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An Agricultural Law Research Article

**And When She Go There, the Cupboard Was
Bare: The Producer's Plight in Grain
Warehouse Insolvency**

Part 2

by

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ceipt had been issued, the warehouse would get title to the grain upon surrender of the receipt.¹⁸⁴

Title to and possession of the grain under a purchase contract empowers the warehouse to encumber the grain with security interests, even if the seller has not been paid and the lender has not advanced funds in reliance on the specific grain purchase.¹⁸⁵ The warehouse also gets the power to resell and deliver the grain to a buyer, free from any claims of the unpaid producer-seller.¹⁸⁶

If the agreement between the warehouse-buyer and the producer-seller is for a cash sale,¹⁸⁷ the U.C.C. gives the seller the right to reclaim the grain from the buyer upon demand.¹⁸⁸ Credit sellers have a similar right, if they can show the warehouse was already insolvent when it took delivery of the grain under the sales

at time and place of contracting." See also *Reeves v. Pillsbury Co.*, 229 Kan. 423, — 625 P.2d 440, 446-47 (1981).

184. NEB. REV. STAT. (U.C.C.) § 2-401(3)(a) (Reissue 1980) provides, "Unless otherwise explicitly agreed where delivery is to be made without moving the goods . . . (a) if the seller is to deliver a document of title, title passes at the time when . . . he delivers such document . . ."

185. NEB. REV. STAT. (U.C.C.) § 2-403(1) (Reissue 1980) provides:

A purchaser of goods acquires all title which his transferor had or had power to transfer. . . . A person with voidable title has power to transfer good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though . . .

- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a "cash sale," or
- (d) the delivery was procured through fraud. . . .

For cases holding a lender with a security interest in the buyer's inventory to be a good faith purchaser for value, see *In re Samuels & Co.*, 526 F.2d 1238, 1244 (5th Cir. 1976), cert. denied 429 U.S. 834 (1976); *In re Western Farmers Ass'n*, 6 Bankr. 432, 435-36 (W.D. Wash. 1980).

186. NEB. REV. STAT. (U.C.C.) § 2-403(1) (Reissue 1980) (text at note 185 *supra*); NEB. REV. STAT. (U.C.C.) § 7-205 (Reissue 1980) (which provides, "A buyer in the ordinary course of business of fungible goods sold and delivered by a warehouseman who is also in the business of buying and selling such goods takes free of any claim under a warehouse receipt even though it has been duly negotiated."). See also *In re Fairfield Elevator Co.*, 14 U.C.C. REP. SERV. (Callahan) 96, 108 (Bankr. S.D. Iowa 1973).

187. A "cash sale" may, but need not, involve the exchange of legal tender at time of delivery. It is enough that payment in the form of a check or other draft is demanded at the time of delivery, so that there is no voluntary extension of credit by the seller. See NEB. REV. STAT. (U.C.C.) §§ 2-507, -511 (Reissue 1980); see also *Peck v. Augustin Bros.*, 203 Neb. 574, 578, 279 N.W.2d 397, 399 (1979).

188. See NEB. REV. STAT. (U.C.C.) § 2-507(2) (Reissue 1980), which provides, "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due."

Reclamation could be affected by filing a replevin action. See *Peck v. Augustin Bros.*, 203 Neb. 574, 581, 279 N.W.2d 397, 400-01 (1979).

contract.¹⁸⁹

However, reclamation rights usually prove illusory. Reclamation can be demanded only against the buyer-warehouse itself. If, before grain is successfully reclaimed, a third-party good faith purchaser's rights attach to the grain, the right to reclaim is lost or subordinated.¹⁹⁰ Good faith purchasers whose rights may intervene include secured lenders to¹⁹¹ and buyers from the warehouse.¹⁹² Even if no third-party intervenes, reclamation time limits are short. Credit sellers must demand reclamation within 10 days after delivery. The Eighth Circuit would give cash sellers more time,¹⁹³ but if a bankruptcy petition is filed, the Bankruptcy Act generally limits all unpaid sellers' reclamation rights to written demands made within ten days after delivery to the warehouse.¹⁹⁴

If the producer-seller is unable to reclaim his grain, the U.C.C.

189. See NEB. REV. STAT. (U.C.C.) § 2-702(2) (Reissue 1980), which provides, "Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt"

190. For cash sellers that limitation is derived from the phrase "as against the seller" found in *id.* § 2-507(2) (text at note 188 *supra*); see also *id.* § 2-507 Official Comment 3. For credit sellers, the limitation is expressed in U.C.C. § 2-702(3), 1A U.L.A. 349 (1976), which provides: "The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). . . ."

191. See *In Re Samuels & Co.*, 526 F.2d 1238, 1246-48 (5th Cir. 1976); *In re Western Farmers Ass'n*, 6 Bankr. 432, 435-36 (W.D. Wash. 1980).

192. See *In re Fairfield Elevator Co.*, 14 U.C.C. REP. SERV. (Callaghan) 96, 108 (Bankr. S.D. Iowa 1973).

193. See NEB. REV. STAT. (U.C.C.) § 2-702(2) (Reissue 1980) (text at note 189 *supra*) (credit sellers); see also *id.* § 2-507 Official Comment 3 (cash sellers). The Comment states: "The provision of this Article for a ten-day limit within which the seller may reclaim goods delivered on credit to an insolvent buyer is also applicable here." Courts are divided on whether this Comment, which clearly goes beyond the text of the U.C.C., should be given effect. Compare *Burk v. Emmick*, 637 F.2d 1172 (8th Cir. 1980) (cash seller's reclamation not limited to ten days) with *Szabo v. Vinton Motors, Inc.*, 630 F.2d 1 (1st Cir. 1980) (cash sellers must reclaim within ten days).

194. 11 U.S.C. § 546(c) (1979), provides:

The rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory right or common-law right of a seller, in the ordinary course of such seller's business, of goods to the debtor to reclaim such goods if the debtor has received such goods while insolvent, but—

- (1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after receipt of such goods by the debtor; and
- (2) the court may deny reclamation . . . only if court—
 - (A) grants the claim of such a seller priority as an administrative expense; or
 - (B) secures such claim by a lien.

The seller's right to reclaim is ably examined in Wallach, *The Unpaid Seller's Right*

and the Bankruptcy Act give him only an unsecured claim against the warehouse.¹⁹⁵ Therefore, the seller should examine the state and federal statutes under which the warehouse is licensed and bonded.

RIGHTS OF SELLERS UNDER WAREHOUSE LICENSING STATUTES—IN GENERAL

Whether an unpaid seller of grain is covered by a warehouse bond depends on the statute requiring the bond. Some states, as noted earlier, extend bond coverage to sellers. In many jurisdictions, however, the bond excludes sellers. Typical statutory language says the bond secures: “. . . the faithful performance of his obligations as a warehouseman under the terms of this chapter . . . and of such additional obligations as a warehouseman as may be assumed by him under contracts with the respective depositors of agricultural products in such warehouse.”¹⁹⁶

Such a statute provides bond coverage for breach of two types of warehouse duties: those imposed by statute and those undertaken by contract. In both cases, the duties are expressly qualified by the phrase “as a warehouseman.” Courts faced with the “as a warehouseman” limitation generally hold that a warehouseman is one in the business of storing goods for profit, and that only those statutory or contractual duties which involve storage for profit are “obligations as a warehouseman.” For example, in *Merchants Mutual Bonding Co. v. Appalachian Insurance Co.*,¹⁹⁷ unpaid sellers claimed the warehouse’s grain purchase contracts were “additional obligations . . . assumed” within the meaning of an Iowa statute identical to that quoted above.¹⁹⁸ The Eighth Circuit Court of Appeals rejected that argument, stating that not every obligation of a warehouse is an obligation “as a warehouseman.”¹⁹⁹

Coverage is limited to “obligations as a warehouseman,”

to Reclaim Goods: The Impact of the Uniform Commercial Code and the Bankruptcy Acts of 1898 and 1978, 36 ARK. L. REV. 252 (1980).

Both Houses of Congress have passed bills which would amend 11 U.S.C. § 546 by adding a new subsection on reclamation by grain sellers against a grain warehouse. Each bill provides, “the court may deny reclamation to such a producer with a right of reclamation that has made such a demand only if the court secures such claim by a lien.” See H.R. 5174, 98th Cong., 2d Sess. § 251 (1984); S. 445, 98th Cong., 1st Sess., § 236 (1983). The effect of the bills could be to ensure a reclaiming seller’s claim is treated as a secured claim rather than as a priority unsecured claim.

195. See notes 207-15 *infra*.

196. The quotation is from the United States Warehouse Act, 7 U.S.C. § 247 (1982).

197. 556 F.2d 889 (8th Cir. 1977).

198. *Id.* at 901, quoting IOWA CODE ANN. § 543.12 (West 1950).

199. 556 F.2d at 901.

i.e., obligations incurred in "the storage of agricultural products for compensation." The obligation involved in this case, however, is the elevator's duty to pay . . . the purchase price of grain. This duty arose, not from the elevator's storage of the grain for compensation, but from its purchase of the grain for its own account. . . . [An] obligation of this kind is not within the coverage of the statutory bond.²⁰⁰

Similarly, many cases hold that sales of a producer's grain on commission by a warehouse are not covered by the bond, when the warehouse fails to remit the price. Since warehouse statutes do not require warehousemen to act as factors or selling agents and since storage plays only an incidental part in such transactions, sales on commission are not obligations as a warehouseman.²⁰¹ Another transaction sometimes excluded in the purchase of grain from a warehouse, when the claimant shows he paid the price to the warehouse but never received the grain.²⁰²

A minority of cases read similar language more broadly, arguing that bond coverage is intended not only for duties required by law but also for the normal and customary activities of the licensed businesses. A recent Minnesota case extended coverage to unpaid sellers, even though the statute in force at time of loss said the

200. *Id.* For other cases holding that sellers of grain to the warehouse are not protected by the warehouse bond, see *Thomas v. Reliance Ins. Co.*, 617 F.2d 122, 125-27 (5th Cir. 1980) (Texas law); *United States Fidelity & Guar. Co. v. Long*, 214 F. Supp. 307, 314 (D. Or. 1963) (Oregon law); *United States v. Fireman's Fund Ins. Co.*, 191 F. Supp. 317, 320 (D. Idaho 1961) (Idaho law); *Jensen v. United States Fidelity & Guar. Co.*, 78 Idaho 145, —, 298 P.2d 976, 978 (1956); *True v. Merchants Mut. Bonding Co.*, 251 N.W.2d 543, 544 (Iowa 1977) (cash seller denied bond protection under Iowa's Bonded Grain Warehouse Act, although court noted seller would have been protected under the subsequently enacted Iowa Grain Dealers Act, if his loss had not preceded its effective date); *Michael v. Merchants Mut. Bonding Co.*, 251 N.W.2d 531, 533 (Iowa 1977).

201. See *United States v. Fireman's Fund Ins. Co.*, 191 F. Supp. 317, 320 (D. Idaho 1961) (Idaho law); *Jensen v. United States Fidelity & Guar. Co.*, 78 Idaho 145, —, 298 P.2d 976, 978-79 (1956); *State ex rel. Cawrse v. American Sur. Co.*, 148 Or. 1, —, 33 P.2d 487, 491-92 (1934); *Republic Underwriters v. Tillamook Bay Fish Co.*, 133 Tex. 141, —, 126 S.W.3d 641, 642-43 (1937). *But cf.* *Indemnity Ins. Co. v. Archibald*, 299 S.W. 340, 341 (Tex. Civ. App. 1927) (distinguished in *Tillamook*).

202. For a case denying bond protection to buyers from the warehouse, see *Allied Mut. Ins. Co. v. Farmers Nat'l Co.*, 309 F. Supp. 732, 733 (N.D. Iowa 1970); *Allied Mut. Ins. Co. v. Farmers Nat'l Co.*, 303 F. Supp. 555, 557-58 (N.D. Iowa 1969). Buyers were held covered by the warehouse's storage bond in *Aetna Ins. Co. v. Junction Warehouse Co.*, 389 F.2d 464, 466-67 (5th Cir. 1968) (Texas Law) and *People v. Farmers Elevator Mut. Ins. Co.*, 74 Ill. App. 2d 1, —, 220 N.E.2d 585, 585-591 (1966).

The differences in result may be due to the different role of storage in the cases. In the Iowa cases, the buyer was to take almost immediate delivery and had not been issued scale tickets or warehouse receipts. In the Texas and Illinois cases, the warehouse had agreed to store the grain for the buyer and had issued scale tickets or warehouse receipts for the grain purchased.

bond covered only "persons storing grain in such warehouse."²⁰³ The result was heavily influenced by legislative history, with the court pointing out that Minnesota had previously required two licenses and two bonds, one for storage and one for merchandising. Later the statutes had been amended to require only one license and one bond, but merchandising activities were still regulated by the licensing statute. The court relied on this history in stating that the bond should be "coextensive with the operations licensed," and that sellers as well as storers should be covered.²⁰⁴ The court emphasized that warehouse bonds should be liberally construed to protect all who deal with public warehousemen "in normal and usual transactions," and that sellers rely on warehousemen just as storers do.²⁰⁵

UNPAID SELLERS OF GRAIN TO NEBRASKA WAREHOUSES

With that background, let us examine the Nebraska statutes which might provide bond coverage for unpaid sellers of grain. We will consider:

- (1) The United States Warehouse Act and Nebraska Grain Buyer's Act.
- (2) The Nebraska Warehouse Act if loss occurred prior to August 1983.
- (3) The Nebraska Warehouse Act if loss incurred after August 1983.

Sellers to Federally-Licensed Nebraska Warehouses

The United States, under its Warehouse Act (U.S.W.A.)²⁰⁶ does not regulate the grain buying and selling activities of warehouses. The U.S.W.A.'s bond provision²⁰⁷ is identical to the Iowa statute construed in *Merchants Mutual*.²⁰⁸ There are few reported decisions interpreting the federal act's bond coverage, but the result would probably be the same as in *Merchants Mutual*, and unpaid sellers would have no claim under the U.S.W.A. bond.²⁰⁹

While Nebraska could, as some other states do, regulate and

203. *St. Paul Ins. Cos. v. Fireman's Fund Am. Ins. Cos.*, 245 N.W.2d 209, 217 (Minn. 1976).

204. *Id.*

205. *Id.*

206. 7 U.S.C. §§ 241-273 (1982).

207. 7 U.S.C. § 247 (1982).

208. 556 F.2d 889 (8th Cir. 1977).

209. *See, e.g., Farmers Elevator Mut. Ins. Co. v. Jewett*, 394 F.2d 896, 899-900 (10th Cir. 1968) (emphasizing that the grain in question had not been sold to the warehouse); *Stevens v. Farmers Elevator Mut. Ins. Co.*, 197 Kan. 74, —, 415 P.2d 236, 240-41 (1966). The U.S. Department of Agriculture in 1981 proposed regulating and

bond the nonstorage activities of federal licensees,²¹⁰ neither the Nebraska Warehouse Act²¹¹ nor the Nebraska Grain Buyer's Act²¹² do so. The Nebraska Warehouse Act specifically exempts federally licensed warehouses from all of its provisions.²¹³ The Grain Buyer's Act specifically excludes "public grain warehouses licensed as such in this state" from its coverage.²¹⁴ Since the Nebraska Warehouse Act's licensing requirement can be satisfied by obtaining either a state or federal license,²¹⁵ a federal licensee may be a warehouse "licensed as such in this state" within the meaning of the Grain Buyer's Act exclusion. If the Grain Buyer's Act were read to include federal warehouses, it would discriminate by requiring them, but not state-licensed warehouses, to obtain a dealer's license and bond. Essentially then, an unpaid seller to a federally-licensed Nebraska warehouse remains where the U.C.C. leaves him, just an unsecured creditor without bond protection.

Unpaid Sellers of Grain to State-Licensed Nebraska Warehouses—Pre-1983

Since this article will appear in 1984, it may seem unnecessary to investigate a seller's status under the pre-1983 version of the Nebraska Warehouse Act. This historical digression, however, has several purposes. First, there are claims still pending that arose before the 1983 amendments took effect. Second, the history may shed some light on the current version of the Act and on similar legislation in other states. Finally, it illustrates a common problem with statutes, that amendments are adopted without reference to prior judicial construction, creating difficult problems of interpretation.

Until a 1983 amendment,²¹⁶ the Nebraska Warehouse Act bond ran to "all persons storing grain in such warehouse" and was conditioned on "the delivery of all stored grain or payment of the value thereof upon the surrender of the warehouse receipt, and upon the faithful performance by the warehouse of all the provisions of law relating to the storage of grain by such warehouseman

bonding warehouse purchases and sales, but the proposed regulations have not been adopted. See USDA TASK FORCE REPORT, *supra* note 7, at 39-46.

210. See text at notes 53-53 *supra*. See also USDA TASK FORCE REPORT, *supra* note 7, at 18.

211. NEB. REV. STAT. §§ 88-501 to -517 (Reissue 1981).

212. *Id.* at §§ 88-518, -519.

213. *Id.* § 88-516.

214. *Id.*

215. *Id.* §§ 88-501, -516.

216. L.B. 73, 1983 Neb. Laws 289. This amendment is discussed in the text at notes 250-55 *infra*.

. . .²¹⁷

One familiar with warehouse regulation in other states might conclude that sellers are excluded under this Act just as they are under the U.S.W.A. and similar legislation. However, judicial interpretation of the Nebraska Warehouse Act has been more generous. Both the Nebraska Supreme Court and the United States District Court for the District of Nebraska held that the pre-1983 Nebraska Warehouse Act included unpaid sellers within the protected category of "storers of grain."²¹⁸ Both courts awarded unpaid sellers a portion of the warehouse bond. While neither case involved a claim to the proceeds of the grain remaining in the warehouse, the same reasoning might have been used to give sellers a share in that as well.

The state agency charged with administering the Nebraska Warehouse Act, the PSC, considered these decisions incorrect, and adhered to the view that sellers had no claim to the grain or the bond. In PSC decisions on distribution of grain and bond proceeds from insolvent warehouses, the judicial decisions were not followed.²¹⁹

The controversy hinged on the Nebraska Warehouse Act's definition of stored grain. Until 1951, what is now section 88-501 of the Act provided: "Any grain, which has been received at any . . . grain warehouse and for which the actual sale price is not fixed within ten days after the receipt of the same, is construed to be grain held in storage within the meaning of [the Act]."²²⁰

In that form, the definition established a presumption for the protection of depositors of grain. The warehouse and the surety had the burden of proving a delivery was for sale rather than storage.²²¹ Unless the warehouse could show that a contract for sale had been made and the price fixed, the grain was to be treated as stored grain, to which the depositor would retain title and on which he could demand a warehouse receipt.

In 1951, the statutory definition of stored grain was amended to read: "Any grain, which has been received at any . . . grain warehouse and for which the actual sale price is not fixed *and payment*

217. NEB. REV. STAT. § 88-503(3) (Reissue 1981) (amended 1983).

218. *Kort v. Western Sur. Co.*, No. CV 77-L-208, slip op. at 2-4 (D. Neb. Aug. 4, 1980); *Mintken v. Nebraska Sur. Co.*, 187 Neb. 215, 217, 188 N.W.2d 819, 820-21 (1971).

219. *See, e.g.*, *In re Fecht (Milligan Grain Co.)*, PSC, No. 159 (July 26, 1983); *In re Fecht (Traders Grain, Inc.)*, PSC, No. 146 (Jan. 12, 1982).

220. NEB. REV. STAT. § 88-201 (Reissue 1950) (current version at *id.* § 88-501 (Reissue 1981)).

221. *Cf. Farmers Elevator Mut. Ins. Co. v. Jewett*, 394 F.2d 896, 899 (10th Cir. 1968); *Hartford Accident & Indem. Co. v. State* 247 F.2d 315, 320 (10th Cir. 1957).

made therefor within ten days after the receipt of the same, is construed to be grain held in storage”²²² In 1965, the ten days was changed to thirty days,²²³ and in that form, the definition still stands. The legislative history sheds no light on the purpose of adding the phrase “and payment made therefor.”

Certainly it is possible to read section 88-501 as amended to mean that grain is stored grain, and its depositor is a storer of grain under the Act, despite a contract of sale, so long as the seller has not received final payment. The Nebraska Supreme Court so construed section 88-501 in *Mintken v. Nebraska Surety Co.*²²⁴ In that case, an unpaid seller sued the buyer-warehouse’s bonding company, claiming that he was a storer of grain protected by the bond. The bonding company argued that storers of grain were only those who had not transferred title to their grain to the warehouse. Since the seller admitted making a contract of sale and receiving part payment, the surety contended the seller could not be a storer within the meaning of the Act.²²⁵

The court, without discussing the history of section 88-501 or analyzing the Nebraska Warehouse Act as a whole, held for the seller. The court stated that even though title to the grain had passed to the warehouse, that was not relevant under the Nebraska Warehouse Act. The Act’s definition of stored grain, the court held, was controlling on the question of bond coverage. Grain sold but not paid for was stored grain under section 88-501. The seller therefore was deemed a storer of grain entitled to bond coverage under the Act.²²⁶

Nine years later, the United States District Court for the District of Nebraska followed *Mintken*. In *Kort v. Western Surety Co.*,²²⁷ the court found that unpaid cash and credit sellers were storers of grain under section 88-501 and so were covered by the warehouse bond.²²⁸

The PSC has advanced a very different construction of section 88-501. In the PSC’s view, location of title is and always has been a crucial dividing line, and section 88-501 was never intended to bring sellers, who had transferred title to their grain to the warehouse, within the protection of the Act. Instead, the PSC argues, the function of section 88-501 before and after the 1951 addition of

222. L.B. 377, § 1, 1951 Neb. Laws 1151 (emphasis added).

223. L.B. 200, ch. 584, art. II, § 1, 1965 Neb. Laws 1886.

224. 187 Neb. 215, 217, 188 N.W.2d 819, 820-21 (1971).

225. *Id.*

226. *Id.*

227. *Kort v. Western Sur. Co.*, No. CV 77-L-208 (D. Neb. Aug. 4, 1980).

228. *Id.* at 2-4.

"and payment made," is simply to determine whether a particular depositor of grain has agreed to sell and has transferred title to the warehouse. Only if there has been no transfer of title would the grain be stored grain, and its owner entitled to a warehouse receipt and bond coverage.²²⁹

In the PSC's view, grain delivered to a warehouse is not stored grain if either of two facts can be proved. First, if the depositor has entered into a contract of sale, not within the statute of frauds and not otherwise invalid, which fixes a price, then the grain is warehouse-owned rather than stored grain and the depositor is not a storer under the Act.²³⁰ A second way to remove grain from the protected category of "stored grain" is to show that at or after delivery, payment was made by the warehouse and accepted by the seller.²³¹ Since under this construction, the aim of section 88-501 is only to determine whether the parties intended a sale, it is irrelevant that the warehouse grain payment check has bounced. The fact that a check was issued to and accepted by the grain depositor would evidence a sale.²³²

Whether section 88-501 and the rest of the Nebraska Warehouse Act, prior to the 1983 amendments, were intended to treat all unpaid sellers as storers is a difficult question. In support of a broad seller-protection aim, one can point to the precise language of section 88-501: It says "and payment made" rather than "or payment made." If the purpose were only to search for evidence of a contract of sale, it would be unnecessary to prove both a contract which fixed a price *and* payment by the seller.²³³

229. See *In re Fecht* (Traders Grain, Inc.), PSC, No. 146 at 4 (Jan. 12, 1982). The Public Service Commission said:

[T]he Mintken case was incorrectly decided by the district court . . . and the error was perpetuated by the Supreme Court and further compounded by the U.S. District Court. . . .

Where contracts for sale of grain have been concerned, the Commission has held that those who delivered their grain over to the warehouseman and passed title were not storers of grain. . . .

Id.

230. *Id.* at 4-5. "The establishment of the price and the change in title have always been the deciding factors for the Commission." *Id.*

231. *Id.* at 2-3. "When the books showed that the grain was sold to the warehouse and the check register showed a concurring transaction . . . the seller was no longer considered . . . a storer of grain." *Id.*

232. *Id.* at 5. "The payment is presumed to have been completed once a check is issued and the Commission has steadfastly declined to go behind the check." *Id.*

233. Iowa formerly had a provision in its Bonded Warehouse Law quite similar to Nebraska's § 88-501. In 1964, the Iowa Attorney General issued an opinion that the "and payment made" requirement of the Iowa statute meant actual satisfaction of the debt, not just documentation of the amount owed in the warehouse records. 1.6 Op. Iowa Att'y Gen. 9 (Feb. 12, 1964).

Nevertheless the Iowa provision was interpreted in *Allied Mut. Ins. Co. v. Farm-*

Sellers could also rely on the fact that the 1951 amendment to section 88-501's definition of stored grain was followed, in the next legislative session, by enactment of the Nebraska Grain Buyer's Act.²³⁴ That statute was very clearly intended to protect grain sellers from the risk of nonpayment by the buyer,²³⁵ yet it excludes from its coverage licensed grain warehouses.²³⁶ Perhaps the reason for excluding so important a group of grain buyers was the belief that sellers to warehouses were already protected by the 1951 amendment's addition of "and payment made" to the Nebraska Warehouse Act.

On balance, however, the arguments in favor of a narrower role for section 88-501 seem stronger. When the Nebraska Warehouse Act is read as a whole, other sections place importance on whether title to the grain has passed to the warehouse or has been retained by the depositor. For example, section 88-501, giving the PSC power to close a warehouse and liquidate its grain, provides that the PSC holds the grain or its proceeds for "distribution . . . to all valid owners, depositors, or storers of grain who shall be holders of evidence of ownership of grain."²³⁷ Thus, only persons holding documents of title, i.e. evidence of ownership, may share in the remaining grain.

Although the language includes persons other than owners, the non-owner depositors and storers referred to need not be unpaid sellers. There are cases in which non-owners deposit grain in a warehouse without the warehouse gaining title to the grain. For example, a lender might hold documents of title to grain owned by its debtor, a producer. A warehouse filled to capacity might move

ers Nat'l Co., 303 F. Supp. 555, 559 (N.D. Iowa 1969), as not extending bond coverage to grain not under warehouse receipt. See *Michael v. Merchants Mut. Bonding Co.*, 251 N.W.2d 531, 532-33 (Iowa 1977) denying bond coverage for grain sold but not paid for.

Later, Iowa amended its provision to provide: "Any grain which has been received at any licensed warehouse for which the actual sale price is not fixed and proper documentation made or payment made shall be construed to be grain held for storage within the meaning of this chapter." IOWA CODE ANN. § 543.17.1 (West Supp. 1983-84) (emphasis added). With these changes, Iowa's statute would permit grain sold to the warehouse but for which final payment had not been made to become company-owned rather than stored grain if the price were fixed and there was proper documentation in a warehouse records.

234. L.B. 585, § 1, 1953 Neb. Laws 1151.

235. NEB. REV. STAT. § 88-518 (Reissue 1981). The grain buyer's bond is "conditional that the applicant will pay the purchase price of such grain upon demand of the owner or seller . . ." *Id.*

236. *Id.* The statute begins with the words "Any person, firm, cooperative, or corporation, other than a public grain warehouseman licensed as such in this state, who shall purchase grain . . . for . . . resale . . ." *Id.* (emphasis added).

237. *Id.* § 88-515(3)(a).

grain owned by its storage customers to a second warehouse. In these cases, the grain is stored grain in the usual sense of the word, and the warehouse in possession does not have title.

Similarly, the statutory condition of the bond, before a 1983 amendment, was "the delivery of all stored grain or payment of the value thereof upon the surrender of the warehouse receipt"²³⁸ The section presupposes that the bond claimant holds a document of title to the grain, yet unpaid sellers, unless they had initially stored their grain in the warehouse, would not have a warehouse receipt.

Another consideration is that the amount of the Nebraska Warehouse Bond has not been determined with reference to the warehouse's probable liability to unpaid sellers. The PSC bases the amount on the physical storage capacity of the warehouse.²³⁹ By contrast, the amounts of the Nebraska Grain Buyer's Bond and similar seller protection bonds in other states are usually measured by a percentage of the buyer's aggregate grain purchases in prior years.²⁴⁰ The fact that potential liability to sellers has played no part in setting the amount of the bond indicates the bond was not intended to cover unpaid sellers.

A seller's argument that warehouses were excluded from the Grain Buyer's Act only because unpaid sellers to warehouses already had bond protection could be countered by pointing out that there were in 1953, and still are, good reasons for affording Nebraska producers more protection from non-warehouse buyers than from warehouse grain buyers. The 1953 Grain Buyer's Act was originally entitled the "Itinerant Grain Buyer's Act."²⁴¹ Apparently it was aimed a particularly predatory group—truckers who pick up a seller's grain at his farm, cheat him by understating the amount of grain,²⁴² then quickly resell the grain and perhaps leave the state before the payment check bounces.²⁴³ Licensed

238. *Id.* § 88-513 (amended 1983). See note 216 *supra*.

239. See note 8 *supra*.

240. NEB. REV. STAT. § 88-518 (Reissue 1981). Iowa's Bonded Grain Dealer's Law requires a \$50,000 bond for dealers whose grain purchases from producers exceeded \$250,000 in the previous fiscal year. IOWA CODE ANN. § 542.3.4a (West Supp. 1983-1984) (emphasis added).

241. L.B. 585, § 1, 1953 Neb. Laws 1151. L.B. 585 carried the title "Requiring Licensing of Itinerant Grain Buyers." *Id.*

242. See *Hearings on L.B. 529, supra* note 27, at 42, 84.

243. No legislative history is available on the Grain Buyer's Act. L.B. 585 (1953) was placed directly on the General File, which means there was no public hearing before a legislative committee. Floor debates of the Nebraska Unicameral were not recorded before 1961. See Letter from Patrick J. O'Donnell, Clerk of the Legislature, Nebraska Unicameral to Marianne Culhane (Mar. 7, 1984) (on file with CREIGHTON L. REVIEW).

grain warehouses, by contrast, have an established place of business, some minimum net worth, regularly inspected scales, and an expectation of repeat business with particular sellers. Warehouses arguably present less of a danger to sellers, since even if sellers are not protected by the warehouse bond, the warehouse has assets from which debts might be collectable.

A further argument that grain sellers were not intended to be protected arises from the method of calculating the warehouseman's obligation, that is, the amount of grain which the warehouse is required to have on hand.²⁴⁴ If one treated all grain received under purchase contracts but not finally paid for as stored grain, that would impose a 100 percent reserve requirement for grain delivered under purchase contracts, as well as for that under straight storage contracts. The warehouse could not rightfully resell or re-ship the purchased but unpaid grain. Such treatment of grain under purchase contract is not consistent with usual warehouse operational and regulatory patterns. Other states which have recently adopted statutes clearly intended to protect unpaid sellers do not require a 100 percent reserve against unpaid grain.²⁴⁵

The PSC's interpretation of "and payment made" as referring merely to issuance and acceptance of a check, rather than to final payment, is consistent with the U.C.C.'s Article Two statute of frauds. U.C.C. section 2-201(3)(c) takes an oral contract out of the statute of frauds with respect to goods for which "payment has been made and accepted . . ." ²⁴⁶ An insufficient funds check does not discharge the underlying debt, but its issue and acceptance constitute "payment" within the meaning of the statute of frauds.²⁴⁷ Since U.C.C. § 2-201 was not available in 1951 to help de-

244. Neither the Nebraska Grain Warehouse Act nor the Public Service Commission's published regulations defines the warehouseman's obligation, although Title 291, chapter 8, section 004.17 of the PSC regulations mentions the concept when referring to "the total storage obligations" of the warehouse.

Iowa's Bonded Warehouse Law differentiates between "grain of depositors" and "company-owned grain"; and then states "At no time may a warehouseman have less grain . . . in the warehouse than the obligations to depositors . . ." IOWA CODE ANN. § 543.1.15 (West Supp. 1983-1984).

245. For example, Iowa's Bonded Grain Dealers Law requires a grain dealer [to] "maintain current assets equal to at least ninety percent of current liabilities or provide bond . . ." IOWA CODE ANN. § 542.3.4.c (West Supp. 1983-1984). The grain dealer thus can satisfy this requirement with assets other than grain in the warehouse. See also MICH. COMP. LAWS ANN. § 285.67A (West Supp. 1983-1984).

246. See NEB. REV. STAT. (U.C.C.) § 2-201(3)(c) (Reissue 1980).

247. See *Lea Indus. Inc. v. Raelyn Int'l, Inc.*, 363 So. 2d 49, 52 (Fla. Dist. Ct. App. 1978); cf. *Kaufman v. Solomon*, 524 F.2d 501, 502-03 (3d Cir. 1975); *Presti v. Wilson*, 348 F. Supp. 543, 546 (E.D.N.Y. 1972).

cide whether a sales contract had been made,²⁴⁸ it seems reasonable to presume that the "and payment made" language of section 88-501 was added for that narrow purpose, and not to add all unpaid sellers to the category of storers of grain.

Whatever the merits of this controversy, it probably has been settled for the future by a 1983 amendment to the Nebraska Warehouse Act.

Unpaid Sellers to Nebraska State-Licensed Warehouse—Post-1983.

Apparently, few sellers were aware of the judicial interpretation of the pre-1983 Nebraska Warehouse Act. Instead of challenging the PSC and the bonding companies in court, unpaid sellers took their disappointments to the legislature. The legislature responded in 1983 by amending the Nebraska Warehouse Act's bond provision to include one narrow class of sellers. This amendment seems to reject the prior broad judicial construction, although nothing in the legislative history indicates the legislature was aware of the prior case law.²⁴⁹

The 1983 amendments to the Nebraska Warehouse Act were embodied in L.B. 73.²⁵⁰ That bill added to the class of persons entitled to share in the warehouse bond "persons holding checks for the purchase of grain which were issued by the warehouseman not more than five business days prior to the cutoff date of operations for the warehouse" ²⁵¹ The legislative history shows the five-day rule was a delicate compromise. In response to producer pressure, the bill's proponents attempted to protect some unpaid sellers without requiring big increases in the cost of the warehouseman's bond and without unduly diluting bond protec-

248. L.B. 49, 1963 Neb. Laws 1693. Nebraska adopted the Uniform Commercial Code in 1963.

249. See *Hearings on L.B. 73, supra* note 41, at 31-32. For example, Robert Andersen, Executive Secretary of the Nebraska Cooperative Council, testified "[T]he transactions of the price—later contracts [and] deferred payment contracts . . . are not included within the warehouseman's bond The warehouseman's bond applies to grain that is brought into a local elevator . . . and is being stored for that individual farmer . . . he retains title to that grain." *Id.*

In floor debate on the bill, Sen. Chronister opposed adding seller protection to the warehouse bond, stating: "[W]e can't guard . . . against everything . . . so the powers that be in past decided [to] . . . protect grain in storage . . . and that has been the historical purpose of the bond." See *Floor Debate on L.B. 73 in the Nebraska Unicameral, 88th Leg., 1st Sess.* — (Mar. 29, 1983) [hereinafter cited as *Floor Debate on L.B. 73*].

250. See L.B. 73, § 3, 1983 Neb. Laws 291.

251. *Id.* § 4.

tion for storers of grain.²⁵²

While the arbitrary five-day rule may be easy to apply, the amendment may not fulfill its sponsors' hopes. The apparent intent was to include only cash sellers, those who had never agreed to extend credit to the warehouse but instead demand and receive a check when they deliver grain. Those unfortunate cash sellers who deliver grain and receive checks within the warehouse's last five days of operation would not, it was argued, have a reasonable time to get the check cleared before the warehouse's bank account was frozen.²⁵³ So small an extension of bond coverage, it was thought, would not require much of an increase in the cost of the bond.²⁵⁴

However, the amendment as drafted is not so limited; it could be read to cover credit sellers as well. The text of the statute refers only to the date the check was issued, and not to the relationship of that date to the contract date and the delivery date. A check issued within the warehouse's last five days might well be one due under a deferred payment or deferred pricing contract for grain delivered months earlier.

The lack of an express limitation to cash sales opens the provision to possible manipulation. A warehouseman who knew he was in trouble, perhaps because some checks had already bounced, might be able to predict PSC action within a few days. He could protect his friends to some extent by issuing checks to cover their outstanding credit sale contracts, thus guaranteeing bond protection, if the checks were not paid. Further, a credit seller could pressure a warehouseman into issuing a check if he heard rumors of complaints to the PSC. While producers selling grain on credit may deserve bond coverage, including them without increasing the amount of the bond could greatly dilute protection of other claimants.

Non-producer sellers are another group apparently outside the amendment's intended scope but within its language. Warehouses

252. *Floor Debate on L.B. 73, supra* note 249, at —. Several senators opposed extending bond coverage to holders of checks because they believed this additional exposure would increase bond premiums beyond the warehouses' ability to pay. *Id.* (remarks of Senators De Camp, Jacobson and Chronister). A proponent countered with the question "[H]ow much grain could be bought in five days time . . . [?] We are moving with the five day margin here and this cannot [add] that much to the cost of the bond." *Id.* (remarks of Sen. Eret).

253. *Floor Debate on L.B. 73, supra* note 249, at —. The bill's sponsor remarked during floor debate, "What happens if I deliver a thousand bushels of corn to the elevator today, get a check and tomorrow I find out the elevator is bankrupt? Very frankly, I was not covered." *Id.* (remarks of Senator Schmit).

254. *See* note 252 *supra*.

sometimes buy large quantities of grain for resale from other warehouses and other non-producer sellers in cash or credit transactions. Non-producer sellers are perhaps less deserving of the limited bond coverage the statute affords. Normally they are professional grain merchants better able to assess the buyer's financial status and to take other measures to reduce insolvency risks than are many producers. Since transactions with non-producer sellers tend to be large, the inclusion of their claims under the bond could substantially reduce the resources available to the bond's intended beneficiaries.

Not only is Nebraska's new seller-protection provision over-inclusive as indicated, it is under-inclusive in important ways. The legislature seems to have assumed, in adopting the five-day cutoff, that the only reason warehouse checks bounce is that sellers fail to present the checks for payment before the warehouse ceases operation. Frequently, however, warehouses in financial trouble write some bad checks well before they are shut down.²⁵⁵ Suppose a producer gets a check when he delivers his grain to XYZ warehouse, promptly deposits the check in his bank and the check is returned for insufficient funds several days later. Suppose further that our seller promptly calls the warehouse and when he gets no satisfactory response, call the PSC to report that XYZ warehouse has issued a bad check in a cash sale of grain. Unless the PSC can investigate and shut the warehouse down in the one or two remaining days of the statutory five, that cash seller who acted with all possible diligence will be cut out of the bond's protection.

It appears that the only bond protection for unpaid sellers of grain to Nebraska warehouses is that afforded under the 1983 amendments to the Nebraska Warehouse Act, in favor of sellers holding checks issued within five days before the warehouse ceased operations. This is less protection than sellers enjoy in several nearby states, such as Iowa, Michigan and Illinois, which all offer bonds for unpaid sellers.²⁵⁶ Denying bond protection to sellers puts Nebraska producers at a financial disadvantage. It may also slow settlements to storers, as alleged sellers will contest that

255. See *State Maintains Grain in Storage is Farmers'*, Des Moines Reg., Feb. 19, 1980 at 3A, col. 1. For example, the Iowa Commerce Commission's January 1980 inspection of Prairie Grain Company in Stockport, Iowa was triggered by a tip, allegedly from a competitor, that Prairie Grain had issued a number of bad checks. The firm's checks began bouncing in the fall of 1979, but the recipients did not report the problem promptly to the I.C.C. *Id.*

256. See IOWA CODE ANN. § 542.4 (West Supp. 1983); ILL. ANN. STAT. ch. 111, ¶ 303 (Smith-Hurd Supp. 1983-84); MICH. COMP. LAWS ANN. § 285.67a (West Supp. 1983).

classification and try to bring themselves within the protected category of storer of grain.

How To Tell the Storers From the Sellers

Any depositor of grain runs some risk, in event of warehouse insolvency, that he will be classed as a seller rather than a storer. Sellers, of course, do not share in grain proceeds and usually get little or no bond protection, while storers get a *pro rata* share of grain and bond proceeds. Sometimes these funds are too small in relation to total claims to justify any contest by the alleged seller. Where the proceeds are more ample, however, the alleged seller may seek to escape that category and to be treated as a storer. To do this, he may rely on the U.C.C. statute of frauds or additional documentation requirements of warehouse licensing statutes. He may show that he never agreed to sell his grain. Alternatively, he may contend his sales contract is avoidable on some ground such as fraud.

In some states, statutes raise a presumption of storage or sale. The Nebraska Warehouse Act, as already discussed, presumes grain delivered to a warehouse is stored grain unless a contract of sale is adequately documented.²⁵⁷ Minnesota, on the contrary, treats all deliveries as sales unless the depositor proves a storage contract.²⁵⁸ In warehouse insolvency cases, it seems more reasonable to put the burden on the warehouse, its surety and the liquidators to prove that a particular delivery was for sale rather than storage. After all, the warehouse is in the business of storing grain, it should have good records of its transactions, and it will normally have drafted any writings involved.

Categorizing a depositor can be difficult, since practices in the grain warehousing industry muddy distinctions between sales of grain and deliveries for storage. In either case, the agreement is often oral, and the only writing at the time of delivery is a scale ticket signed only by a warehouse employee.²⁵⁹ Further, it apparently is common for grain to be delivered to the warehouse without any express agreement on storage or sale, because producers and warehousemen are so busy at harvest that they postpone any deci-

257. NEB. REV. STAT. § 88-501 (Reissue 1981).

258. See MINN. STAT. ANN. § 232.23 subd. 3 (West Supp. 1984). The statute provides "All grain delivered to a public grain warehouse operator shall be considered sold at the time of delivery, unless arrangements have been made . . . prior to or at the time of delivery to apply the grain on contract, for shipment or consignment or for storage." *Id.*

259. See text at notes 135-43 *supra*.

sion on the matter.²⁶⁰ Finally, most grain delivered to a warehouse for storage will be sold to the same warehouse during the ensuing marketing year or later. These factors make it difficult to determine which, if any, agreement the parties had at the relevant time.

A producer who wants to be considered a storer might turn to the U.C.C.'s section 2-201 statute of frauds. Section 2-201 provides that a contract for sale of goods for a price of \$500 or more is not enforceable by way of action or defense unless there is a writing, signed by the party against whom enforcement is sought (the producer, in our context), sufficient to indicate that a contract for sale has been made and containing a quantity term.²⁶¹

Even if the producer has not signed any writing, however, his statute of frauds defense may be lost under the partial performance exception found in section 2-201(3)(c):

- (3) A contract which does not satisfy the requirements of subsection (1) [for a writing] but which is valid in other respects is enforceable . . .

. . . .
(c) with respect to goods . . . which have been received and accepted . . .²⁶²

The justification for this exception is, of course, that the acts of the parties indicate that a contract was made and thus fulfill the corroboration function of a signed writing.

Goods are "received" by the buyer when they are delivered to him and he has physical possession of them.²⁶³ That requirement, of course, is fulfilled when a producer deposits grain at the warehouse, regardless of the sale or storage arrangement intended. Goods are "accepted" by the buyer when he indicates he will "take or retain" them or does some act inconsistent with the seller's ownership.²⁶⁴ The "acceptance" facet of the partial performance exception is troublesome in our context. The warehouse, of course, would take or retain the goods even if storage rather than sale were the purpose of the delivery, and combining the grain with other similar grain in the warehouse is not inconsistent with the depositor's ownership. Retention of the grain and issuance of an unpriced scale ticket are equally consistent with storage and sale. Thus, while delivery of grain to and its retention by the warehouse are evidence that some contract was made between the parties, those acts do not indicate the type of contract.

260. See, e.g., *In re Fecht* (Traders Grain, Inc.), PSC, No. 146, at 4 (Jan. 12, 1982).

261. NEB. REV. STAT. (U.C.C.) § 2-201(1) (Reissue 1980).

262. *Id.* § 2-201(3)(c).

263. *Id.* § 2-103(c).

264. *Id.* § 2-606.

The Official Comments to the U.C.C. suggest, however, that evidence of "a contract" is enough to take the contract out of the statute of frauds, even if the partial performance in question is "not . . . inconsistent with a different transaction such as a consignment for resale. . . ." ²⁶⁵ The Comments have been followed in several cases which emphasize that the partial performance need not be "exclusively referable" to the type of oral contract alleged.

In a Wisconsin case, ²⁶⁶ a producer delivered 10,000 bushels of grain to a buyer. The buyer alleged the delivery fulfilled an oral forward contract made early in the year when prices were low. The seller claimed the delivery should not take the oral contract out of the statute of frauds because the transaction might just as well have been a spot sale, that is, a sale at time of delivery for the then-current (and much higher) market price. ²⁶⁷ The court agreed the conduct was equivocal, but held in reliance on the Comments that the statute of frauds had been satisfied. ²⁶⁸

A similar result obtained in North Dakota when an uncle furnished his nephew with cattle feed, use of milking machines, and pasture space after a fire destroyed the nephew's barn. The uncle later sued the nephew for the price of the feed. The nephew relied on section 2-201, and said his receipt and use of the feed were not the types of partial performance envisioned by section 2-201(3)(c). ²⁶⁹ Given the family relationship and temporary emergency created by the fire, he argued, it was equally reasonable to believe the feed was intended as a gift. The court held that regardless of any ambiguity in the conduct, there was receipt and acceptance sufficient to remove the bar of the statute. ²⁷⁰

One might distinguish these cases on the grounds that the conduct, under any interpretation, indicated an intention to transfer title. After all, in the Wisconsin grain sale, the seller had accepted a check, so the real dispute concerned the price. In the cattle feed case, the feed had been consumed by the nephew's cattle, an act clearly inconsistent with the uncle's continued ownership. Here too, the real issue was the price. ²⁷¹

In the sale versus storage of grain situation, however, one might argue that only partial performance which shows intent to

265. *Id.* § 2-201 Official Comment 2.

266. *Gerner v. Vasby*, 75 Wis. 2d 660, —, 250 N.W.2d 319, 321 (1977).

267. *Id.* at —, 250 N.W.2d at 323.

268. *Id.* at —, 250 N.W.2d at 324-25.

269. *Hofmann v. Stoller*, 320 N.W.2d 786, 790-91 (N.D. 1982).

270. *Id.* at 791.

271. *See also* *West Cent. Packing Inc. v. A.F. Murch Co.*, 109 Mich. App. 493, —, 311 N.W.2d 404, 409 (1981).

transfer title should take a contract out of the statute of frauds. Delivery to the warehouse plus pretention and commingling of the grain into the common mass would not show any such intent, for they are consistent with the depositor's ownership. An argument along these lines was presented in a recent Nebraska case, *Johnson v. Holdrege Cooperative Equity Exchange*,²⁷² although the positions of the parties were reversed. The Co-op claimed Johnson delivered his wheat for storage, which Johnson claimed the delivery was for sale under an oral contract market price plus a premium for his wheat's particularly high protein content. The Co-op relied on the Section 2-201 statute of frauds when Johnson sued for the price. The trial court granted summary judgment to the Co-op, holding that the delivery of wheat to the defendant Co-op was not the type of part performance contemplated by section 2-201(3)(c).

The Nebraska Supreme Court reversed, however, and remanded to determine whether the Co-op's acts were inconsistent with the seller's ownership within the meaning of U.C.C. sections 2-201(3)(c) and 2-606. The court suggested, without deciding that two acts "may . . . [be] inconsistent with the seller's ownership." The acts were: (1) protein testing the wheat and charging test costs to the producer, and (2) combining Johnson's wheat with other lower-protein wheat, so that he could not recover the identical wheat he delivered, or even wheat of equal protein content.²⁷³

The Supreme Court's decision to remand on this issue, rather than simply to hold that delivery of the wheat satisfies the statute of frauds as a matter of law, is inconsistent with the Comments to section 2-201, but is perhaps truer to the statute. After all, section 2-201(1) is looking for evidence of a "contract of sale," not just of any contract, and section 2-206's definition of acceptance has a similar aim, some indication of an intent in the recipient to claim title to the goods. *Johnson* may mean that the partial performance relied on must indicate intent to transfer title, and that mere transfer of the goods is not enough in a context where a bailment is a realistic alternative possibility.²⁷⁴ It is unclear, however, whether the court intended so restrictive a reading of section 2-201(3)(c) in *Johnson*, since the decision was at least a partial victory for the litigant relying on an oral contract.

If delivery to the warehouse does not remove the bar of the statute of frauds, some of the other exceptions to the statute must

272. 206 Neb. 568, 293 N.W.2d 863 (1980).

273. *Id.* at 572, 293 N.W.2d at 865.

274. *Cf. West Cent. Packing Inc. v. A.F. Murch Co.*, 109 Mich. App. 493, —, 311 N.W.2d 404, 408-09 (1981).

be considered. For example, the contract may still be proven if the producer admits in the course of litigation that a contract for sale was made or if he has received and accepted a check in payment for the grain.²⁷⁵

Suppose, however, that the producer denies making a sales contract, and that he has received only a scale ticket at time of delivery and no check then or since. In that case, the scale ticket is arguably a "writing in confirmation of the contract" within the meaning of subsection (2) of U.C.C. 2-201, which provides:

Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirement of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.²⁷⁶

However, a scale ticket may not satisfy that provision. First, a scale ticket would be issued at time of delivery, whether the parties agreed on storage or sale or had not yet made any definite agreement. Therefore, a scale ticket might not "satisfy the requirements of subsection (1)" because it would not be "sufficient to indicate that a contract for sale had been made." On the other hand, if a scale ticket contained a warehouse's notation of a price or other indicia of sale, such as the words that the grain was "sold by" the named producer, it would indicate sale within the meaning of subsection (2).

Attention must also be paid to subsection 2's words "between merchants . . ." Except in Nebraska, a confirmation signed by the buyer may be used to satisfy the statute against the seller only if both parties are merchants.²⁷⁷ Whether a farmer can be merchant as a matter of law, and whether a particular farmer is a merchant as a matter of fact, are frequently litigated questions.²⁷⁸

275. See NEB. REV. STAT. (U.C.C.) § 2-201(3) (Reissue 1980).

276. See U.C.C. § 2-201(2), 1 U.L.A. 146 (1976). As will be explained in the text at notes 280-82 *infra*, Nebraska has adopted a non-uniform version of U.C.C. § 2-201(2).

277. *Id.* The U.C.C. defines a merchant as:

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

Id. § 2-104(1), at 120.

278. See, e.g., *Sierens v. Clausen*, 60 Ill. 2d 585, —, 328 N.E.2d 559, 561 (1975); *Sand Seed Serv., Inc. v. Poeckes*, 249 N.W.2d 663, 666 (Iowa 1977); *Decatur Coop. Ass'n v. Urban*, 219 Kan. 171, —, 547 P.2d 323, 328 (1976); *Lish v. Compton*, 547 P.2d 223, 226

The Nebraska Supreme Court has not decided whether farmers can be merchants.²⁷⁹ In 1983, the legislature sought to remedy this uncertainty with a non-uniform amendment to Article Two's statute of frauds. LB 188 added a new subsection (2)(b) to section 2-201, which provides that a contract of sale otherwise within the statute may be enforced:

Between a merchant and a buyer or seller of grain not a merchant, if (i) the contract is an oral contract for the sale of grain, (ii) within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received, (iii) the party receiving it has reason to know its contents, (iv) it contains a statement of the kind of grain, quantity of grain, per unit price, date of contract, and delivery date of the grain, and (v) notice appears on the face of the written confirmation stating that the contract will be enforceable according to the terms contained in the confirmation unless written notice of objection is given within ten days, the writing satisfies the requirements of subsection (1) of this section against the party receiving it unless written notice of objection to its contents is given within ten days after it is received.²⁸⁰

The amendment applies only to oral contracts for the sale of grain. It denies the defense of the statute to a party who has signed nothing, if he receives a writing with the required details, has reason to know its contents, and does not promptly object in writing. Scale tickets could and probably will be printed to include this information, so Nebraska producers can lose their statute of frauds defense if they fail to examine the tickets and object within ten days. Of course, warehouses could achieve the same result with a form confirmation mailed to the seller soon after delivery of the grain.

Even if the U.C.C. statute of frauds is satisfied, warehouse regulatory statutes may impose additional documentation requirements before a depositor can be classified as a seller. For example, an Oregon statute required grain to be treated as "grain in storage" even though its depositor agreed to sell it to the warehouse, until

(Utah 1976); *Continental Grain Co. v. Brown*, 19 U.C.C. REP. SERV. (Callahan) 52, 57 (W.D. Wis. 1976).

279. The question was presented in *Kimball County Grain Coop. v. Yung*, 200 Neb. 233, 237-38, 263 N.W.2d 818, 820-21 (1978). However, because the confirmation relied upon was sent six months after the alleged oral contract was made, the Nebraska Supreme Court found it had not been sent within a reasonable time as required by U.C.C. § 2-201(2). Therefore, a majority of the court held it was unnecessary to decide whether the farmer was a merchant for purposes of that section. *Id.*

280. L.B. 188, 1983 Neb. Laws 504.

the warehouse obtained "adequate definite written instructions . . . given . . . by the owner of the grain . . . directed to a licensed warehouseman . . ." ²⁸¹ In a case arising under the Oregon statute, sellers of grain had received part payment, had obtained judgments against the warehouse for the unpaid balance of the purchase price, and had taken security interests in warehouse property to secure payment of the judgments. Nevertheless, the sellers filed claims against the warehouse's bond. The court held that since the warehouse did not obtain written instructions to sell within the meaning of the statute, the sellers were to be treated as storers for purposes of the bond. ²⁸²

Of somewhat similar effect is section 88-501 of the Nebraska Warehouse Act, which defines as stored grain any grain "for which the actual sale price is not fixed . . ." ²⁸³ Arguably, this requirement is satisfied if the parties agree either on an absolute dollar figure or on a price determination mechanism (as in deferred price contracts).

This latter matter is subject to some dispute. The United States District Court for the District of Nebraska held that deferred price contracts, at least prior to the seller's choice of a pricing day, did not fix a price within the meaning of section 88-501. Since no price was fixed, the court held that grain delivered under deferred price contracts was stored grain and its depositors were entitled to the protection of the warehouse bond. ²⁸⁴ The court's holding may accord with the actual expectations of many producers, especially if they are paying service charges equal to the warehouse's per bushel storage charge. However, the decision probably misinterprets the Nebraska Warehouse Act, for deferred price contracting is an established practice and it provides an ade-

281. See OR. REV. STAT. § 586.425 (1957), construed in *United States Fidelity & Guar. Co. v. Long*, 214 F. Supp. 307, 313 n.6 (D. Or. 1963).

282. *United States Fidelity & Guar. Co. v. Long*, 214 F. Supp. 307, 315-16 (D. Or. 1963).

283. NEB. REV. STAT. § 88-501 (Reissue 1981).

284. *Kort v. Western Sur. Co.*, No. CV77-L-208, slip op. at 3 (D. Neb. Aug. 4, 1980). On some of the deferred price contracts involved in *Kort*, "storage" charges were to accrue until the seller priced his grain. See *id.* at 13.

Service charges are commonly paid by the seller on delayed price grain. As one expert explains:

For delayed price grain which is placed in storage and not moved until priced by the seller, the service charge is actually a charge for storage and is often identical to the storage rate. For delayed price grain which is sold by the elevator and replaced with futures, the service charge reflects the anticipated narrowing of the basis between the time the elevator sells the grain and the time the seller prices it.

Good, *Delayed Pricing By Country Elevators* 6 (Sept. 1977) (Dept. of Agricultural Economics, University of Illinois, No. 77 E-22).

quate method to determine the warehouse's liability. In any event, however, the Nebraska Warehouse Act treats as stored grain any grain for which a price is not shown to have been fixed by agreement.

Of course, satisfaction of the documentation requirements by evidence indicating that a contract of sale was made does not end the matter. It is still necessary to prove by a preponderance of the evidence that a contract of sale was in fact made.²⁸⁵

In order for an agreement regarding grain to constitute a sale, the parties must intend that the buyer will get not only possession of the goods, but also title to them, in exchange for a price.²⁸⁶ Contracts for sale can be made quite informally, and if the court believes the parties intended to be bound, the contract is not invalid under the U.C.C. merely because some terms are not expressly agreed upon.²⁸⁷ However, the more terms that are left open, the more likely a court is to conclude the parties did not intend to be bound.²⁸⁸

Sometimes what looks like evidence of a contract to sell grain is also consistent with storage. Consider the similarities between a deferred price contract and storage with an offer to buy. Under the deferred price contract, a producer sells his grain and passes title to the buyer at the later of the date of the contract or the date of delivery of the grain or warehouse receipts. The price will be set later, whenever the seller notifies the warehouse that he is "pricing out" his grain. Under the contract, the warehouse is obligated to pay a designated market's closing price as of the pricing day, less an agreed discount. An agreement of that type leaves the depositor only the choice of the pricing day. He has already agreed to sell the grain, and he has no right, absent a breach by the warehouse, to reclaim the grain in kind. Thus, the deferred pricing contract is a present sale with the price to be determined in the future.²⁸⁹

A very similar arrangement in fact, but quite different in legal effect, is the common practice of warehouses to tell depositors that they may store their grain at the usual storage charge, but that the warehouse will be happy to buy the grain at any future date the

285. *Tipton v. Woodbury*, 616 F.2d 170, 170 (5th Cir. 1980); see *McCubbin Seed Farm, Inc. v. Tri-Mor. Sales, Inc.*, 257 N.W.2d 55, 58-59 (Iowa 1977).

286. See NEB. REV. STAT. (U.C.C.) § 2-106(1) (Reissue 1980).

287. See *id.* §§ 2-204, -305, -308 to -310.

288. See *id.* § 2-204 Official Comment.

289. See *id.* s§ 2-106(1), -204(3), -305; *Nytco Serv. Inc. v. Wilson*, 351 So. 2d 875, 879 (Ala. 1977).

depositor chooses.²⁹⁰ The price might be, as in a deferred pricing contract, that of a designated market less some discount on the chosen day. In this case, however, the depositor retains the right to demand redelivery of the grain in kind. When the depositor retains the right to redelivery of grain, the transaction is a bailment or storage transaction; it is not yet a sale.²⁹¹

Where the agreements are oral, and the only writings are scale tickets, it is difficult to distinguish these two transactions. Even payment of monthly fees equal to the warehouse's posted storage charges may not be decisive, since it is common for deferred price sellers to be charged a service charge equal to the warehouse's storage fee, especially if the contract is made soon after harvest.²⁹²

Courts and administrative agencies faced with deciding whether particular deliveries were sales or bailments have understandably had difficulty in these cases. They have relied on all available evidence of the parties' intent, such as prior course of dealing, discussions at the time of delivery, the documentation of the transaction in the warehouse's own records, and the contents of any writings delivered to the depositor. For example, a recent Alabama case held soybeans were stored rather than sold even though the scale tickets given depositors contained the preprinted words "bought of" followed by the depositing producer's name, because the warehouse's agent admitted she told the producers they could "store" their grain in the warehouse, and the scale tickets had the word "hold" handwritten on them.²⁹³

On the other hand, an Iowa case held beans were sold rather than stored, despite the depositor's testimony that he asked the grain warehouse to "take that grain and keep it there until I get ready to sell it." The court relied in part on the warehouse's internal records, which said the beans in question were "bought of" the depositor. There also was evidence that the producer knew the warehouse had resold the same beans and that the producer's trucker delivered the beans directly to the warehouse's resale buyer.²⁹⁴

Sometimes an alleged seller has signed a written sales con-

290. See, e.g., *Kramer v. Northwestern Elevator Co.*, 91 Minn. 346, 347-48, 98 N.W. 96, 97 (1904).

291. See *Nytco Serv. Inc. v. Wilson*, 351 So. 2d 875, 879 (Ala. 1977); *Rotterman v. General Mills*, 245 Iowa 229, 232-35, 61 N.W.2d 718, 719-21 (1953); *Kramer v. Northwestern Elevator Co.*, 91 Minn. 346, 348-49, 98 N.W. 96, 97 (1904).

292. See note 284 *supra*.

293. See *Nytco Services, Inc. v. Wilson*, 351 So. 2d 875, 877-79 (Ala. 1977).

294. See *Rotterman v. General Mills, Inc.*, 245 Iowa, 229, 229-39, 61 N.W.2d 718, 719-21 (1953).

tract clearly fulfilling all the documentation requirements of the U.C.C. and of warehouse licensing statutes. The grain covered by the writing may still be classified as stored grain, and the "seller" as a storer, if the agreement can be avoided under general contract law. For example, in a recent Nebraska case, some producers had signed written contracts providing for sale to the warehouse of grain already in storage there. Allegedly, warehouse employees eager to cover a shortage sought out the producers at their farms and requested their signatures on the form contracts. The employees allegedly told the producers the writing merely permitted their stored grain to be moved from one warehouse to another to make room for the incoming harvest. The PSC held that contracts signed in reliance on this misrepresentation could be avoided. The signers were then treated as storers of grain entitled to the protection of the Nebraska Warehouse Bond.²⁹⁵

These complexities cause many of the delays in warehouse insolvency cases. Both Houses of Congress have passed bills which would amend the Bankruptcy Act to expedite distribution of grain or grain proceeds.²⁹⁶ However, the variety and informality of the transactions involved make it difficult to speed a decision without sacrificing the truth. Standardization of the transactions and greatly increased documentation will be necessary before delays can be much reduced.

VII. PRODUCER SELF-DEFENSE

Since producers doing business with grain warehouses risk loss due to warehouse insolvency, it may be useful to review some measures individual producers could take to reduce their risk. Some of these suggestions are obvious, other more innovative. None requires legislative change.

The first suggestion, of course, is to learn as much as possible about the warehouse with which a producer might deal. Before contracting with or delivering grain to a warehouse, ask others about its general reputation. Ask whether its debts are paid as they fall due. Ask whether sellers in recent transactions have received warehouse checks without delay from the warehouseman, and of course, whether those checks have cleared the bank. Ask whether the warehouse gives storers warehouse receipts on demand, or only excuses, such as "we're all out of receipts."²⁹⁷ Other

295. See *In re Fecht* (Milligan Grain Co.), PSC, No. 159, at 2-3 (July 26, 1983).

296. See, e.g., S. 445, 98th Cong., 1st Sess. § 237 (1983); H.R. 5174, 98th Cong., 2d Sess. § 252 (1984).

297. See *Prairie Grain's Collapse—Some Miss the Man More Than Their Money*,

matters for inquiry are the rate of employee turnover at the warehouse, and the relationship of the warehouse's bid price for grain to that of its regional competition. High turnover may indicate that some employees have learned of and are unwilling to participate in wrongful activities such as conversion of stored grain. Unusually high prices offered for grain may indicate a warehouseman's need to cover a shortage by drawing in more distant sellers.²⁹⁸

If these inquiries produce satisfactory results, then storers and sellers can go ahead, cautiously. A storer should request warehouse receipts rather than relying on scale tickets.

The *Farm Journal* recently advised cash sellers to protect themselves by spreading out the delivery dates under cash forward contracts, and by requesting payment daily rather than waiting until all the grain is harvested and hauled to the warehouse. Of course, those daily checks must be promptly presented for payment, and finally paid before more grain is delivered, for this method to help.²⁹⁹

If a seller plans instead to sell on credit (and perhaps he ought to think twice about that decision), he might investigate obtaining a letter of credit or insurance against losses due to the warehouse insolvency. Professor Keith Meyer suggests credit sellers can protect themselves with stand-by letters of credit, under which a seller gets a bank's commitment to pay the purchase price if the buyer defaults.³⁰⁰ These bank obligations are widely used in other sales of goods to protect sellers.

The transaction is structured as follows: the seller, as a condi-

Des Moines Reg., Feb. 17, 1980, at 5A, col. 1-2. The information often is available. For example, although Prairie Grain in Stockport, Iowa continued to do business until January 7, 1980,

[t]he community had hints that its finances were teetering. Checks issued by the elevator bounced as early as [the fall of 1979] and . . . word got out that Keller [the owner] wasn't paying some of his personal bills.

Farmers scrambled to protect themselves, and many requested warehouse receipts in exchange for their scale tickets. . . . Keller turned back many of them, saying he was temporarily out of receipts.

Id.

298. Again, Prairie Grain serves as an example. For a long time, the warehouse outbid others in the area, and it also had a dual-pricing system, under which sellers from 90 to 100 miles away were paid more for their grain than Prairie would pay to local sellers. Wallace Dick, then Chief of the Iowa Commerce Commission's Warehouse Division, commented that the firm could not have made any profit on these distant purchases. Since it was not making immediate payment for the grain, however, it could sell the grain and use the proceeds for commodities trading. See *Dealer's Last Note Mentions Revenge*, Des Moines Trib., Feb. 18, 1980, at 1A, col. 5.

299. See Braun, *More Grain Elevators Belly-Up in Bankruptcy*, 106 *Farm Journal* 17, 17 (June-July 1982).

300. See Meyer, *Advising Market Strategies: The Farmer as a Creditor*, I Annual Meeting of the Iowa State Bar Association 1, B4-B5 (1983).

tion of his extension of credit to the buyer-warehouse, requires the warehouse to obtain a stand-by letter of credit from the warehouse's bank, naming the seller as beneficiary. The bank, when issuing the letter, undertakes an irrevocable obligation to pay the amount of the letter to the seller-beneficiary, if the warehouse fails to make payment when due. In exchange for this bank guarantee, the bank charges a front-end fee and takes a security interest in warehouse property, most likely the grain itself. The bank does not advance any money, however, unless and until the warehouse defaults and the seller notifies the bank of the default.³⁰¹

Use of a stand-by letter of credit will not disrupt the tax advantages producers seek from deferred payment contracts. Under current Treasury Regulations, recognition of income occurs only when payment is actually received. Income need not be recognized when the stand-by letter is issued by the bank to the beneficiary.³⁰²

Although stand-by letters of credit are attractive in theory, individual producers may lack the bargaining power to get them. Each grain producer sells a fungible commodity available from many others, and supply often exceeds demand. In such a buyer's market, the warehouse might view a letter of credit as an unnecessary complication and an unwise allocation of the limited bank credit available.

Even if the warehouse and its bank were willing, the bank might be unable to issue the letter. Some warehouses are already heavy users of bank credit, so the bank's lending limit could pose a problem.³⁰³ Under bank regulations, the face amount of the letter of credit is counted against the lending limit as soon as the letter is issued, rather than later, when and if the credit is drawn upon.³⁰⁴ Therefore, if many sellers wanted stand-by letters, or a few large letters were demanded, a single bank might not be able to issue the letters and a participation arrangement would be needed.

A further problem is that the letter might not be promptly paid if the warehouse filed bankruptcy. One Florida bankruptcy court enjoined a bank from honoring a stand-by letter on the ground that payment to the beneficiary is a preference.³⁰⁵ At least one court

301. *Id.*

302. *Id.* at B10-B11.

303. The general lending limit on loans and extensions of credit to one person was increased to 15% of unimpaired capital and surplus in 1983. It had previously been 10%. See Banks and Banking, 12 C.F.R. § 32.3 (1983).

304. 12 C.F.R. § 337.2 (1983).

305. See *Twist Cap, Inc. v. Southeast Bank*, 1 Bankr. 284-85 (D. Fla. 1979).

has refused to follow that decision,³⁰⁶ and commentators generally uphold the letter against preference attack.³⁰⁷ However, there is still some possibility of litigation and resulting delay in payment.

Another possible self-defense technique is individual insurance coverage. Both storers and sellers may be able to insure against losses due to warehouse insolvencies. In September 1983, one insurer obtained approval to market such policies in Nebraska,³⁰⁸ and a few insurers have been offering the coverage in other states. Generally though, insurers have not been rushing in to fill this void. Some may have decided the policies would not sell in states where indemnity funds promise to cover most losses, and others may be waiting to see whether the Federal Crop Insurance Corporation will be authorized to sell the coverage.³⁰⁹

Farm Bureau offers this type of insurance to its Iowa and Minnesota members for grain stored in or sold to warehouses. Under the Farm Bureau policy, the warehouse in question need not be informed, at least prior to the filing of a claim, that a producer has obtained the coverage. Thus, the producer need not fear offending his local warehouseman by showing doubt of his solvency. The cost for one year ranges from \$35.00 for \$50,000 coverage up to \$80.00 for \$200,000 limits. Farm Bureau would pay up to 80% of the loss. Claims are payable in two stages. Within a month after proof of loss was filed, an advance payment of 50% of the insurer's 80% share of the producer's estimated ultimate loss would be made. When a final determination has been made, the balance of the claim if any, would be due.³¹⁰ This type of coverage is very new, so there is little experience of possible problems with it. However, it does offer an option to producers which does not require the cooperation of the warehouse or its banker.

Hopefully, using these techniques will minimize losses due to warehouse insolvency. Another way to minimize these losses may be legislative change, to which we now turn.

306. See, e.g., *Westinghouse Credit Corp. v. Page*, 18 B.R. 713 (Bankr. D.D.C. 1982).

307. See Baird, *Standby Letters of Credit in Bankruptcy*, 49 U. CHI. L. REV. 130, 147-51 (1982); Chaitman & Sovern, *Enjoining Payment on a Letter of Credit in Bankruptcy: A Tempest in a Twist Cap*, 38 BUS. LAW. 21, 26-27 (1982); McLaughlin, *Letters of Credit as Preferential Transfers in Bankruptcy*, 50 FORDHAM L. REV. 1033, 1069-70 (1982).

308. First Financial Insurance Company of Springfield, Illinois received Nebraska Department of Insurance approval in late 1983 to market these policies.

309. H.R. 4284, 98th Cong., 1st Sess. (1983). Representative Dan Glickman of Kansas introduced the bill. *Id.* The bill would direct the Federal Crop Insurance Corporation to offer such insurance to producers and to "promote the issuance of similar insurance by private insurers." *Id.* § 2(a).

310. See Iowa Farm Bureau, *THE GRAIN PROTECTOR POLICY* (1983).

VIII. PROPOSED LEGISLATIVE CHANGES

For the most part, this article has been concerned with explaining the plight of producers in grain warehouse insolvencies under current law. It is not surprising that numerous legislative and administrative proposals have been made, at the state and federal level, aimed at reducing losses from grain warehouse insolvencies. The choices range from a full federal takeover of all grain warehouse regulation to the ever present option of maintaining the status quo.³¹¹ It would be the subject of several more articles to examine all these proposals in depth; that cannot be done here.

The federal government, in the current political climate, seems unlikely to commit itself to creation of a new federal agency preempting current state regulatory programs. Therefore, it might be useful to consider some changes in state law which could reduce losses to Nebraska producers. Measures aimed at preventing warehouse insolvency or at least at alerting regulators to a warehouse's financial problems before shortages grow large, include more stringent financial reporting requirements and limits, such as reserve requirements, on credit purchases of grain. Where prevention fails, remedial measures such as increased storage bonding, merchandising bonds to cover unpaid sellers, and indemnity funds or some other form of deposit insurance might cushion the blow to storers and sellers of grain.

One preventive option is to require state-licensed warehouses to submit to an annual CPA audit, and to make an unqualified CPA opinion a prerequisite to licensing. The Nebraska Grain Warehouse Act requires applicants for new or renewal licenses to submit financial statements to the PSC for use in calculating net worth and bonding requirements.³¹² The PSC also uses this data to identify warehouses in financial difficulty, so that it can force changes in the troubled firm before shortages develop.³¹³ The accuracy of these determinations of course depends on the reliability of the financial statements themselves.

Currently, the Nebraska Warehouse Act requires these annual financial statements to be "compiled by" a CPA,³¹⁴ but this is a much less rigorous standard than a certified audit. The CPA's only function with regard to a compilation statement is to compile a balance sheet based on the books and records the warehouse gives

311. See, e.g., USDA TASK FORCE REPORT, *supra* note 7, at 10-17.

312. See NEB. REV. STAT. § 88-503(1) (Reissue 1981). See also *Hearings on L.B. 73*, *supra* note 41, at 11.

313. *Id.* at 10, 18.

314. See NEB. REV. STAT. § 88-503(1) (Reissue 1981).

the CPA. The CPA does not, however, attempt to verify the accuracy of the records when preparing a compilation statement.³¹⁵

An annual audit by an independent CPA would provide more accurate information both for warehouse management and warehouse regulators. The information submitted to the PSC should be reliable enough to permit valid comparisons and use of sophisticated predictive modelling, thus enhancing the PSC's ability to target its resources at those firms most likely to fail.

The USDA's Grain Elevator Task Force concluded in 1981 that warehouses storing CCC-owned or loan grain should be required to submit to an annual CPA audit.³¹⁶ Illinois has an annual audit requirement for all its state-licensed warehouses.³¹⁷ Iowa grain warehouses must choose between an annual CPA audit or double the usual number of state inspections.³¹⁸

The principal objection to an audit requirement is the added cost. The USDA Task Force estimated the 1981 cost at \$3,000 to \$5,000 a year, and noted that this might be burdensome to smaller businesses even though they were well-run and provided a much-needed service.³¹⁹ Another objection sometimes raised is that audits are already performed often enough. Even under current law, most warehouses in fact undergo a periodic full CPA audit, though not on an annual basis. While the Nebraska Grain Warehouse Act does not require an annual audit, it does make a corporate surety bond or a certificate of deposit a prerequisite for a new or renewed license.³²⁰ A corporate surety normally requires an independent audit before initial issuance of a bond and follow-up audits at intervals of one to five years.³²¹ In those years, the warehouse would submit the audited statement to the PSC. Only those warehouses who post a certificate of deposit in lieu of a bond could entirely escape periodic full audits. In addition, the many cooperatively-owned warehouses in Nebraska undergo an annual CPA audit pursuant to their own regulations.³²² Of course, the fact that most warehouses are already paying for audits at intervals of one to five years reduces the effective additional cost if an annual audit were required.

Another proposed change of a preventive nature is increased

315. See *Floor Debate on L.B. 529*, *supra* note 66, at 4534-35.

316. See USDA TASK FORCE REPORT, *supra* note 7, at 23-24.

317. See ILL. ANN. STAT. ch. 111, ¶ 304, § 2 (Smith-Hurd Supp. 1983-1984).

318. See IOWA CODE ANN. § 543.6b (West Supp. 1983-1984).

319. See USDA TASK FORCE REPORT, *supra* note 7, at 24.

320. See NEB. REV. STAT. § 88-503(3)(b) (Reissue 1981).

321. See *Floor Debate on L.B. 529*, *supra* note 66, at 4537-40.

322. *Id.* at 4539.

scrutiny of, and controls on grain merchandising. These controls are increasingly a source of financial difficulty for warehouses and consequently, for producers. Nebraska might adopt its own version of the dual-license pattern emerging in other states, where a warehouse is separately licensed (and separately bonded) for its storage and merchandising activities. The particular advantage of the dual system, as discussed earlier, is that the merchandising license and regulations can be applied to all warehouses, even those licensed for storage under the U.S. Warehouse Act.³²³ This would maximize producer protection and spread the costs of compliance fairly among competing warehouses.

Some insolvency prevention measures that might be considered are price protection and reserve requirements against credit purchases of grain, particularly on the deferred price contracts which have been the downfall of many grain dealers. Several other states now require grain dealers to practice prudence in the form of price protection and reserves of liquid assets. For example, Illinois requires its grain dealers to protect against adverse price fluctuation by purchasing options.³²⁴ Both Illinois and Michigan require their grain dealers to maintain a reserve of liquid assets at a specified percentage of estimated deferred price liabilities so the dealers can pay producers when they eventually price out their grain. Illinois requires a reserve of 90% of estimated deferred price debt to be held in the form of grain in the warehouse, warehouse receipts for grain stored in other warehouses, and proceeds of grain, that is, cash and certain other very liquid assets.³²⁵ Michigan's similar system sets its reserve level at 80%.³²⁶

No regulatory pattern can be devised, of course, which will completely avoid warehouse failures. Mismanagement, fraud and sheer bad luck will continue to bedevil the grain warehousing industry as they do all others. For this reason, preventive measures have long been supplemented with remedial provisions. The prime example is the warehouse bond, a cushion that often proves too thin and which is in some jurisdictions unavailable to unpaid sellers.

Storage bonds are not particularly expensive. The premium is about \$5 for each \$1,000 in bond amount. Merchandising bonds are more expensive, running at least \$10 per \$1,000 in bond amount. The premiums are not the only problem for a warehouse, however,

323. See text accompanying note 55 *supra*.

324. ILL. ANN. STAT. ch. 111, ¶ 311, § 10 (Smith-Hurd Supp. 1983-1984).

325. See *id.*

326. See MICH. COMP. LAWS ANN. § 285.67a, § 7a(2)(d) (West Supp. 1982).

for the surety will not issue a bond unless it is convinced the warehouse's net worth is adequate to protect the surety. If storage bond amounts were significantly raised, or very sizeable merchandising bonds were required, it is possible that many warehouses would be unable to obtain a bond.³²⁷ A more affordable package would be a combination of a merchandising bond and an indemnity fund.

The merchandising bond might be tied to the grain dealer's license, and should be set at some percentage of prior year's grain purchases. The merchandising bond would be purchased by a particular warehouse, and could be for the benefit of all persons who delivered grain to the warehouse for purposes of sale but did not receive final payment.

An indemnity fund, on the other hand, is a fund not tied to a particular warehouse, but available as added protection when the bonds, either storage or merchandising, of an insolvent warehouse, prove insufficient. Such a fund has been established in several states.³²⁸ An indemnity fund was considered by the Nebraska Unicameral in 1981, but was not enacted.³²⁹ The fund could be collected by assessing a per bushel charge, perhaps one-tenth of a cent, on first deliveries of grain by a producer to a warehouse for storage or sale. When the fund reached the desired level, perhaps ten million dollars, assessments would cease and the fund could be activated.³³⁰ Claims arising thereafter could be compensated in full or at whatever lesser percentage the legislature deemed appropriate. The fund could be a primary source of recovery, providing relatively quick payment in return for assignment by the producers to the fund of any rights to compensation from the warehouse bankruptcy or other sources. On the other hand, the fund could be last resort coverage, available only after all other resources had been exhausted. It would be most convenient to collect the assessments from grain dealers, but the producers whom it would protect would probably bear the burden through slightly lower prices offered for their grain. Even so, the indemnity fund should be less

327. See Note, *Dealing with Grain Dealers: The Use of State Legislation to Avert Grain Elevator Failures*, 68 IOWA L. REV. 305, 319 n.121 (1983).

328. See note — *supra*.

329. See *Hearings on L.B. 529, supra* note 27, at 39-45. L.B. 529 (1981) as originally introduced contained an indemnity fund proposal. L.B. 529, 1981 Neb. Laws 1679. While the bill passed, the indemnity fund provision was deleted. *Id.*

330. Governor Charles Thone appointed a task force to study grain storage and merchandising problems and many of its recommendations were incorporated into LB 529. The ten million dollar limit was one the task force came up with as the likely maximum liability of a single large warehouse in Nebraska. *Hearings on L.B. 529, supra* note 27, at 59.

expensive protection than individual insurance policies over time, for additional assessments would be needed only if the fund had been considerably depleted.

CONCLUSION

The financial protection of grain warehouse bonds is often inadequate to cover the losses of producers who deliver grain for storage to a warehouse which became insolvent. In many jurisdictions, the bond is unavailable to those who delivered grain for sale to the warehouse but were never paid for it. Producers can protect themselves to some extent, by informal credit investigation, prompt demands for warehouse receipts or payment checks, as well as individual insurance and stand-by letters of credit.

However, the long-recognized public interest in the grain warehousing industry means legislative changes may be necessary to supplement individual initiatives. Therefore, some measures to preserve producer trust in the grain warehousing system are warranted, particularly in the grain merchandising area. Better financial reporting and reserves against credit grain purchases should be required to help prevent insolvency. When prevention fails, both storers and sellers need increased bond protection which might be best provided through an indemnity fund in lieu of or in combination with the bonding of individual warehouses.