the imposition of a criminal penalty for the same act violates the defendant's right to be free from successive punishment for the same act. U.S. CONST. amend. V, and related state constitutional equivalents.

713. NEB. REV. STAT. ANN. § 88-545 (LexisNexis 2003).

714. *Id.* § 88-546.

715. *Id.* § 88-547.

716. § 88-547(1).

717. § 88-547(2).

718. § 88-547(3).

719. § 88-547(1).

720. *Id.* § 88-549.

721. *Id.*

722. *In re Claims Against Atlanta Elevator, Inc.*, 268 Neb. 598, 617, 685 N.W.2d 477, 493 (2004) (citing *Omaha Nat'l Bank v. Goddard Realty, Inc.*, 210 Neb. 604, 316 N.W.2d 306 (1982)).

723. *Atlanta Elevator, Inc.*, 268 Neb. at 618, 685 N.W.2d at 493.

even if the price is unsettled. "In such a case the price is a reasonable price at the time for delivery if . . . nothing is said as to price."<sup>724</sup>

(b) Inapplicability of the discretionary function

In *D.K. Buskirk & Sons, Inc. v. State*,<sup>725</sup> nineteen plaintiffs brought suit against the Nebraska Public Service Commission alleging negligent regulation of Quality Processing, Inc. ("QPI"), a grain dealer.<sup>726</sup> The gravamen of the plaintiffs' allegation was that the Public Service Commission was negligent in its duty to enforce the Nebraska Grain Warehouse Act and the Nebraska Grain Dealer Act.<sup>727</sup> When QPI filed for bankruptcy in February of 1990, the plaintiffs, as a group, suffered losses in excess of \$400,000.<sup>728</sup> QPI had not been licensed by the Public Service Commission as a grain warehouse pursuant to the Grain Warehouse Act and "was not permitted to accept grain for storage."<sup>729</sup>

The district court sustained the state's motion for summary judgment on the basis of the "discretionary function exemption" to the Nebraska State Tort Claims Act.<sup>730</sup> The Nebraska Court of Appeals reversed the order of the district court.<sup>731</sup> The Nebraska Supreme Court affirmed the decision of the court of appeals "albeit on different grounds" from the court of appeals.<sup>732</sup>

The gist of the state's motion for summary judgment was that in 1989 the Grain Warehouse Director for the Public Service Commission learned that QPI was engaged in the storage of beans as a grain dealer.<sup>733</sup> Under Nebraska law, as a grain dealer, it could purchase grain from producers to sell but was not "permitted to accept grain for storage."<sup>734</sup>

In an effort to bring QPI into compliance with state law, the Commission arranged for the appropriate forms to be sent to QPI.<sup>735</sup> Also, two inspectors were sent to inspect two different storage facilities used

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724. *Id.* (citing Neb. U.C.C. § 2-305(1)(Reissue 2001)).

725. 252 Neb. 84, 560 N.W.2d 462 (1997)

726. *D.K. Buskirk & Sons, Inc. v. State*, 252 Neb. 84, 85, 560 N.W.2d 462, 464 (1997).

727. *D.K. Buskirk & Sons, Inc.*, 252 Neb. at 85, 560 N.W.2d at 464 (citing NEB. REV. STAT. § 88-525 et seq. (Reissue 1987 & Cum. Supp. 1990) and NEB. REV. STAT. § 75-901 et seq. (Reissue 1990) respectively).

728. *Id.*

729. *Id.*

730. *Id.* at 87, 560 N.W.2d at 465 (citing NEB. REV. STAT. § 81-8, 219(1)).

731. *Id.* at 88, 560 N.W.2d at 465.

732. *Id.* at 94-95, 560 N.W.2d at 469.

733. *Id.* at 85-86, 560 N.W.2d at 464.

734. *Id.* at 85, 560 N.W.2d at 464.

735. *Id.* at 86, 560 N.W.2d at 464.

by QPI.<sup>736</sup> QPI then failed to return the application in a timely manner.<sup>737</sup> A public service staff accountant was directed to contact QPI's accountant to inquire as to the status of the application.<sup>738</sup> QPI later informed the Public Service Commission that it had misplaced the application; another set was sent.<sup>739</sup> Ultimately, QPI's application was submitted to the Public Service Commission; however, QPI failed to provide the necessary financial statements.<sup>740</sup> QPI never corrected the omission nor did it purchase all the grain it was holding in storage.<sup>741</sup>

The last straw occurred when the Public Service Commission was informed by a deputy sheriff that QPI issued insufficient funds checks.<sup>742</sup> Over two weeks later, the Public Service Commission began proceedings for the suspension of QPI's grain dealer license.<sup>743</sup> During this entire period, the Public Service Commission allowed QPI to continue to function as a grain warehouse without a license.<sup>744</sup>

Thereafter, following the suspension of its license, QPI failed.<sup>745</sup> Thirty-four businesses and individuals filed forty-four claims with the Public Service Commission seeking a share of QPI's grain dealer's bond.<sup>746</sup> Only eight of the claims were allowed, and the bond covered only half of the allowed claims.<sup>747</sup> The majority of the claims were denied for one of two reasons.<sup>748</sup> Either the claim was submitted untimely or, in the alternative, the claim was based on a contract for grain storage and not for the sale of grain.<sup>749</sup> The court stated "QPI's bond could reimburse only those contracts in which QPI acted in its capacity as a grain dealer."<sup>750</sup> The bond did not cover losses caused by QPI's conduct as a "unlicensed grain warehouse."<sup>751</sup> Thus, the nineteen individual plaintiffs in *D.K. Buskirk & Sons, Inc.* were those individuals or entities whose claims were denied.<sup>752</sup>

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736. *Id.*

737. *Id.*

738. *Id.*

739. *Id.*

740. *Id.*

741. *Id.*

742. *Id.*

743. *Id.*

744. *Id.*

745. *Id.*

746. *Id.*

747. *Id.*, 560 N.W.2d at 464-65.

748. *Id.*, 560 N.W.2d at 465.

749. *Id.*

750. *Id.* at 86-87, 560 N.W.2d at 465.

751. *Id.* at 87, 560 N.W.2d at 465.

752. *Id.*

The state's summary judgment motion was based upon "the discretionary function exception to the State Tort Claims Act."<sup>753</sup> The district court granted the summary judgment and stated, in part:

No rules or regulations have been established by the PSC setting forth a procedure to be used in issuing a grain warehouse license to an applicant. No rule or regulation exists which says that an application must be filled out and received by the PSC within 'x' number of days after the PSC becomes aware that a person is operating without the appropriate license. No rule or regulation authorizes [PSC] to allow a person to operate as a grain warehouse while the application process is ongoing. Conversely, no rule or regulation prohibits [PSC] from trying to work with an operator while attempting to bring it into compliance.<sup>754</sup>

As the Nebraska Supreme Court stated, "[w]hen a statute does not prescribe the action to be taken, leaving the agency to make a judgment and this judgment is based upon social, economic or political considerations, it will be protected by the discretionary function."<sup>755</sup> The Nebraska State Tort Claims Act immunizes conduct "based upon an act or omission of an employee of the state . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused."<sup>756</sup>

Only when the facts are undisputed is the applicability of the discretionary function exemption a question of law.<sup>757</sup> Consequently, the Nebraska Supreme Court found the court of appeals erred in reversing the district court's judgment on the grounds that a genuine issue of material fact had been presented, as both sides acknowledged the facts were undisputed.<sup>758</sup>

However, the Nebraska Supreme Court continued in its analysis and found the Grain Warehouse Act contained a nondiscretionary term when it commanded that the Public Service Commission "shall enforce the Grain Warehouse Act' . . . and 'no person shall operate a warehouse nor act as a warehouseman without a license issued pursuant to the Grain Warehouse Act . . .'"<sup>759</sup> The plaintiffs argued that the plain language of the statute made its terms mandatory and, as a result, the Public Service Commission was without discretion in its

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753. *Id.*

754. *Id.*

755. *Id.* at 87-88, 560 N.W.2d at 465 (citations omitted).

756. *Id.* at 89, 560 N.W.2d at 466 (quoting NEB. REV. STAT. § 81-8,219(1)(a)).

757. *Id.* at 90, 560 N.W.2d at 467.

758. *Id.* at 91, 560 N.W.2d at 467.

759. *Id.* at 93, 560 N.W.2d at 468 (quoting NEB. REV. STAT. § 88-545 and NEB. REV. STAT. § 88-527).

duty to not allow QPI to act as a grain warehouse in the absence of the license.<sup>760</sup> Thus, "a statute prescribes a clear course of conduct" for the Public Service Commission.<sup>761</sup> Consequently, "the discretionary function exemption is inapplicable."<sup>762</sup> In short, the statute mandates that the Public Service Commission not allow an unlicensed grain warehouse to operate.<sup>763</sup>

(c) How the statute works

On a different occasion, the Nebraska Supreme Court determined, pursuant to Nebraska Revised Statute section 75-905, that no seller of grain can have recourse to a grain dealer's security, unless the seller demands payment from the grain dealer within ten days of the date of delivery and upon non-payment notifies the Commission within ten days of the apparent loss to be covered under the terms of the security.<sup>764</sup> Furthermore, the statute provides that when grain is delivered in multiple shipments but comprised of a single contract, the seller must notify the Commission of any apparent loss to be covered by the security within forty-five days of the date of the first shipment.<sup>765</sup> Accordingly, the seller had no recourse to the security when the statute was not followed.<sup>766</sup>

The Nebraska Supreme Court also concluded that under the Nebraska Grain Warehouse Act, the Nebraska Public Service Commission had jurisdiction over public warehouses as limited by the statutory scheme set out in Nebraska Revised Statute Chapter 88, Article 5.<sup>767</sup> Nebraska Revised Statute section 88-513(3) provides the Commission the authority to take title to all grain stored and distribute the same on a pro rata basis to all owners.<sup>768</sup> The distribution can be made either in the form of grain or proceeds from the sale of grain.<sup>769</sup> In the alternative, the Commission may bring "a suit . . . for the benefit of owners, depositors, or storers of grain."<sup>770</sup> However, in-

760. *Id.*

761. *Id.* at 94, 560 N.W.2d at 468.

762. *Id.* (citation omitted).

763. *Id.*, 560 N.W.2d at 469.

764. *Fecht v. Quality Processing, Inc.*, 244 Neb. 522, 523-24, 508 N.W.2d 236, 237 (1993) (citing NEB. REV. STAT. § 75-905(1)(a)-(c) (Reissue 1990)).

765. *Quality Processing, Inc.*, 244 Neb. at 524-25, 508 N.W.2d at 237-38 (citing NEB. REV. STAT. § 75-905(2) (Reissue 1990)).

766. *Id.* at 525, 508 N.W.2d at 238.

767. *In re Complaint of Fecht*, 216 Neb. 535, 539, 344 N.W.2d 636, 639 (1984).

768. *Complaint of Fecht*, 216 Neb. at 540, 344 N.W.2d at 639 (quoting NEB. REV. STAT. § 88-515(3) (Reissue 1981)).

769. *Id.*

770. *Id.* (quoting NEB. REV. STAT. § 88-515(3) (Reissue 1981)).

demnitors on the bond have no standing before the Public Service Commission.<sup>771</sup>

(d) Interest

The Nebraska Supreme Court has concluded that the producer delivering grain to a grain warehouse is entitled to interest from the date of the last delivery of the grain.<sup>772</sup>

(e) Surety law

While not expressly decided under either the Nebraska Grain Warehouse Act or the Nebraska Grain Dealer Act, the Nebraska Supreme Court previously found, with respect to a dispute between an elevator company and a railroad, that an indemnity bond executed by a elevator company to protect carriers from losses occasioned by the delivery of grain was not breached by a proper delivery of a consignment nor did the bond protect the carrier from loss resulting from its own negligence or mistakes.<sup>773</sup>

Furthermore, “*pro tanto*” discharge does not exist under Nebraska law.<sup>774</sup> Nevertheless, the doctrine of subrogation will be recognized in Nebraska.<sup>775</sup> However, the surety cannot collect attorney fees against the indemnitors.<sup>776</sup>

(f) Administrative procedure and the due process claim

Given the administrative-type hearings that take place to resolve the claims before a public agency, the elimination of cross-examination does not constitute a deprivation of due process.<sup>777</sup>

(g) Appellate practice

In Nebraska, the rules of error preservation apply. Failure to challenge an evidentiary finding from an administrative-type hearing will result in waiver of the claim on the appeal in the absence of as-

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771. *Id.* at 541, 344 N.W.2d at 640.

772. *Mintken v. Neb. Sur. Co.*, 187 Neb. 215, 217, 188 N.W.2d 819, 821 (1971).

773. *Omaha Elevator Co. v. Chicago, Burlington & Quincy R.R. Co.*, 104 Neb. 566, 573-74, 178 N.W. 211, 215 (1920).

774. *Omaha Grain Exch. v. Nat'l Sur. Co.*, 103 Neb. 820, 824-25, 174 N.W. 426, 427-28 (1919).

775. *Omaha Grain Exch.*, 103 Neb. at 824-25, 174 N.W. at 427-28.

776. *Havelock Bank of Lincoln v. W. Sur. Co.*, 217 Neb. 560, 566-67, 352 N.W.2d 855, 859 (1984).

777. *In re Claims Against Atlanta Elevator, Inc.*, 268 Neb. 598, 620, 685 N.W.2d 477, 495 (2004).



signment of error and a specific argument in the brief of the party alleging the error.<sup>778</sup>

Likewise, Nebraska appellate courts will defer to an administrative agency's findings of fact. A finding will not be disturbed by an appellate court unless the finding was "arbitrary or unreasonable."<sup>779</sup>

#### (h) Statutory interpretation

With respect to statutory construction in this arena, the doctrine of *in pari materia* applies.<sup>780</sup>

### H. NORTH DAKOTA

#### 1. Statutes

##### (a) Grain warehouses

Under North Dakota law, before any license may be issued to a public warehouseman, the applicant must file a bond that must be in a sum of not less than \$5,000, be continuous, and run to the State of North Dakota.<sup>781</sup> The bond must be conditioned upon the faithful performance of the licensee's duties, compliance with the provisions of law and rules of the Public Service Commission, and specify the location of each warehouse covered by the bond.<sup>782</sup> Failure to keep the grain insured against specified risks will result in suspension of the license.<sup>783</sup>

The bond must be for the specific purpose of "protecting the holders of outstanding receipts" and cover the costs incurred by the Commission in the event of a licensee's insolvency.<sup>784</sup> However, the bond does not accrue to the benefit "of any person entering into a credit-sale contract with a public warehouseman."<sup>785</sup>

The liability of the surety on the bond may accumulate "for each successive annual license renewal period during which such bond is in force but, for losses during any annual license renewal period, shall be limited in the aggregate to the bond amount stated or changed by appropriate endorsement or rider."<sup>786</sup> The Commission is empowered to require regular reports from the warehouse.<sup>787</sup> In lieu of a surety

778. *Atlanta Elevator, Inc.*, 268 Neb. at 603-04, 685 N.W.2d at 484 (citing *Misle v. HJA, Inc.*, 267 Neb. 375, 382, 674 N.W.2d 257, 263 (2004)).

779. *Id.* at 610, 685 N.W.2d at 488.

780. *Id.* at 606, 685 N.W.2d at 486 (citations omitted).

781. N.D. CENT. CODE § 60-02-09(1)-(3) (2003).

782. § 60-02-09(4)-(5). See also *id.* § 60-02-01(1).

783. *Id.* §§ 60-02-35 to -35.1.

784. § 60-02-09(6)(a)-(b).

785. § 60-02-09(7).

786. § 60-02-09(8).

787. *Id.* § 60-02-24.

bond, the Commission may accept cash, negotiable instruments, or a bond executed by personal sureties if the Commission believes it will protect the holders of outstanding receipts.<sup>788</sup>

The statute provides the means by which a surety bond may be canceled. The surety is released from future liability ninety days after notice is given to the Commission.<sup>789</sup> Failure to have security and insurance in place will result in suspension and may result in revocation of the license.<sup>790</sup> Statutory requirements exist for the closure<sup>791</sup> or transfer of a warehouse.<sup>792</sup>

The statute does not require that the surety information be posted. Instead, only the license must be posted.<sup>793</sup>

North Dakota statutorily defines the content of scale tickets.<sup>794</sup> In the event stored grain is purchased by the warehouse, a specific receipt is required, the format for which is set out in the statute.<sup>795</sup> Warehouse receipt and documentation requirements are denominated per the Code.<sup>796</sup> The storage contract must be on the receipt as well.<sup>797</sup> Failure to issue a receipt or the issuance of an incorrect receipt is a misdemeanor.<sup>798</sup> A warehouse may include a covenant against liens in the warehouse receipt.<sup>799</sup> In any event, a warehouse is liable to the owner of the grain to deliver the exact "kind, grade, quality, and quantity of grain called for by the warehouse receipt."<sup>800</sup> The receipt holder has a "first priority lien" on both the grain contained in the warehouse and grain owned by the warehouse.<sup>801</sup> The lien is preferred over the liens and security interests of other creditors regardless of the time in which the creditor's lien attached.<sup>802</sup>

The state also tightly regulates credit-sales contracts. The contracts may only be entered into as allowed and as defined by the statute.<sup>803</sup>

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788. § 60-02-09(8).

789. *Id.* § 60-02-09.1.

790. *Id.* § 60-02-10.1.

791. *Id.* §§ 60-02-39, 60-02-41.

792. *Id.* § 60-02-40.

793. *Id.* § 60-02-10.

794. *Id.* § 60-02-11.

795. *Id.* § 60-02-13.

796. *Id.* §§ 60-02-14, 60-02-16 (2003 & Supp. 2005). *See also id.* § 60-02-23.

797. *Id.* § 60-02-17.

798. *Id.* § 60-02-21.

799. *Id.* § 60-02-18.

800. *Id.* § 60-02-22.

801. *Id.* § 60-02-25.1. *See also id.* § 60-02-36.

802. § 60-02-25.1.

803. *Id.* § 60-02-19.1.

North Dakota, like some other jurisdictions, provides that delivery of grain to a warehouse constitutes a bailment.<sup>804</sup> As such, the grain is exempt from execution, except in an action by the owner of the subject grain.<sup>805</sup> The statute also defines how storage contracts terminate<sup>806</sup> and the required notice to be provided to the owner.<sup>807</sup> If the storage contract is renewed, a new receipt must issue.<sup>808</sup>

Insolvent warehouses are subject to coverage in a different Chapter.<sup>809</sup> The provisions are very similar to those concerning North Dakota grain buyers, which are discussed *infra*.<sup>810</sup> Insolvency is broadly defined. "A licensee is insolvent when the licensee refuses, neglects, or is unable upon proper demand to make payment for grain purchased or marketed by the licensee or to make redelivery or payment for grain stored."<sup>811</sup>

Upon the insolvency of a warehouse, the Commission is appointed trustee of the warehouse.<sup>812</sup> In this proceeding, the surety must be joined.<sup>813</sup> The trust includes various assets, claims, and property of an insolvent grain warehouse.<sup>814</sup> The trust consists of the following assets:

1. The grain in the warehouse of the insolvent warehouseman or the proceeds as obtained through the sale of such grain.
2. The proceeds, including accounts receivable, from any grain sold from the time of the filing of the claim that precipitated an insolvency until the commission is appointed trustee must be remitted to the commission and included in the trust fund.
3. The proceeds of insurance policies upon grain destroyed in the elevator.
4. The claims for relief, and proceeds therefrom, for damages upon any bond given by the warehouseman to ensure faithful performance of the duties of a warehouseman.
5. The claim for relief, and proceeds therefrom, for the conversion of any grain stored in the warehouse.
6. Unencumbered accounts receivable for grain sold prior to the filing of the claim that precipitated an insolvency.

804. *Id.* § 60-02-25.

805. *Id.*

806. *Id.* § 60-02-30.

807. *Id.* § 60-02-31.

808. *Id.* § 60-02-32.

809. N. D. CENT. CODE § 60-04-01 to -10 (2003).

810. *See infra* § III(H)(1)(B) and accompanying text.

811. N. D. CENT. CODE § 60-04-02.

812. *Id.* § 60-04-03.

813. *Id.* § 60-04-03.3.

814. *Id.* § 60-04-03.1.

7. Unencumbered equity in grain hedging accounts.
8. Unencumbered grain product assets.<sup>815</sup>

The statute specifically provides that grain on hand is to be sold, and the proceeds are to be included in the trust fund.<sup>816</sup> The Commission has the authority to marshal the trust assets<sup>817</sup> and prosecute or compromise claims.<sup>818</sup>

The statute restricts the remedies of receiptholders by barring separate claims for relief upon the warehouse's bond unless certain exceptions are met.<sup>819</sup> The receiptholder must, after notice, timely file a claim or the claim may be barred.<sup>820</sup>

(b) Grain buyers

Grain buyers are also regulated by the Commission<sup>821</sup> and are required to be licensed.<sup>822</sup> Similar to a warehouse, the grain buyer, as part of the licensing process, must provide a bond<sup>823</sup> and financial statements.<sup>824</sup> Like the warehouse bond, the grain buyer's bond must "run to the State of North Dakota for the benefit of all persons selling grain to or through the grain buyer."<sup>825</sup> The grain buyer's bond is conditioned upon the licensee faithfully performing his duties in compliance with the law and regulations concerning grain buyers.<sup>826</sup>

The grain buyer provisions are very similar to the warehouse provisions. For instance, the grain buyer statute addresses cancellation of the bond,<sup>827</sup> posting of the license,<sup>828</sup> revocation and suspension of the license,<sup>829</sup> credit-sale contracts,<sup>830</sup> and scale ticket contents.<sup>831</sup> Grain buyers are also subject to record keeping requirements<sup>832</sup> and are required to make routine reports to the Commission.<sup>833</sup> The grain buyer is to be insured,<sup>834</sup> and failure to do so will result in suspension

815. *Id.*

816. *Id.* § 60-04-03.2.

817. *Id.* § 60-04-06.

818. *Id.* § 60-04-07.

819. *Id.* § 60-04-05.

820. *Id.* § 60-04-04.

821. *Id.* § 60-02.1-1 to -40 (2003 & Supp. 2005).

822. *Id.* § 60-02.1-07.

823. *Id.* § 60-02.1-08.

824. § 60-02.1-07.

825. § 60-02.1-08(3). *Cf. Id.* § 60-02-09(3) (warehouse bonding obligations).

826. § 60-02.1-08(4).

827. § 60-02.1-09.

828. *Id.* § 60-02.1-10.

829. *Id.* § 60-02.1-11.

830. *Id.* § 60-02.1-14.

831. *Id.* § 60-02.1-12.

832. *Id.* § 60-02.1-16.

833. *Id.* § 60-02.1-17(1)-(2).

834. *Id.* § 60-02.1-21.

of the buyer's license.<sup>835</sup> Liens are statutorily provided to the holders of scale tickets.<sup>836</sup> The statute also creates a framework in which facilities are closed<sup>837</sup> or transferred.<sup>838</sup>

Once a licensee becomes insolvent,<sup>839</sup> upon application or an order of the district court,<sup>840</sup> a trust fund is established by the Commission for the benefit of all claimants and to pay any costs the Commission might incur in administering the insolvency proceedings.<sup>841</sup>

The trust fund shall consist of "[n]onwarehouse receipt grain . . . held in storage or the proceeds obtained from the conversion of such grain."<sup>842</sup> Also, the fund shall include "[t]he proceeds, including accounts receivable, from any grain sold from the time of the filing of the claim that precipitated an insolvency . . . ."<sup>843</sup> The proceeds of any insurance policies on destroyed grain are included in the trust.<sup>844</sup> The claims for relief of damages on any bond are also included in the trust.<sup>845</sup> This includes a "claim for relief, and proceeds therefrom, for the conversion of any grain stored in the warehouse."<sup>846</sup> Moreover, the trust funds shall include, "[u]nencumbered accounts receivable for grain sold prior to the filing of the claim that precipitated an insolvency."<sup>847</sup> The fund shall also include unencumbered equity in grain hedge accounts as well as the unencumbered grain product assets.<sup>848</sup>

Claimants do not have a claim for separate relief on the bond or any person converting grain.<sup>849</sup> The surety must be joined as a party in a proceeding regarding an insolvent grain buyer.<sup>850</sup> Receipt holders are to be notified by publication and failure to file a claim within the time allotted will result in the claim being barred.<sup>851</sup> Albeit, "receipholders are not parties to the insolvency action unless admitted by the court upon a motion for intervention."<sup>852</sup>

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835. *Id.* § 60-02.1-22.

836. *Id.* § 60-02.1-23.

837. *Id.* §§ 60-02.1-25, 60-02.1-27.

838. *Id.* § 60-02.1-26.

839. *Id.* § 60-02.1-28.

840. *Id.* § 60-02.1-29.

841. *Id.* § 60-02.1-30.

842. § 60-02.1-30(1).

843. § 60-02.1-30(2).

844. § 60-02.1-30(3).

845. § 60-02.1-30(4).

846. § 60-02.1-30(5).

847. § 60-02.1-30(6).

848. § 60-02.1-30(7)-(8).

849. *Id.* § 60-02.1-33.

850. *Id.* § 60-02.1-31.

851. *Id.* § 60-02.1-32.

852. *Id.*

The Commission has the authority to prosecute and compromise claims.<sup>853</sup> Although, “[u]pon payment of the amount of any settlement or of the full amount of any bond, [the Commission may] exonerate the person so paying from further liability growing out of the action.”<sup>854</sup>

## 2. Case law

### (a) The common law and the statute

Under the common law of the State of North Dakota, as between the holder of the storage ticket and the warehouseman, there exists a bailment.<sup>855</sup> The statutes still require as much:

The holders of warehouse receipts are owners in common of the grain in the warehouse up to the quantity required to redeem the receipts. There is nothing in our statutes which can reasonably be construed as a recognition of an actual authority in the warehouseman to sell stored grain required for the redemption of outstanding receipts.<sup>856</sup>

Nonetheless, it is “plain that the ticket holder has no claim or right to the identical grain stored by him.”<sup>857</sup>

The authority of the Commission is also quite clear in the case law. “The commission is the holder of the receipt for the purpose of enforcing the storage contract and has all the rights and privileges of the party to whom the receipt was issued.”<sup>858</sup>

### (b) The claimant

A recent North Dakota case discusses the definition of “claimant” for purposes of the North Dakota Century Code.<sup>859</sup> As observed by the North Dakota Supreme Court, the term “claimant” is not defined in section 60-02.1 of the North Dakota Century Code.<sup>860</sup> Employing the plain, ordinary, and commonly understood meaning, the court concluded that “[a] ‘claimant’ is one who claims or asserts a right or demand.”<sup>861</sup> Thus, “[u]nder the plain meaning of the term, a claimant is a person who asserts a right to payment for grain sold to a licen-

853. *Id.* § 60-02.1-35(3).

854. § 60-02.1-35(4).

855. *State ex rel. Ertelt v. Daniels*, 159 N.W.17, 18 (N.D. 1916).

856. *Kastner v. Andrews*, 194 N.W. 824, 829 (N.D. 1923).

857. *Stutsman v. Cook*, 204 N.W. 976, 981 (N.D. 1925).

858. *State ex rel. Larkin v. Wheat Growers Warehouse Co.*, 249 N.W. 718, 723 (N.D. 1933).

859. *Pub. Serv. Comm’n v. Wimbledon Grain Co.*, 663 N.W.2d 186, 193-94 (N.D. 2003).

860. *Wimbledon Grain Co.*, 663 N.W.2d at 194.

861. *Id.* (quoting *Weisgerber v. Workmen’s Comp. Bureau*, 292 N.W. 627, 630 (1940)).

see . . . .”<sup>862</sup> It follows, therefore, that a person entering into credit sale contracts may be eligible to participate in the Commission’s trusts funds other than bond proceeds.<sup>863</sup>

(c) The surety and the principal

Under North Dakota law, a judgment for conversion against the principal is admissible evidence against the surety.<sup>864</sup>

(d) The surety and the roving grain buyer

Pooling agreements whereby members of a production cooperative are paid the net proceeds from all sales on a quarterly basis would defeat a claim on a “roving grain or hay buyers” bond.<sup>865</sup>

(e) The surety and the banker

The North Dakota Supreme Court has also concluded that “warehouse receipts” given by a production association to a bank to secure the bank’s line of credit with the association are not warehouse receipts within the meaning of the statute and, consequently, the bank is not entitled to share in the trust fund assets marshaled upon the insolvency of the warehouse.<sup>866</sup>

(f) Conversion

North Dakota has found that conversion may occur when the warehouse ships out grain and sells it without substituting other grain, though the default may be cured before demand.<sup>867</sup> As acknowledged by the North Dakota Supreme Court, its holding is different from that reached on the same point by the South Dakota Supreme Court.<sup>868</sup>

(g) Invalid defenses

The North Dakota Supreme Court has previously determined that when the warehouseman fails to produce grain because of a fire that

862. *Id.*

863. *Id.* at 194, 196.

864. *State ex rel. Coan v. Plaza Equity Elevator Co.*, 261 N.W. 46, 50 (N.D. 1935).

865. *Pub. Serv. Comm’n v. Am. Grain & Cattle, Inc.*, 281 N.W.2d 48, 49, 51 (N.D. 1979).

866. *N.D. Pub. Serv. Comm’n v. Valley Farmers Bean Ass’n*, 365 N.W.2d 528, 538 (N.D. 1985).

867. *State ex rel. Harding v. Hoover Grain Co.*, 248 N.W. 275, 279 (N.D. 1933) (citations omitted).

868. *Cf. id.* (distinguishing *S.D. Wheat Growers’ Ass’n v. Farmers’ Grain Co.*, 237 N.W. 723 (S.D. 1931) (wherein South Dakota Supreme Court holds that conversion does not take place until failure or refusal to deliver on demand)).

destroys the stored grain, the warehouseman is liable notwithstanding the failure of the parties to reach an agreement with respect to the degree of care required of the warehouse.<sup>869</sup> Moreover, the failure to convert scale tickets into storage tickets will not defeat the warehouse's (and ultimately the surety's) liability because the failure to do so is placed upon the warehouse.<sup>870</sup>

Under North Dakota law, it is not a valid defense to a bond claim that notice of the acceptance of a bond is required in order to make a binding surety contract.<sup>871</sup> Thus, the law of guarantees is inapplicable to a delivered surety bond.

(h) Damages

When determining the loss arising from a conversion, the court will use the value of the grain on the date of the demand; that is, the date on which the conversion occurred.<sup>872</sup>

(i) Contribution and subrogation

There is no right of contribution among successive sureties, but the paying surety is subrogated to the rights of its principal.<sup>873</sup>

(j) Interest

Interest begins to run on a claim from the date the warehouseman fails to redeem a receipt upon proper demand (that is, the date on which the insolvency occurred), rather than the date upon which the district court signs the order that the warehouse is insolvent.<sup>874</sup>

(k) The surety and the bankruptcy wrinkle

The North Dakota Supreme Court has concluded the surety is not liable for damages to the grain when the grain is in the care and custody of the trustee for the bankruptcy estate following the principal's bankruptcy.<sup>875</sup>

At a subsequent time, however, the North Dakota Supreme Court rejected the argument that a surety's liability on a bond is determined

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869. *Larkin v. Doerr*, 255 N.W. 567, 568 (N.D. 1934).

870. *Larkin*, 255 N.W. at 568-69.

871. *State ex rel. Harding v. Lane*, 236 N.W. 353, 355 (N.D. 1931). Cf. § III(E)(2)(e) *supra* (discussing case law regarding obligation of delivery of a surety bond).

872. *Huether v. McCaull-Dinsmore Co.*, 204 N.W. 614, 620 (N.D. 1925), *overruled in part by Sollin v. Wangler*, 627 N.W.2d 159 (N.D. 2001).

873. *Stutsman*, 204 N.W. at 983.

874. *Valley Farmers Bean Ass'n*, 365 N.W.2d at 548 (citing N.D. CENT. CODE §§ 60-04-09, 60-04-02).

875. *N.D. Pub. Serv. Comm'n v. Jamestown Farmers Elevator, Inc.*, 422 N.W.2d 405, 407-08 (N.D. 1988).



by state law irrespective of the bankruptcy court's determination of the grain ownership claim.<sup>876</sup> Ordinarily, the North Dakota courts "give effect" to bankruptcy court decisions as a matter of comity to avoid the prospect of "state and federal courts . . . reaching different results, ultimately resulting in unseemly and unnecessary conflict as each properly sought to enforce its determinations."<sup>877</sup> In any event, to the extent the surety in *North Dakota Public Service Commission v. Central States Grain* believed it was entitled to a credit, the surety's remedy was in the federal bankruptcy proceeding and not in state court. In the North Dakota Supreme Court's view the surety was not without a remedy; once the surety had paid the receiptholders' claims it could seek relief from the bankruptcy proceedings and acquire the right of subrogation pursuant to 11 U.S.C. § 509(a).<sup>878</sup>

However, on another occasion, the North Dakota Supreme Court rejected the argument that the Commission should be required to seek relief from the bankruptcy court to acquire the proceeds of sunflower inventories.<sup>879</sup>

(l) Laches as an equitable defense

The claim on a storage ticket can be barred by the doctrine of laches.<sup>880</sup>

I. SOUTH DAKOTA

1. Statutes

(a) Warehouses

South Dakota has defined by statute that delivery of grain to a warehouse is a bailment and not a sale.

If any grain is delivered to any person doing a public grain warehouse business in this state, and a receipt is issued therefor providing for delivery of a like kind, amount and grade to the holder of the receipt in return, such delivery is a bailment and not a sale of the grain so delivered.<sup>881</sup>

Grain held pursuant to a storage receipt is not "liable to seizure upon process of any court in any action against the bailee, except an action

876. N.D. Pub. Serv. Comm'n v. Woods Farmers Coop. Elevator, Co., 488 N.W.2d 860 (N.D. 1992).

877. *Woods Farmers Coop. Elevator, Co.*, 488 N.W.2d at 863 (citations omitted).

878. *Id.* at 865-66.

879. N.D. Pub. Serv. Comm'n v. Cent. States Grain, 371 N.W.2d 767, 774-75 (N.D. 1985).

880. *State ex rel. Reilly v. Farmers' Coop. Elevator Co.*, 167 N.W. 223, 225 (N.D. 1918).

881. S.D. CODIFIED LAWS § 49-43-2 (2004).

by the owner or holder of such warehouse receipt to enforce the terms of the same."<sup>882</sup>

Upon initial delivery, the warehouse must indicate in a writing whether the grain should be sold or stored.<sup>883</sup> The statute defines the contents of the receipt.<sup>884</sup> A warehouse storing its own grain must comply with the statute as well.<sup>885</sup>

Warehouses are subject to licensing and an application process.<sup>886</sup> Pooling agreements between competing companies are prohibited.<sup>887</sup> The Public Utilities Commission also has the authority to investigate and set storage rates.<sup>888</sup> Once licensed, warehouses must make monthly reports to the Commission.<sup>889</sup>

A bond is required for the purpose of protecting those persons storing the grain with the warehouse.<sup>890</sup> The bond must have a minimum value of \$25,000 per location and particularly describe the exact locations of any warehouses to be covered.<sup>891</sup> The fact that the bond is issued on a per location basis does not diminish the security available to depositors. "Such minimum bond amounts . . ." do not "limit the bond coverage available to depositors at any one warehouse location. The entire bond, up to the amount on its face, shall provide coverage to a depositor conducting business at any of the warehouse's locations."<sup>892</sup> Should the surety fail or cease to do business in South Dakota, by rule, other financial documents may be received instead of a corporate surety bond.<sup>893</sup>

In South Dakota, an injured depositor has the right to sue in the depositor's own name for damages sustained by the depositor.<sup>894</sup> The action may be brought directly against the surety.<sup>895</sup>

In the event that the Public Utilities Commission takes over the facility, notice is to be given to the surety.<sup>896</sup> Also, an immediate audit is to take place.<sup>897</sup>

882. *Id.* § 49-43-3.

883. *Id.* § 49-43-1.

884. *Id.* § 49-43-2.1.

885. *Id.* § 49-43-4.

886. *Id.* § 49-43-5.1.

887. *Id.* § 49-43-33.

888. *Id.* § 49-43-7.

889. *Id.* § 49-43-9.

890. *Id.* § 49-43-5.3.

891. *Id.*

892. *Id.*

893. *Id.* § 49-43-5.5.

894. *Id.* § 49-43-5.7.

895. *Id.*

896. *Id.* § 49-43-5.8(2); *see also id.* § 49-43-1.1(1).

897. § 49-43-5.8(1).

Once a warehouse license is revoked, terminated, or canceled, any claim against the warehouse must be made in writing with the Commission, surety and warehousemen within six months of receiving notice of any termination, cancellation, or revocation.<sup>898</sup> Failure to make a claim will relieve the surety of all obligations to the claimants, but such failure to make a claim will not reduce the aggregate liability on the bond.<sup>899</sup> The statute defines the specific notice that the Commission must provide to the holders of grain storage receipts and scale tickets.<sup>900</sup> However, the provisions do not apply if a receiver is appointed before the expiration of six months after receiving the cancellation, revocation, or termination notice.<sup>901</sup> The statute also commands that, "grain on hand in the public grain warehouse shall first be applied to the redemption and satisfaction of outstanding receipts . . ." upon failure or insolvency of the bailee.<sup>902</sup>

South Dakota's legislation only allows for a one-year storage contract.<sup>903</sup> After the expiration of one year, the product is sold and funds are provided to the owner (minus storage charges and advances) "upon surrender of the storage receipt."<sup>904</sup>

South Dakota statutorily prohibits a grain warehouse that has issued receipts for the storage of grain from denying that the grain represented by the receipt is the property of the person to whom the receipt was issued.<sup>905</sup> Under the state's law, the receipt is "conclusive evidence of the fact that the person to whom the receipt was issued," or assigned, "is the owner of such grain and is the person entitled to make surrender of such receipt and receive the grain thereby promised to be delivered."<sup>906</sup> No modification of the warehouse's liability may be placed on the receipt.<sup>907</sup>

Once the receipt is received by the warehouse, the receipt must be marked canceled<sup>908</sup> and "such grain or an equal quantity of the same grade, kind and quality shall immediately be delivered . . ."<sup>909</sup> Willful refusal to deliver constitutes theft.<sup>910</sup> Delivery contrary to the

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898. *Id.* § 49-43-5.9.

899. *Id.*

900. *Id.*

901. *Id.*

902. *Id.* § 49-43-3.

903. *Id.* § 49-43-13.

904. *Id.*

905. *Id.* § 49-43-21.

906. *Id.*

907. *Id.* § 49-43-17.

908. *Id.* § 49-43-18.

909. *Id.* § 49-43-22.

910. *Id.* § 49-43-25.

owner's instruction is a misdemeanor.<sup>911</sup> Partial deliveries require a new receipt.<sup>912</sup>

(b) Grain dealers

South Dakota separately regulates grain dealers. A person is subject to both a civil penalty and a misdemeanor for dealing in grain without a license.<sup>913</sup> The Commission has the authority to issue and suspend licenses<sup>914</sup> as well as conduct inspections of facilities.<sup>915</sup> Licenses expire annually.<sup>916</sup>

Reports must be provided to the Commission by the dealer.<sup>917</sup> Failure to do so constitutes a misdemeanor.<sup>918</sup> The licensee is also required to post the statutes and rules regarding their conduct.<sup>919</sup> Failure to post is also a misdemeanor.<sup>920</sup>

Upon receipt of the application and the bond, a license may be issued.<sup>921</sup> The bond must be in a minimum amount of \$50,000, which may be increased upon order of the Commission.<sup>922</sup> The bond is conditioned upon the "faithful performance of the applicant's obligations as a grain dealer and full and unreserved compliance with the laws" of South Dakota and the Commission's regulations.<sup>923</sup> The bond is only for the protection of those selling grain to the grain dealer; credit sales are not covered.<sup>924</sup> It is a misdemeanor not to have a bond in place, *and* each day of operation without the bond constitutes a separate offense.<sup>925</sup>

In the event of a credit sale, the payment must be made in accordance with the statute and the Commission's regulations.<sup>926</sup> The agreement must also be in writing.<sup>927</sup>

Payment for grain must be upon demand of either the owner or agent.<sup>928</sup> Failure to redeem the receipt or the loss of bond coverage

911. *Id.* § 49-43-32.

912. *Id.* § 49-43-19. *See also id.* § 49-43-20 (regarding consolidation).

913. *Id.* § 49-45-1. *See supra* note 774 and accompanying text (regarding potential constitutional violation arising from successive punishments).

914. § 49-45-1.

915. *Id.* § 49-45-13.

916. *Id.* § 49-45-3.

917. *Id.* § 49-45-14.

918. *Id.*

919. *Id.* § 49-45-20.

920. *Id.*

921. *Id.* § 49-45-7.

922. *Id.* § 49-45-9.

923. *Id.*

924. *Id.*

925. *Id.*

926. *Id.* § 49-45-10.

927. *Id.* § 49-45-11.

928. § 49-45-10.

will result in the Commission requesting a county circuit court to appoint a receiver that will have the powers and duties provided to it by the circuit court.<sup>929</sup> In addition, the Commission must take possession of the facility, conduct an audit, and notify the surety.<sup>930</sup> Simultaneously with steps taken by the Commission, the injured party may bring an action against the surety directly to recover damages.<sup>931</sup>

The state's provision for claims against dealers is almost identical to the provision regarding warehouses. Once the dealer's license is revoked, terminated, or canceled, any claim against the dealer must be made in writing with the Commission and others; such claim shall be made within six months after receiving notice of the termination, cancellation, or revocation.<sup>932</sup> Failure to make a claim relieves the surety of any obligation to the claimant.<sup>933</sup> Yet, failure of a claimant to make a claim will not reduce the aggregate liability on the bond.<sup>934</sup> The statute defines the specific notice that the Commission must provide to the holders of scale tickets.<sup>935</sup> However, if a receiver is appointed before the expiration of six months after receiving the cancellation, revocation, or termination notice, the provisions do not apply.<sup>936</sup>

It is noteworthy that the grain dealer statute does not command the Commission to use grain on hand to satisfy any outstanding claims.<sup>937</sup> Presumably, this is the case because the grain dealer would not have grain on hand.

Finally, South Dakota's statute has a unique provision among those midwestern states that are the subject of this Article. The statute specifically allows the Commission to contract with the following South Dakota commissions to determine compliance with assessment and check off requirements: Wheat Commission, Oilseeds Council, Soybean Research and Promotion Council, Corn Utilization Council, and the South Dakota Pulse Crop Council.<sup>938</sup>

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929. *Id.* § 49-45-16.

930. *Id.* § 49-45-18(1)-(2).

931. *Id.* § 49-45-17.

932. *Id.* § 49-45-19.

933. *Id.*

934. *Id.*

935. *Id.*

936. *Id.*

937. *See id.* *Cf. id.* § 49-43-3 (grain on hand shall be applied to satisfy outstanding receipts).

938. S.D. CODIFIED LAWS § 49-45-21 (2006).

## 2. Case law

### (a) Surety coverage

While the case of *Farmers' Elevator Co. v. Swanson*<sup>939</sup> predates the existing South Dakota statutory scheme, the case is nonetheless instructive. In *Farmers' Elevator Co. v. Swanson*, F.M. Swanson ("Swanson") was employed as a manager and grain buyer.<sup>940</sup> Swanson provided a bond that he would well and faithfully discharge his duties as a grain buyer with his employer as obligee under the bond.<sup>941</sup>

During his tenure as a grain buyer, Swanson engaged in options trading, which resulted in a net loss to the elevator.<sup>942</sup> Thereafter, his employer filed suit on the bond.<sup>943</sup> A specific resolution of the elevator company's board of directors that prohibited dealing in options was presented at trial.<sup>944</sup> The situation was compounded when Swanson, in order to make good his loss, settled losses by means of misappropriation of moneys and grain held by the employer.<sup>945</sup>

In affirming the decision of the trial court, the South Dakota Supreme Court concluded under the circumstances present in the record that Swanson had violated the terms of the bond.<sup>946</sup> The evidence supported the fact that he could not account for the employer's grain and moneys.<sup>947</sup> Thus, liability fell upon Swanson and the sureties.<sup>948</sup>

Under South Dakota law, merely being a stockholder and a holder of a storage ticket will not preclude a party from recovering on the bond.<sup>949</sup> When a party deposits grain prior to issuance of the bond and is aware that the warehouseman has not yet obtained a permit to store grain, there can be no liability under the bond.<sup>950</sup>

While the result may vary from state to state, the South Dakota Supreme Court has determined that a separate bond is not required for each building where grain might be stored by a particular warehouseman.<sup>951</sup> However, the statute now clarifies the requirement.<sup>952</sup>

939. 146 N.W. 586 (S.D. 1914).

940. *Farmers' Elevator Co. v. Swanson*, 146 N.W. 586, 586 (S.D. 1914).

941. *Swanson*, 146 N.W. at 586.

942. *Id.*

943. *Id.*

944. *Id.*

945. *Id.* The employer's net loss totaled \$980. *Id.*

946. *Id.* at 586-87.

947. *Id.*

948. *Id.* at 586.

949. *State ex rel. Sommers v. Interstate Sur. Co.*, 201 N.W. 717, 719-20 (S.D. 1924).

950. *State ex rel. Vojta v. Deibert*, 240 N.W. 332, 334 (S.D. 1932).

951. *Sommers*, 201 N.W. at 720-21.

952. S.D. CODIFIED LAWS § 49-43-5.3 (2004).

## (b) Interest

Counsel should also be cautioned that a client may waive its right to interest by acceptance of the payment of the principal.<sup>953</sup>

## J. WISCONSIN

## 1. Statutes

Wisconsin regulates a number of agriculturally related storage facilities under the broad notion of "agricultural producer security."<sup>954</sup> Wisconsin state law requires the Department of Agriculture, Trade and Consumer Protection to procure "contingent financial backing to secure payment" from milk contractors, grain dealers, grain warehouse keepers, and vegetable contractors.<sup>955</sup> The balance of this discussion will focus on grain dealers and grain warehouse keepers.<sup>956</sup>

At the same time, some provisions are common to the statute. The statute requires that the Department procure surety bonds or "contract to provide a cash loan" to a subject fund.<sup>957</sup> To accomplish this end, the legislature appropriated a start-up loan of \$2,000,000 to the Agricultural Producer Security Fund, which is to be repaid in installments back to the Agrichemical Management Fund.<sup>958</sup> The Agricultural Producer Security Fund is a public trust that secures payments to producers.<sup>959</sup>

## (a) Grain dealers

Grain dealers are not to procure grain from producers unless the dealer is licensed, subject to two exceptions.<sup>960</sup> An entity need not be licensed if it pays cash on delivery for producer grain or the dealer acquires less than \$400,000 annually for grain that is used by the dealer for feed or seed.<sup>961</sup> Licenses expire on an annual basis and are not transferable or assignable.<sup>962</sup>

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953. S.D. Pub. Utils. Comm'n v. Barzen Int'l Inc., 479 N.W.2d 910, 912 (S.D. 1992).

954. WIS. STAT. ANN. §§ 126.01-.90 (West Supp. 2006).

955. WIS. STAT. ANN. §§ 126.06, 126.01(8) (West Supp. 2006). *See also* § 126.01(5) (defining contractors).

956. *See* WIS. STAT. ANN. §§ 126.10-.21 (West Supp. 2006) (addressing grain dealers); WIS. STAT. ANN. §§ 126.25-.34 (West Supp. 2006) (addressing grain warehouse keepers).

957. § 126.06(1)(a)-(b).

958. *Id.* § 126.08.

959. *Id.* § 126.05(1).

960. *Id.* § 126.11(1).

961. § 126.11(2)(a)-(b).

962. § 126.11(2m).

The license application is defined by statute.<sup>963</sup> The process includes a review of financial information.<sup>964</sup> Wisconsin now charges a license fee.<sup>965</sup> Once established as a dealer, the dealer must pay annual fund assessments.<sup>966</sup> It is the annual fund assessments that now drive the system.

Simultaneously, if certain conditions apply, the dealer must also post security in the form of cash or a surety bond.<sup>967</sup> If a commercial surety is used, the bond must be made payable to the Department "for the benefit of grain producers and producer agents."<sup>968</sup> The bond may be canceled only upon permission of the Department or upon ninety days notice to the Department.<sup>969</sup> The Department must physically hold the security.<sup>970</sup> If security is required under the Code, additional reports are required by the Department.<sup>971</sup> The security may be released as provided for in the Code.<sup>972</sup>

At the same time, the dealer is required to carry insurance as specified in the statute.<sup>973</sup> Grain dealers are required to display the license<sup>974</sup> and keep certain records.<sup>975</sup> The receipt used by the dealer is statutorily defined.<sup>976</sup> Deferred payment contracts must also be in writing,<sup>977</sup> contain a special notice,<sup>978</sup> and are subject to a special assessment.<sup>979</sup>

The statute also specifies required and prohibited business practices of the grain dealer.<sup>980</sup> These include a duty of accuracy, timely payment to producers, and maintenance of a permanent business location that is open during hours the Chicago Board of Trade is open for trading.<sup>981</sup> Meanwhile, a grain dealer may not, *inter alia*, misrepresent the amount of grain delivered or received, falsify records, make false statements to the Department or producers, or fail to file security

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963. § 126.11(3).

964. § 126.11(3)(g). *See also id.* § 126.13.

965. § 126.11(4).

966. *Id.* § 126.15. Wisconsin's system formerly utilized surety bonds exclusively before the adoption of the new system in 2001. *See id.* § 126.06.

967. *Id.* § 126.16(4)(a)-(b).

968. § 126.16(4)(b)(1).

969. § 126.16(4)(b)(3).

970. § 126.16(5).

971. § 126.16(6).

972. § 126.16(8).

973. *Id.* § 126.12(1).

974. *Id.* § 126.11(11).

975. *Id.* § 126.17.

976. *Id.* § 126.18.

977. *Id.* § 126.19(1)-(2).

978. § 126.19(4).

979. § 126.19(5).

980. *Id.* § 126.20.

981. § 126.20(1)-(3).



(if required).<sup>982</sup> On the other hand, the dealer can require that the producer or the producer's agent disclose the existence of any liens or security interest in the grain.<sup>983</sup> Likewise, if the producer contracted to sell at a certain price, the producer cannot refuse to deliver.<sup>984</sup>

(b) Grain warehouses

Grain warehouse keepers must also be licensed if their capacity exceeds 50,000 bushels of grain stored for others, unless the entity proves it is not holding more than 50,000 bushels.<sup>985</sup> The grain warehouse is, likewise, subject to an application process along with the subject fees and surcharges.<sup>986</sup> Financial statements must be submitted.<sup>987</sup> Insurance also must be maintained.<sup>988</sup> So too must the warehouse pay assessments into the fund<sup>989</sup> and post security, if required by the statute.<sup>990</sup> The security requirements are identical to the grain dealer provisions.<sup>991</sup> The grain warehouse is statutorily required to keep certain records.<sup>992</sup>

The warehouse is duty-bound to use the receipt prescribed by statute.<sup>993</sup> In addition to other duties enumerated in the statute,<sup>994</sup> the warehouse has a duty to protect the grain from "loss or abnormal deterioration."<sup>995</sup> To that end, the warehouse must keep adequate equipment and facilities.<sup>996</sup>

(c) Recovery proceedings

In Wisconsin, claims against both the dealer and the warehouse are dealt with by means of a recovery proceeding.<sup>997</sup> The claim is triggered when a producer or depositor is not paid.<sup>998</sup> The claim must be filed with the Department within thirty days of the claimant's knowl-

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982. § 126.20(4).

983. *Id.* § 126.21(2).

984. § 126.21(1).

985. *Id.* § 126.26(1).

986. § 126.26(3).

987. *Id.* § 126.28.

988. *Id.* § 126.27.

989. *Id.* § 126.30.

990. *Id.* § 126.31.

991. *See supra* § III(J)(1)(a) and accompanying text.

992. WIS. STAT. ANN. § 126.32 (West Supp. 2006).

993. *Id.* § 126.33.

994. *Id.* § 126.34.

995. § 126.34(2).

996. *Id.*

997. *Id.* § 126.70.

998. § 126.70(1)(a)-(b).

edge of the default.<sup>999</sup> If the Department believes that others are unpaid, it may provide broader notice to other potential claimants.<sup>1000</sup>

Once a claim has been filed, the Department is to review the claim and, if necessary, disallow it.<sup>1001</sup> Under either circumstance, the Department will issue a proposed decision.<sup>1002</sup> If no objections are filed, the decision becomes the final decision of the Department; otherwise, upon objection, a public hearing is performed.<sup>1003</sup>

Claims are paid first from the security, if applicable.<sup>1004</sup> If the contractor is not a contributor to the fund, then the claims are paid from the security on a prorated basis.<sup>1005</sup> If the contractor is both a contributor and has security, the security is used to reimburse the fund when the security exceeds the claims.<sup>1006</sup> If the security is insufficient to pay all claims on a contributing contractor, the Department is to pay the claimants on a prorated basis.<sup>1007</sup> The claimant is still entitled, under any scenario, to pursue the contractor.<sup>1008</sup>

The statute preserves the surety's right to subrogation against its principal.<sup>1009</sup> However, the surety is obligated to give notice of its demand upon the principal to the Department.<sup>1010</sup>

## 2. Case law

At the time this Article was submitted for publication, Wisconsin had no published cases discussing Chapter 126 in its present state or former Chapter 127 (which regulated warehouses prior to the rewrite of Chapter 126).<sup>1011</sup> Nonetheless, the Wisconsin Supreme Court has previously determined that a grain buyer can be considered a merchant for purposes of the Uniform Commercial Code (as adopted in Wisconsin).<sup>1012</sup>

## IV. CONCLUSION

The foregoing Article has discussed the obligations imposed upon warehouses, grain dealers, and various other agricultural enterprises

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999. § 126.70(2).

1000. § 126.70(3)(b).

1001. § 126.70(4).

1002. § 126.70(6).

1003. § 126.70(7)-(8).

1004. *Id.* § 126.71.

1005. § 126.71(2)(a).

1006. § 126.71(2)(b).

1007. § 126.71(2)(c).

1008. § 126.71(4).

1009. *Id.* § 126.73(2).

1010. *Id.*

1011. WIS. STAT. ANN. §§ 127.01-18 (West 2001) (repealed 2002).

1012. *Cargill, Inc. v. Gaard*, 267 N.W.2d 22, 24 (Wis. 1978).

under both federal and state law. Counsel can benefit from an analysis of the various obligations imposed upon all of the players in the industry. Most of all, counsel's client is well-served when counsel (be it for a claimant or a surety) understands the limits and preconditions to obtaining surety coverage for such transactions.