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Importance: High

Attached please find Appellants' Brief in Supreme Court Case No. 20080068, as corrected for the caption of the case, certain citations, and several punctuation corrections. The Appendix was filed with the Supreme Court Clerk in hard copy yesterday afternoon. The electronic filing fee was also submitted to the Supreme Court Clerk yesterday. Supplemental service of this Brief will be made upon Mr. Mensing by USPS.

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Attached please find Appellants' Brief in Supreme Court Case No. 20080068. The Appendix was filed with the Supreme Court Clerk in hard copy this afternoon. The electronic filing fee was also submitted to the Supreme Court Clerk today. Service of the Appendix as shown on the Certificate of Service.

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PUBLIC SERVICE COMMISSION

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 20080068
Bowman County District Court No.: 06-07-C-18-1
PSC Case No.: GE-07-99

PUBLIC SERVICE COMMISSION,

Petitioner and Appellee,

v.

MINNESOTA GRAIN, INC., AND
HARTFORD FIRE INSURANCE CO.,

Respondents and Appellees,

JIM BROTEN, ERIC BROTEN, AND BROTEN FARMS,

Appellants.

APPELLANTS' BRIEF

**APPEAL FROM JANUARY 23, 2008 JUDGMENT ISSUED
BY JUDGE ALAN L. SCHMALENBERGER
BOWMAN COUNTY DISTRICT COURT**

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether N.D.C.C. ch. 60-04 controls these proceedings and controls the administration of a trust created to settle the affairs of an insolvent grain warehouseman.

2. Whether Minnesota Grain, Inc. is an insolvent warehouseman under N.D.C.C. ch. 60-04.

3. Whether Brotens are "receiptholders" of an "insolvent warehouseman" as referenced in N.D.C.C. ch. 60-04.

4. Whether Brotens are therefore entitled to payment from the trust fund created by the Public Service Commission to administer the estate of the insolvent grain warehouseman, Minnesota Grain, Inc.

5. Whether the proper amount of the bond is $100,000 or $200,000.

STATEMENT OF THE CASE

Errors by the PSC

6. This action arises under N.D.C.C. ch. 60-04, **Insolvent Grain Warehousemen**. It concerns two significant errors by the Public Service Commission ("PSC") in administering the insolvency action of Minnesota Grain, Inc. (PSC No. GE-07-99). The first error was the PSC's determination that Jim Broten, Eric Broten and Broten Farms ("Brotens") were not receiptholders eligible for and entitled to partial payment from the trust established under N.D.C.C. ch. 60-04 upon the insolvency of Minnesota Grain, Inc., a warehouseman licensed by the State of North Dakota. At the time the PSC commenced the insolvency action, Minnesota Grain, Inc. owed the Brotens, collectively, $336,911.97 for barley purchased from the Brotens. The Brotens submitted claims within the time provided by the statute and provided evidence that they were holders of "receipts" as defined by N.C.C.C. ch. 60-04. Although the Brotens were "receiptholders" and

submitted timely claims, the PSC rejected their claims as "Minnesota transactions" ineligible for the protections of ch. 60-04 because the barley had been delivered to a facility of Minnesota Grain, Inc. located in East Grand Forks, Minnesota. As allowed by law, the Brotens submitted an objection to the PSC's determination that their claims were ineligible for benefits under the trust fund. The Brotens' ineligibility was upheld by the trial court, and this appeal ensued. This appeal contends that the Brotens are among the class of "noncredit-sale receiptholders of the insolvent warehouseman" for whose explicit benefit the trust was established by N.D.C.C. ch. 60-04, and in particular by N.D.C.C. §§60-04-03.1, 60-04-04 and 60-04-06.

7. The second significant error concerns the PSC's failure to demand that Hartford Fire Insurance Co., ("Hartford") the surety for Minnesota Grain, Inc., pay the face amount of the Grain Elevator Warehouseman's Bond for "any annual license renewal period" in which losses occurred, as provided by N.D.C.C. §60-02-09(8). Here, losses to receiptholders occurred, during the licensing year prior to July 31, 2006, and during the licensing year starting on August 1, 2006. Because the face amount of the bond was $100,000 during each of these licensing periods, the PSC should have demanded that Hartford pay $100,000 of the face amount of the bond for each license period during which losses occurred.

The Statutory Scheme Under which Minnesota Grain, Inc. Became Licensed and Facts Concerning Its Licensure

8. Minnesota Grain, Inc., of Eagan, Minnesota, applied for a license to operate a grain warehouse in Rhame, North Dakota on September 10, 2001. App.156[1]. This application

[1] The application and many other documents were obtained from the PSC. *See* App.216. A disk containing these papers was provided to the Trial Court by Brotens at the time of their

was pursuant to the provisions of N.D.C.C. Ch.60-02, and in particular §60-02-07. The Grain Warehouse license was issued by the PSC on September 19, 2001, effective September 14, 2001. App.158. Notwithstanding the title "Warehouse License", a warehouseman's license allows a licensee to store, buy, sell, ship or process grain for compensation. *See* N.D.C.C. §60-02-01(5) and §60-04-01(5).

9. Under Ch.60-02 and Ch.60-04, "warehouseman" means the "person operating a public warehouse that is located or doing business in this state, whether or not such owner or operator resides within this state." N.D.C.C. §60-02-01(6) and 60-04-01(5). As shown by the application for license, the "warehouse" was operated by a corporation, Minnesota Grain, Inc. of Eagan, Minnesota and thus the "warehouseman" was Minnesota Grain, Inc. of Eagan, Minnesota. App.156.

10. At or about the time of licensing, Minnesota Grain, Inc. obtained a bond, as required by N.D.C.C. §60-02-09. App.24, 26-28. This bond is on a form prepared by the PSC. ("SFN 7573(4-95)". It includes the seal of the State of North Dakota and is captioned "Grain Elevator Warehouse Bond." *Id.* Bond No. 41BSBBL3293 (hereafter "the bond") was signed by the Principal, Minnesota Grain, Inc., and by the surety, Hartford Fire Insurance Company. *Id.* The bond was originally in the amount of $75,000. *Id.*, App.24. The bond was increased to the face amount of $100,000 on January 21, 2003. App.25.

11. N.D.C.C. §60-02-07 provides that every grain warehouse license expires on July 31 of each year. Accordingly, Minnesota Grain, Inc. of Eagan, Minnesota was licensed to

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objection to the PSC's Report and Recommendation. See Docket 20. The PSC file for Minnesota Grain, Inc. is in two parts. The first part, Bates No. 10001 to 100509 comprises the "insolvency file" of Minnesota Grain, Inc. The second part, Bates No. 20001 to 200039 comprises the "licensing file" of Minnesota Grain, Inc. Documents referenced in this Brief are generally printed out in the Appendix; the balance are available in a disk at App.216 and can be located by Bates No. references.

operate as a grain warehouse in North Dakota from September 2001 to July 31, 2002, and successive years thereafter. Its two most recent license years were August 1, 2005 through July 31, 2006 and August 1, 2006 the date its authority to operate was removed by the PSC and court.

Minnesota Grain, Inc. Became "Insolvent" Long Before March, 2007.

12. The definition of "Insolvency of warehouseman" is provided at N.D.C.C §60-04-02. "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."

13. The "Insolvency File" of the PSC submitted by Brotens to the trial court (App.216) contains many documents showing that Minnesota Grain, Inc. was "insolvent" long before the PSC became aware of (or acted upon) its insolvency. For example, the CEO of Minnesota Grain, Inc. wrote to Equity Coop Elevator of Sheyenne, North Dakota[2] on September 20, 2006 admitting that $40,813 was "all past due" and the elevator would not be paid for another four to six months. App.216 (Bates No. 100172). Storage tickets accompanying they Sheyenne Elevator claim show unpaid deliveries from as early as February 2006. App. 216 (Bates No. 10176).

14. The claim of Ryan Kadrmas[3] shows that he was not paid for a load of wheat delivered on March 9, 2006, (App.109, 112) and that seven other loads shipped in October through December 2005 remained unpaid as of March 2007 (App.110-111).

[2] This Equity Coop was deemed to be, in the same category as Brotens' claims and the claim was denied. App.7.

[3] Mr. Kadrmas was a "cash" claimant whose claim was accepted by the PSC. App.8.

15. Another example is Cyrus Hartman's February 20, 2007 letter to Minnesota Grain, Inc. demanding payment on an overdue credit sale contract with a due date of July 1, 2006. This letter was "cc'd" to the PSC. App.206.

16. In summary, the Insolvency File of the PSC is replete with instances where Minnesota Grain, Inc. had refused, neglected, or been unable to pay for grain purchased or marketed by it during at least two annual licensing periods[4].

The Insolvency Action Commenced by the PSC in March, 2007.

17. The insolvency action in question (PSC Case No. GE- 07-99) was initiated by oral and written complaints of Thomas G. Powell of Bowman, North Dakota received by the PSC March 12 and 13, 2007 in which he said his credit sales contracts had not been paid, and he wanted to be paid by the credit sale indemnity fund. App.3, Par.2.

18. The PSC's Application for Appointment as Trustee and Petition to Join Surety was filed with the District Court in Bowman County on March 20, 2007. Docket 1, App.1, Par. 3.

19. On April 9, 2007, the Bowman County District Court declared Minnesota Grain, Inc., insolvent and appointed the PSC trustee of the Minnesota Grain, Inc. estate. Docket 6, App.4, Par.5. The Bowman County District Court also ordered that the surety, Hartford Fire Insurance Company, be joined as a respondent in the action. *Id.* The Order was filed with the Clerk of the Bowman County District Court on April 11, 2007. *Id.*

20. On April 20 and 27, 2007, the PSC published a "Notice of Appointment as Trustee and Notice to File Claims." Docket 8, App.4, Par.6. This Notice said persons "*with a claim against Minnesota Grain, Inc., Rhame, North Dakota, for the non-payment of grain*

[4] The PSC has broad authority to review records of grain a warehouseman. N.D.C.C. §60-02-03. On remand, the PSC could determine if losses were suffered by farmers in more than two license renewal periods.

purchased by Minnesota Grain, Inc., Rhame North Dakota, shall file the claim with the Public Service Commission ... ." (Emphasis added.) This was published in The Bowman County Pioneer on April 20 and April 27, 2007. App.29-30.

21. The PSC also mailed a Notice of Appointment as Trustee and Notice to File Claims to twenty-eight persons the commission had identified as potential claimants. App.4, Par. 6.

22. N.D.C.C. §60-04-04, **Notice to receiptholders**, provides that the PSC's notices "must require outstanding receiptholders to file their claims against the warehouseman with the commission along with the receipts or such other evidence of the claims as required by the commission." The same section goes on to provide that "[i]f an outstanding receiptholder fails to submit a claim within forty-five days after the last publication of the notice or such longer time as prescribed by the commission, the commission is relieved of further duty or action under this chapter on behalf of the receiptholder and the receiptholder may be barred from participation in the trust fund." The PSC accordingly provided 45 days from the date of the second notice. The PSC further advised potential claimants that they "shall include receipts or sufficient documentation to enable the Commission to determine the validity of the claim. This includes unsatisfied scale tickets, warehouse receipts, dishonored checks and any related contracts."[5] App.29-30.

23. Jim Broten, Eric Broten and Broten Farms filed timely claims received by the PSC on April 12, 2007, regarding the sales of barley for which they had not been paid. App.216 (Bates No. 100289-100420).

[5] In contrast, the statutory definition of "receipts" more broadly includes "grain warehouse receipts, scale tickets, checks or other memoranda given by a public warehouseman for, or as evidence of, the receipt, storage, or sale of grain except when such memoranda was received as a result of a credit-sale contract." N.D.C.C. §60-04-01(6); N.D.C.C. §60-02-01(7).

24. On May 17, 2007, the PSC received notice that Hartford intended to cancel its bond coverage of Minnesota Grain, Inc. effective August 23, 2007. App.31.

25. On June 27, 2007, the PSC approved a motion to pay "five claimants based upon their valid cash sale balance claims" to be paid by the trust and that four credit sale claims be paid from the credit-sale indemnity fund. App.205.

26. On June 27, 2007, the PSC filed its Report and Recommendation with the Court, together with a supporting Brief and proposed Order requesting approval of the Report and Recommendation of Trustee, and requested a hearing at which interested parties could show cause why the Report and Recommendation should not be accepted. Docket 13-16, App.3-11.

27. At Paragraph 8 of its Report and Recommendation, the PSC determined that the Brotens' claims were "Minnesota transactions,"[6] and therefore wholly fell outside the protection of ch. 60-04. The PSC recommended that these claims be rejected in their entirety, stating:

> Claims for purchases of grain made by Minnesota Grain, Inc. through its East Grand Forks, Minnesota facility are Minnesota transactions that must be submitted to the Minnesota Department of Agriculture to be determined under Minnesota law. The surety bond on file with the Commission covers only grain purchases made by Minnesota Grain, Inc. through its Rhame North Dakota facility licensed under North Dakota law.

Docket 16, App.4-5.

Brotens' Objection

28. As allowed by N.D.C.C. §60-04-09, "any aggrieved person having an objection to the commission's report shall file the objection with the court and serve copies on the

[6] Five so called "Minnesota transactions" claimants filed a total of $467,920.69 in claims, all of which were for unpaid barley sales. App.4-5, Par. 7 & 8. Brotens' claims represent 72% of the so-called Minnesota transactions.

commission, the warehouseman, and the surety at least ten days before the hearing." The statute further provides that "Failure to file and serve objections in the time set is a waiver of the objection." [7]

29. The Brotens' Objection to the Trustee's Motion for Approval and Adoption of Report and Recommendation of Trustee objection was timely served and filed on August 7, 2007. Docket 19.

30. A hearing in this matter was held on August 20, 2007 at 11:00 am CDT, in Bowman, North Dakota. Broten and their counsel appeared at the hearing, as did the PSC. The Court orally suggested that the parties provide further briefing for the Court on Brotens' request for declaratory relief and set a schedule for briefing by the PSC and Brotens. App.18.

31. On August 24, 2007, the court issued an order authorizing credit-sale claimants to be paid from the indemnity fund. Docket 25.

32. In the ensuing months, a number of briefs were submitted on behalf of Brotens, the PSC and Hartford as well as the North Dakota Grain Dealers Association as *Amicus Curiae*. *See, e.g.*, Docket Nos. 19, 22, 26, 34, 49, 51, 61, 62.

33. On January 4, 2008, the Honorable Judge Allen Schmalenberger issued a Memorandum in which he found that Brotens "did not store or sell grain in the [Rhame[8]] elevator" and "neither the statutes nor the warehouse bond extend coverage to sales made by the North Dakota growers to facilities owned by the Minnesota Grain, Inc. outside of North

[7] Michael Dahlen, who also had a claim for unpaid barley, joined in Brotens' briefing at the trial level, but had not timely file an objection to the Report and Recommendation. The PSC and Hartford objected to Dahlen's participation at the trial court level. Dahlen is accordingly not an appellant here, but might be benefited if there were a reversal and remand and another Report and Recommendation were issued by the PSC after appropriate guidance by this Court.

[8] The text of the opinion uses the phrase "Reeder elevator", which is an obvious misprint.

Dakota." The Memorandum also provided that the maximum amount of the bond was $100,000. Docket 63, App.18-21.

34. An Order Approving Trustee's Report and Discharging Trustee was signed by Judge Schmalenberger on January 23, 2008 and served on Brotens. App.15-17. Docket 65, 66.

35. On March 6, 2008, Brotens served a timely Joint Notice of Appeal. App.22. Docket 76-70.

STATEMENT OF FACTS

36. Brotens are North Dakota farmers. All of the barley that they sold to Minnesota Grain, Inc. was grown in North Dakota. App.12.

37. Brotens commenced doing business with Minnesota Grain, Inc. around harvest time of 2005. App.12, Par.3. Jim Broten had been very active in the North Dakota Barley Council, serving as President and holding various other offices and was a well-known barley farmer. *Id.*, Par. 2. He received calls from officials from Minnesota Grain, Inc. seeking the purchase of barley at or about harvest time of 2005. He was told the barley would be picked up at his farm in North Dakota. *Id.*, Par. 3. He called the PSC to see if Minnesota Grain, Inc. was licensed, and was told that it was licensed. *Id.* He was told also that if the grain was picked up at his farm in North Dakota it would be covered. *Id.*

38. About June 2006, Minnesota Grain, Inc. told Broten that it was "short of trucks" and asked Broten to use his trucks. *Id.*, Par. 4. The price was increased by $.43 per bushel to reflect trucking costs but Broten was sometimes paid separately for freight. *See, e.g.*, App.216 (Bates No. 100334). Sometimes, however, Minnesota Grain, Inc. sent its own trucks. Regardless of who did the trucking, all barley sold by Brotens to Minnesota Grain was delivered by trucks loaded in North Dakota on the Brotens' farm and sent at

the direction of the buyer, Minnesota Grain, Inc., to a facility owned by Minnesota Grain, Inc. in East Grand Forks, Minn. *Id.,* Par 4. At that facility, Minnesota Grain, Inc. processed the barley into flour or it was "pearled" for future sale as flour or pearled barley by Minnesota Grain, Inc. *Id.* Mr. Broten's sole contact with the East Grand Forks facility was to go there once, to seek payment for previously delivered grain but he also met with the principal of Minnesota Grain, Mr. Thomas Mensing, for the same purpose in North Dakota. *Id.*, Par.5. Further, the parties conducted negotiations after the defaults regarding Mr. Mensing's proposal that he would sell Minnesota Grain, Inc. to Mr. Broten but these negotiations were concluded without resolution. *Id.*, Par.5.

39. The pattern and practice of Minnesota Grain, Inc. was to pay for older shipments if new shipments were made by Mr. Broten. *Id.*[9] As soon as Mr. Broten stopped making on-going shipments because of the terrific backlog of payments, Minnesota Grain stopped paying him. *Id.*

40. Jim Broten and Broten Farms submitted claims for $325,150.99 and Eric Broten submitted a claim for $10,761.08. App.7. The reason the PSC provided for the rejection of these claims was that they were "Minnesota transactions". App.4-5.

41. The PSC's factual and legal basis for its determination that Brotens' transactions were "Minnesota Transactions" is unclear. The "Insolvency File" shows a number of paid claims involving sales and delivery to East Grand Forks and payment from East Grand Forks. For example, the claim of Randall Christianson was approved. App.10. Yet the

[9] *See, also* App.216 (Bates No. 100172), in which Mr. Mensing promised payment to another seller if more shipments were made but said "everyone" will be "hammered" if new grain were not received.

bounced checks for the payment of this grain were written on an East Grand Forks bank account of Minnesota Grain, Inc. App.216 (Bates No.100164).

42. Plaza-Makoti Equity Elevator presented by far the largest claim that was approved by PSC – a claim for $275,181.77. It was documented by a number of "Purchase Settlement Sheets" App.44-89. Each of these Purchase Settlement Sheets gives the name of the buyer as "Minnesota Grain Rhame" *but with the following address: "316 5th Ave. NE, East Grand Forks, MN 58721." Id.* This address is identical to the address given on Broten Purchase Settlement Sheets. *See, e.g.,* App.90-108.

43. Another claim accepted as valid by the PSC is the claim of Stanley Palczewski. App.11. On the contract supportive of this claim, the purchaser is listed as "*Minnesota Grain Rhame" with the following address: "1380 Corporate Center Curve, Suit 105, Eagan, MN 56121-1200*". App.119. On the Palczewski purchase settlement sheet the name and address of the buyer is *"Minnesota Grain Rhame" with the same East Grand Forks address* as appears on the Broten and Plaza-Makoti transactions referenced above. App.209.

44. The claim of Ed Maychrzak was also approved by the PSC, even though the "*Direct Ship Load Out Tickets" to location "Minnesota Grain, Inc. EGF Elevator*" are identical to the shipping location on the "Direct Ship Load Out Tickets" submitted by the Brotens. *Compare* App.214 (Maychrzak) to App.215 (Broten).

45. The claim of Ryan Kadrmas was approved for payment by the PSC. His "Direct Ship Loadout Tickets" use the East Grand Forks address: "Minnesota Grain, Inc. – East Grand Forks Elevator "as the location" for delivery. App.110. Broten's is the same. App.215.

46. On all barley sales made by Brotens, Minnesota Grain, Inc. documents always listed the *North Dakota Barley Council* as the "Checkoff agency". *See, e.g.,* App.90-108, The "barley checkoff" is a North Dakota tax that is paid by a "first purchaser" when it purchases barley from a North Dakota grower of barley. *See*, N.D.C.C. ch. 4-10.4.[10] Payment of this tax also mitigates against the PSC's conclusion that the sales were "Minnesota Transactions."

47. In dealing with bond issues, the PSC routinely corresponded with representatives of the Rhame facility that were located in Minnesota. *See, e.g.,* App.147 (letter from PSC to Minnesota Grain, Inc. regarding the bond); App.148 (letter on "Minnesota Grain" letterhead, with an Eagan, Minnesota address to the PSC regarding the bond).

48. The "Grain Storage and Handling Policy" of Minnesota Grain, Inc. filed with the PSC identifies "Minnesota Grain, Inc." as the "elevator name" and "Rhame, North Dakota Station" as simply the "station location." Nothing in the PSC licensing or insolvency files show separate legal or corporate entities - as such -- for either "Minnesota Grain, Inc. (Rhame)" or "Minnesota Grain, Inc. (EGF)." See App.216 (passim).

49. The "warehouseman" identified as the Principal in Bond #41BSBBL3293 (App.24.) and the "warehouseman" identified as the licensee that operates the elevator in Rhame North Dakota is Minnesota Grain, Inc., headquartered in Eagan, Minnesota. App.24, 156. The name of the elevator was "Minnesota Grain, Inc." and the station location was in Rhame. App.130.

[10] Minnesota has a similar council that also collects a checkoff tax –the Minnesota Barley Research and Promotion Council – but there is no indication that the Minnesota tax was deemed applicable to any of Broten's transactions.

50. The conditions of the bond are that "if the PRINCIPAL shall (1) faithfully perform all duties as a public warehouseman, (2) comply with the provisions of law and the rules of the North Dakota Public Service Commission (Commission) relating to the storage and purchase of grain by a warehouseman, and (3) pay for all grain purchased and all sums for which the PRINCIPAL shall become liable to the holders of receipts, then this obligation shall be void, otherwise it shall remain in effect, provided, however, that this surety bond shall not accrue to the benefit of any person entering into a credit-sale with the PRINCIPAL." (Capitalization in original.) App.24.

STANDARD OF REVIEW

51. Brotens' appeal is based on questions of law. The North Dakota Supreme Court applies a *de novo* standard of review for questions of law. Clark v. Clark, 2006 ND 182, ¶25, 721 N.W.2d 6 (citing Oien v. Oien, 2005 ND 205, ¶8, 706 N.W.2d 81). When a statute is unambiguous, the Court does not afford deference to the interpretation of the agency administering the law. "Because the challenged statutes are unambiguous, we give no deference to the Commission's interpretation of them." Public Service Com'n v. Wimbledon Grain Co., 2003 ND 104, ¶28, 663 N.W.2d 186.

ARGUMENT

I. Chapter 60-04 Is a Remedial Statutes Intended to Protect North Dakota Farmers Holding Receipts and Must Be Interpreted Accordingly.

52. N.D.C.C. §60-04-03.1 provides that as trustee, the PSC is to implement the trust fund for the "*benefit of noncredit-sale receiptholders of the insolvent warehouseman.*" (Emphasis added.) N.D.C.C. §60-04-03 provides that the Court appoints the PSC as trustee "if it shall appear to the court that such *warehouseman is insolvent* within the meaning of this

chapter and that it would be for *the best interests of the receiptholders* that the commission secure and execute such trust ... ." (Emphasis added.) N.D.C.C. §60-04-04 mentions "*receiptholders*" or "*holders of receipts*" six times and it is clear that only receiptholders may apply to or receive payment from the trust. N.C.C.C. §60-04-06 states that although the PSC may bring actions in the name of the State of North Dakota against the insurers, bondholders, converters or a receiptholder receiving more than their fair share of grain, such actions are "*for the benefit of receiptholders*."

53. In keeping with North Dakota's agricultural origins, these laws derive from statutes that predate statehood. The predecessor agency of the PSC was known as the Railroad Commission, and it has had the obligation to supervise grain warehouses since 1887. *See,* ch. 139, 1887 Laws of Dakota Territory. Bonds on grain warehouses have been required since 1889. *See*, ch. 62, 1889 Laws of Dakota Territory. Insolvency statutes and protections for farmers have been in place since at least 1889. *Id.*

54. Over the years, a body of law has been developed that governs the grain trade in North Dakota. The legislative goal of these laws is to protect North Dakota farmers from the risks of non-payment for sold grain or the loss of stored grain. This principle is longstanding and has been announced in a number of Supreme Court cases interpreting ch. 60-02, ch. 60-04, ch. 60-02.1 and predecessor and parallel statutes. *See, e.g.,* Wimbledon Grain Co., 2003 ND 104, ¶21 ("[t]he law relating to grain insolvencies was intended for the benefit of claimants, and must be construed with sufficient liberality to effectuate the purpose of settling the legitimate demands of owners of grain delivered to an insolvent elevator ... ."); North Dakota Pub. Serv. Comm'n v. Central States Grain, Inc., 371 N.W.2d 767, 779 (N.D. 1985) ("We conclude that the trust fund exists for the

benefit of all unpaid sellers of grain regardless of whether they hold "cash slips" or "checks," and that the surety's liability under a warehouseman's bond extends to those unpaid sellers unless the unpaid seller had knowingly entered into a deferred payment contract or other credit arrangement within the meaning of §60-02-09(7), N.D.C.C. To limit the scope of the trust fund to the extent urged by [the bond company] would be inimical to the law's purpose of settling the legitimate demands of those producers who store or sell grain with an insolvent warehouseman."); North Dakota Pub. Serv. Comm'n v. Valley Farmers Bean Ass'n., 365 N.W.2d 528, 544 (N.D. 1985); Public Service Commission v. R.F. Gunkelman & Sons, Inc., 219 N.W.2d 853, 859 (N.D. 1974); State v. Hoover Grain Co., 248 N.W. 275, 278 (N.D. 1933) ("It is clearly the intent of the Legislature, however, that this law shall be comprehensive enough to settle the legitimate demands of owners of grain delivered to an insolvent elevator company, against those who have liability because of such grain – an insurance company in case grain is destroyed, a surety on a bond in case grain is not paid for, and those liable for the conversion of the grain. The law was intended for the benefit of the claimants, and must be construed with sufficient liberality to effectuate its purpose without doing injury to those who are liable.")

55. The combination of the explicit language of the ch. 60-04 governing the insolvency of grain warehouses that the trust is for the benefit of "receiptholders" and the body of case law developed over the years regarding the purposes of the grain licensing and insolvency laws make clear that ch. 60-04 must be interpreted for the benefit of farmers who have not been paid for their grain ("receiptholders"), not for the benefit of the bond company, insolvent warehouseman, or for ease of administration by the PSC.

II. Chapter 60-02 Governs Licensing and Operation of Grain Warehouses and Warehousemen.

56. The basic law governing Grain and Seed Warehouses and licensing of such warehouses is found in N.D.C.C. ch. 60-02. The PSC has the duty and power to exercise general supervision of the public warehouses in this state, investigate all complaints of fraud and injustice, unfair practices and unfair discrimination, examine and inspect the books, documents and records of licensed warehouses, require filing of reports, and to make all proper rules for carrying out and enforcing any law in this state regarding public warehouses. N.D.C.C. §60-02-03. This chapter also has provisions for resolving grain marketing disputes, and for testing grain for which disputes arise. N.D.C.C. §§60-02-05 and 60-02-05.1. Most pertinent to the present proceedings, this chapter contains requirements for obtaining a public warehouse license, and requirements for operation of a public warehouse. N.D.C.C. §§60-02-07 *et sequiem*. A licensed public warehouse may establish "a receiving station" subject to certain conditions. N.D.C.C. §60-02-07.2. Before a license is issued under this chapter, a warehouseman must file an approved bond related to the acts and omissions of the warehouseman. N.D.C.C. §60-02-09. This bond "is for the specific purpose of ... protecting the holders of outstanding receipts ... ." N.D.C.C. §60-02-09(6)(a).

57. Thus, N.D.C.C. ch. 60-02 covers the licensing of warehouses in North Dakota, and the requirements for warehousemen to acquire a license, as well as the procedures, rules and guidelines for these warehousemen to operate said warehouses including the necessary bond.

58. As pertinent to this case, there are several sections in ch. 60-02 that reference the bond, insolvency, or marshalling of assets. Nonetheless, it is clear that ch. 60-02 does not govern insolvencies.

59. N.D.C.C. §60-02-09(6) states that the bond shall be for the specific purpose of "[p]rotecting the holders of outstanding receipts" and for "[c]overing the costs incurred by the commission in the administration of chapter 60-04 in the event of the licensee's insolvency." These subsections merely note that the bond required for a warehouseman to receive a license will come into play for these purposes if there is an insolvency.

60. N.D.C.C. §60-02-09(3) states that the required bond shall "run to the state of North Dakota for the benefit of all persons storing or selling grain in such warehouse." This provision however, does not govern how the PSC shall conduct an insolvency action. Rather, it was adopted to "allow" individual receiptholders to sue the bonding company if the commission fails to seek or is refused appointment as trustee of the insolvent warehouseman." App.195. It does not supplant the specific procedures and rules that appear in ch. 60-04.

61. N.D.C.C. §60-02-25 states that "In the event of the failure or insolvency of the warehouseman, all the grain in the warehouse, whether the same is stored or not, first shall be applied at all times to the satisfaction of receipts issued by the warehouseman." In other words, an insolvent warehouseman must use grain in his warehouse to satisfy receipts he has issued.

62. N.D.C.C. §60-02-41 references "insolvency" along with fire, destruction of grain and other circumstances in which grain might not be returned to the owner storing grain. This section merely fixes the liability of a public warehouseman for outstanding unconverted

scale tickets or unpaid warehouse receipts. *See* Keating v. F.H. Peavy and Co. (State ex rel. Board of Railroad Commissioners, Intervener), 71 N.D. 517, 3 N.W.2d 104 (1942).

63. Finally, N.D.C.C. §60-02-44 also refers to insolvency, stating that when a warehouseman leases part of the physical structure of one of his warehouses, upon insolvency, the lessee or owner (under a condominium arrangement) will be treated the same as other valid grain receiptholders. Notably, this section also refers to ch. 60-04 as the active provision for creating a trust fund upon a warehouseman's insolvency.

64. With respect to the issues in this case, ch. 60-02 describes the law's requirements for specification of the location of the public warehouse(s) or receiving stations the warehouseman intends the bond to cover. In addition, it provides specific guidance on whether the face amount of the bond is to be aggregated if defaults occur in more than one licensing period. N.D.C.C. §60-02-09(8). (*See* discussion at Section VI, *infra*.)

65. Consequently, ch. 60-02 governed the process of Minnesota Grain, Inc's application for a license to operate a grain warehouse in North Dakota pursuant to N.D.C.C. §60-02-07 on September 10, 2001. App.156. It also governed the issuance of the Grain Warehouse license issued by the PSC on September 19, 2001. App.158. It also governed the operation of Minnesota Grain, Inc. during the period of its licensure.

66. However, on and after the date that Mr. Powell filed the complaint leading to the commencement of the insolvency proceeding, ch. 60-04 - not ch. 60-02 - governs the PSC with respect to the actions it must take as the trustee for the insolvent grain warehouseman. Chapter 60-02 does not govern an insolvency proceeding.

III. Chapter 60-04 is the Controlling Law that the PSC Must Follow in Administering the Estate of an Insolvent Grain Warehouseman.

67. Chapter 60-04 is titled "**Insolvent Grain Warehousemen**" and sets out the procedures and guidelines to be followed by the PSC when it discovers or is notified that a grain warehouseman has become insolvent. In this case, the PSC commenced the insolvency action after receipt of the written and oral complaints of Thomas G. Powell. App.3, Par.2.

68. Under N.D.C.C. §60-04-01(5), a public warehouseman "means the person owning or operating a public warehouse which is located *or doing business within* this state, whether such owner or operator resides within this state or not." (Emphasis supplied.) Here, the concurrent and coextensive roles of "warehouseman" and "licensee" and "Principal" are performed by Minnesota Grain, Inc. See Par. 8, 9, and 10 of this Brief. Minnesota Grain, Inc. did business in North Dakota not only from its location in Rhame, North Dakota, but also from its locations in East Grand Forks, Minnesota. See Par. 37 to 38, 41-48 of this Brief. Minnesota Grain, Inc. identified itself as the "elevator" and the Rhame, North Dakota location as a "Rhame, North Dakota Station." App.130[11].

69. When a licensee becomes "insolvent" as defined by N.D.C.C. §60-04-02, the PSC is to apply to the district court in a county in which the warehousemen operates a licensed warehouse for appointment as trustee of said warehouseman. N.D.C.C. §60-04-03. Here, the PSC applied to the District Court of Bowman County because that is where the Rhame facility and Mr. Powell were located. Docket 1.

[11] It is unclear whether the warehouseman, Minnesota Grain, Inc. intended the Rhame facility to be a receiving station under N.D.C.C. §60-02-07.2.

70. A trust fund consisting of up to eight categories of assets shall be established "for the benefit of noncredit-sale receiptholders" upon the insolvency. N.D.C.C. §60-04-03.1. One of these eight categories is "[t]he claims for relief and proceeds therefrom for damages upon any bond given by the warehouseman to ensure faithful performance of the duties of warehouseman." N.D.C.C. §60-04-03(4). In this case, the PSC asserts that the only asset of the insolvent estate is the bond. *See* Docket No. 22.

71. Upon being appointed as trustee the PSC must seek recovery of any grain to be included in the trust fund. N.D.C.C. §60-04-03.2. Here, the PSC asserts there is no grain. *See* Docket No. 22.

72. The surety on the warehouseman's bond must be joined as a party, and the court may order the surety to deposit the penal sum of the bond when "it appears in the best interests of the receiptholders." N.D.C.C. §60-04-03.3. Here, the PSC sought and the Court ordered that Hartford be joined in the insolvency action and that $100,000 be paid to the trust. App.5. Docket 6.

73. Upon its appointment, the PSC must cause notice of its appointment to be published. "The notices must require outstanding receiptholders to file their claims against the warehouseman with the commission along with the receipts or such other evidence of the claims as required by the Commission." Here, the PSC provided personal notice and published notice of the opportunity to file claims against "Minnesota Grain, Inc., Rhame, North Dakota." The warehouseman's actual name is "Minnesota Grain, Inc." App.156. Further, although PSC broadly invited submittal of "receipts or sufficient documentation" it did not provide a complete description of the documents that could fall within the meaning of "receipt" as defined in N.D.C.C. §60-04-01(6). Rather, the PSC stated that

claimants could provide "unsatisfied scale tickets, warehouse receipts, dishonored checks or related contracts."

74. The remaining provisions of ch. 60-04 relate to the powers, guidelines and responsibilities of the PSC once a grain dealer does become insolvent.

75. N.D.C.C. ch. 60-04 is the active chapter applicable to the rules and guidelines the PSC must follow when administering the estate of an insolvent grain warehouseman, and is thus aptly titled, "**Insolvent Grain Warehousemen**."

76. Although, as described above at Par. 57 to 63, there are some references to ch. 60-04 in the rules warehousemen must follow under ch. 60-02, it is nonetheless ch. 60-04 that controls the proceedings once the PSC is notified that a grain warehouseman has become insolvent. Chapter 60-02 is important to the arguments, in Section VI, regarding the aggregation of bond amounts, and indeed, there is some overlap in terms of the language and definitions used in these two chapters, and in the issues covered. It could not be clearer, however, that any ambiguities caused by tension between these two chapters must be resolved in favor of the law controlling these proceedings, which is ch. 60-04.

IV. Brotens are "Receiptholders" as Defined by Chapter 60-04 Who Are Entitled to Protections of Chapter 60-04.

77. Brotens concede that there is some language in ch. 60-02 that superficially appears to create tension when they are compared with the provisions in ch. 60-04 dealing with insolvent grain warehousemen. For example, N.D.C.C. §60-02-09(3) states that the bond filed by a warehouseman in order to get his license shall "[r]un to the state of North Dakota for the *benefit of all persons storing or selling grain in such warehouse.*" (Emphasis added.) Additionally, N.D.C.C. §60-02-09(5) states that said bond shall "[s]pecify the location of each public warehouse intended to be covered by such bond."

78. It is a basic principle of the interpretation of North Dakota laws that a particular provision in a statute controls over a conflicting general statute. N.D.C.C. §1-02-07. Thus, in the event of any conflict between the two sections in an insolvency, the provisions of ch. 60-04 must control.

79. The statutory scheme in ch. 60-04 is specifically designed to govern an insolvency of a grain warehouseman, through a warehouse doing business within North Dakota, and is specifically designed for the protection of North Dakota farmers who are "holders of outstanding receipts." Brotens fall squarely under the protection of ch. 60-04. They are "holders of receipts" from Minnesota Grain, Inc. and Minnesota Grain, Inc. is identified as the "warehouseman" with a warehouse that "did business in the state" by purchasing barley from the Brotens at their farm near Dazey. Thus, they fall squarely within the protection of ch. 60-04.

80. The PSC appears to have fashioned an implicit exception for certain claimants where the grain is sold to a warehouseman licensed in North Dakota, the claimant is unpaid and has valid receipts but the grain purchased by that warehouseman from that farmer is shipped out of state. The origin of this theory does not emanate from ch. 60-04. It appears to be based on extrapolations from several of the more general provisions found in ch. 60-02 regarding the location of a warehouse or stating that the bond is for the benefit of persons who sell or store grain "in" a warehouse. The delivery point of the grain appears to be the determinative factor to the PSC. Indeed, the Appendix to the Recommendation of the PSC spells out the specific reason for denying these claims: "DENIED: EGF delivery." App.10. There is no explicit statutory basis for this extrapolated exemption in ch. 60-04.

81. This implicit point-of-delivery exception conflicts with several explicit provisions of ch. 60-04. First, a warehouseman must be licensed if it is "the person operating a public warehouse which is located *or* doing business within this state." (Emphasis added.) N.D.C.C. §60-04-01(5). In interpreting a statute, words are to be understood in their ordinary sense. N.D.C.C. §1-02-02. As stated by this Court in State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, ¶14, 712 N.W.2d 828:

> The word "or" is disjunctive in nature and ordinarily indicates an alternative between different things or actions ... . Terms or phrases separated by "or" have separate and independent significance ..... .

82. It cannot be denied that Minnesota Grain, Inc.'s East Grand Forks facility was "doing business in the state" by the type of grain purchase transactions described in Brotens' Affidavit. App.12-14. The PSC is ignoring the phrase "doing business in the state" and the incontrovertible evidence that Minnesota Grain, Inc., through its East Grand Forks facility did business in North Dakota when it called Jim Broten and purchased Brotens' barley at their farm near Dazey.

83. If a warehouse always had to be located in this state to fall under Ch. 60-04, the language "or doing business in this state" would be nonsensical.

84. The provisions of ch. 60-04 contain only two explicit exceptions in which a "receiptholder" would not have coverage from the trust fund. These two exceptions are credit sale contracts and claims that are untimely. Here, it is uncontested that the PSC treated the Brotens' claims as non-credit sale transactions and that the claims were timely filed. Neither exception applies to the facts here.

85. There simply is no exemption within ch. 60-04 regarding an exclusion for receipts based upon grain delivered out of state. Moreover, the fact that the PSC paid claims from other

sales where delivery was made out of state, or payment was made out of state, or "Rhame" did business from an East Grand Forks address, further undercuts the validity of the purported exclusion. *See* discussion of valid claims based in whole or in part on receipts referencing the East Grand Forks address of Minnesota Grain, Inc. at Par. 41-48 of this Brief.

86. The fact that the bond references a facility in Rhame, North Dakota does not mean grain delivered at the warehouseman's request to its facility in East Grand Forks is not entitled to payment from the trust fund established by the PSC pursuant to N.D.C.C. §60-04-03.1.

87. In the Report and Recommendation of Trustee, the PSC states, in paragraph 8:

> The Commission recommends that the five claims in the total amount of $467,920.69 for grain purchased by Minnesota Grain, Inc. through its East Grand Forks, Minnesota [facility] for delivery to East Grand Forks, Minnesota be denied. Claims for purchases of grain made by Minnesota Grain, Inc. through its East Grand Forks, Minnesota facility are Minnesota transactions that must be submitted to the Minnesota Department of Agriculture to be determined under Minnesota law. The surety bond on file with the Commission covers only grain purchases made by Minnesota Grain, Inc. through its Rhame, North Dakota facility licensed under North Dakota law. (App.4-5.)

88. In a March 28, 2008 letter to Mike Dahlen, the PSC asserts that the PSC does not have "jurisdiction" when grain is delivered to grain facilities in other states. This position is simply without any basis within ch. 60-04 when the sale is made by a licensed warehouseman. App.113.

89. The title of ch. 60-04 is "Insolvent Grain *Warehousemen,*" not "Insolvent Grain *Warehouses*." As discussed *supra*, "public warehouseman" is defined by law as meaning "the person owning or operating a public warehouse which is located or doing business

within this state, whether such owner or operator resides within this state or not." N.D.C.C. §60-04-01(5) (emphasis added).

90. As shown by the Affidavit of Jim Broten (App.12-14), Jim Broten, Broten Farms (Jim Broten and his wife Patricia Broten) and son Eric Broten are residents of North Dakota who have their places of business and residences on a farm near Dazey, North Dakota. They raise various crops, including the barley sold to Minnesota Grain, Inc. The "subject of the contract" was the barley grown, harvested and stored on Broten's farm. The price, delivery times and volume of grain shipped were negotiated over the telephone between agents of Minnesota Grain, Inc. and Jim Broten who was at his North Dakota farm. Broten had in the past done business with Minnesota Grain, Inc. and, in addition, has been very active in the North Dakota Barley Council and was widely known as a barley grower. The initial contacts on these sales were made by Minnesota Grain, Inc. via telephone calls made to Broten in North Dakota. Minnesota Grain, Inc. at first picked up some of the grain with its own trucks on Broten's farm, but after June of 2006 requested assistance of Broten and the use of Broten's trucks and truckers to have the barley delivered.

91. Thus, Minnesota Grain, Inc. is a public warehouseman subject to North Dakota law, which owns and operates two public warehouses, one located in Rhame, North Dakota, and the other located in East Grand Forks but doing business in North Dakota.

92. The argument made by the PSC that Broten's transactions were Minnesota transactions and are therefore not entitled the protections of ch. 60-04 is without merit according to the plain language of the law.

V. Brotens Are Noncredit-Sale Receiptholders of Minnesota Grain, Inc. for Whose Benefit the Trust Was Established.

93. The next question is whether Brotens, under N.D.C.C. §60-04-03.1, are among the category of "noncredit-sale receiptholders of the insolvent warehouseman" for whose benefit the trust fund has been established.

94. "Receipts" are defined by law as meaning "grain warehouse receipts, scale tickets, checks, or other memoranda given by a public warehouseman for, or as evidence of, the receipt, storage, or sale of grain except when such memoranda was received as a result of a credit-sale contract." N.D.C.C. §60-04-01(6) (emphasis added).

95. The definition of "receipts" is very broad, and covers essentially any memoranda that is evidence of a sale of grain. By use of the word "or" it is clear that a sale of grain can be made without the necessity of receipt and storage of grain at a facility. FreeEats.com, Inc., 2006 ND 84, ¶14. Notably, there is an exception for credit-sale contracts, but there is no exception for grain delivered to a warehouse doing business in but not located in North Dakota. The receipts held by Brotens fall into this broad definition, and they have been offered as evidence in the present proceedings. App.216 (Bates No. 100289-100420). They are similar and in some cases identical to the documents accepted by the PSC for other claimants who were deemed eligible for partial payment from the trust fund. *See*, Par. 41-46, *supra*. Thus, the Broten's are "receiptholders" as referred to in ch. 60-04.

96. There is nothing in the definitions of "public warehouse", "public warehouseman", or "receipts" that requires a public warehouse to be physically located in North Dakota in order for a receiptholder to be entitled to payment from a warehouseman for an outstanding receipt. Minnesota Grain, Inc.'s East Grand Forks warehouse was doing

business in North Dakota, and Minnesota Grain, Inc. is clearly an insolvent grain warehouseman subject to the provisions found in ch. 60-04 which are supposed to be administered by the PSC for the benefit of North Dakota's farmers.

97. As noted, Broten concedes that language in the licensing provisions found in ch. 60-02 refers to the location being specified in the bond required for a license, and the bond at issue herein specifies a public warehouse at Rhame, North Dakota. According to N.D.C.C. §60-02-09 (final paragraph, emphasis added), "[o]ne bond only shall be given for any line of elevators, mills, or warehouses, owned, controlled, or operated by one individual, firm, corporation, or limited liability company, and such bond shall be construed to cover such elevators, mills, or warehouses, as a whole and not a specific amount for each." Thus, the bond covers the entire line of Minnesota Grain, Inc. public warehouses and any receiving stations located in the state. Regardless, it should be again noted here that ch. 60-04 applies to any "public warehouseman," which means any "person owning or operating a public warehouse which is located or doing business within this state, whether such owner or operator resides within this state or not." N.D.C.C. §60-04-01(5) (emphasis added), and the bond should cover the unpaid receipts of this warehouseman upon insolvency.

98. Further, N.D.C.C. §60-04-03.1(4) states that "the trust fund must consist of...any bond given by the warehouseman to ensure faithful performance of the duties of the warehouseman."

99. The language of the bond (which is on a form prepared by the PSC) reinforces this conclusion. The third condition is that the warehouseman "pay for all grain purchased and all sums for which the PRINCIPAL shall become liable ... ." App.24. There is no

exclusion for grain purchased by the warehouseman in North Dakota from a North Dakota farmer but delivered out of state. A plain language reading of "All grain purchased" and "all sums for which [a warehouseman] shall become liable" includes grain purchased and sums owed as to grain delivered out of state, as well as grain delivered to a facility in North Dakota. The narrow interpretation of the PSC espoused in this insolvency that grain delivered outside the state falls outside the benefits of the trust fund and bond is antithetical to the broad language in the bond drafted by the PSC.[12]

100. Putting aside what could be interpreted as ambiguous provisions in ch. 60-02, the controlling law in ch. 60-04 is clear. In the instant case, there is a line of grain warehouses operated by a single grain warehouseman. That grain warehouseman has become insolvent, and a trust fund has been created for the benefit of all noncredit-sale receiptholders of that warehouseman under N.D.C.C. §60-04-03.1. That grain warehouseman owns and operates one public warehouse which is located in and does business in North Dakota, and one public warehouse that does business within North Dakota. Brotens hold outstanding receipts from this warehouseman, and are entitled to be paid from this trust fund under ch. 60-04.

[12] The costs of transportation render it unlikely that much grain storage would be done at warehouses that are at any distance from the farm of a North Dakota grower. Most farmers will haul their grain to a warehouse near their farm, and there are many warehouses scattered throughout the state. It would be uncommon for a warehouse from another state (apart from a border state like Minnesota) to do business in North Dakota without a physical location of some type. It would sound ludicrous for a grain warehouse in Iowa, for instance, to expend resources to try to get a farmer from western North Dakota to haul grain to its warehouse. However, when a warehouseman is licensed in North Dakota, it is not at all surprising that it may from time to time direct delivery to its locations out of state that can provide specialized services such as milling or pearling barley.

VI. The Correct Amount Payable by the Surety to the Trust is $200,000 Because the Bond Aggregates in Each Year There is a Loss.

101. In North Dakota, the general rule is that where the state sets up an annual licensing system, and requires a bond for the protection of the public, the bonds must be construed as giving protection for their full face amount for each year that they are in force and any provision in the bond attempting to limit this liability is a nullity. Giese v. Engelhardt, 175 N.W.2d 578, 586 (N.D. 1970). Thus, a $5000 bond in effect for five years may result in a liability of $25,000. *Id.* This principle has been recognized in other cases and jurisdictions. *See, e.g.,* St. Paul Ins. v. Fireman's Fund Am. Ins. Co., 245 N.W.2d 209, 215 (Minn. 1976) (citing Giese), In re Endeco, Inc., 718 F.2d 879, (8th Cir. 1983) (citing Giese).

102. Minnesota Grain, Inc.'s bond with Hartford has been in place for approximately four and half years, starting on August 8, 2002 (when Hartford's bond replaced American Casualty Company's bond). Between August 8, 2002 and January 21, 2003 it was issued in the amount of $75,000, and thereafter has been $100,000. App.24, 25. Grain warehouse licenses expire on July 31 of each year. N.D.C.C. §60-02-07. They must be renewed annually. *Id.* Minnesota Grain, Inc.'s "annual license renewal period" was August 1 to July 31. *Id.* Minnesota Grain, Inc. was continually licensed from August 2002. It was licensed from August 1, 2005 through July 31, 2006 and renewed its license on July 14, 2006 for the year August 1, 2006 to July 31, 2007. App.120.

103. Given this duration of licensure and bonding, under the general rule as described in Giese, the bond would be $500,000 representing five successive annual licensing periods. However, the general rule has been modified in N.D.C.C. §60-02-09(8) which provides: "In no event shall the aggregate liability of the surety under a bond 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." (Emphasis added.) This means that the bond liability is not "stacked" in years without losses, but there is bond liability "for losses during any annual license period." In other words, each license period during which a loss occurs is covered by the face amount of the bond and such bond amounts are to be used to meet losses during that license period. (Because this is a penal bond, the cap to be paid is only actual losses up to the face amount of the bond.)

104. The PSC has requested only $100,000 from Hartford and this determination was upheld by the Court. App.4 (Par. 4) and App.16, 21. This is incorrect.

105. As shown by the full insolvency record of the PSC set forth in the disc attached at App.216, it is clear that losses occurred over at least two license periods. See discussion at Par. 12 to 15 above. For Broten and a number of other claimants, Minnesota Grain *initially violated* state law by failing to pay for grain sold[13] during the license period from July 31, 2005 to July 31, 2006, and Minnesota Grain, Inc. *again violated* state law and had losses by not paying for the grain between August 1, 2006 and the date of the appointment of the PSC as trustee for the insolvent estate. Thus, there are at least two separate license renewal periods during which there was a $100,000 bond is place to cover for losses.

[13] When grain is delivered to a public warehouse, a scale ticket is issued. It must be converted into cash within 30 days, unless a credit sale contract is executed or the grain is put into storage. N.D.C.C. §60-02-11.

106. Application of the plain language of the statute results in the determination that there should be $200,000 available in bond proceeds for the benefit of claimants who hold outstanding receipts.

107. It is obvious that the PSC did not discover the extent of the insolvency of Minnesota Grain, Inc. until a considerable time after it in fact became insolvent. See Par. 12 to 17 above. Under like circumstances, the Minnesota Supreme Court in St. Paul Ins. v. Fireman's Fund Am. Ins. Co., 245 N.W.2d 209, 215 (Minn. 1976), noted that restricting the payment of the bond to one year simply because the default was not discovered by the appropriate regulatory body on a timely basis is illogical. "The statutory purpose for each statutory warehouse bond is to protect, up to its stated limits, the public from sustaining a loss because of the defaults of the warehouseman which occur during that bonding period. This protection should not be destroyed merely because the warehouseman's defaults were not discovered until after that bonding period." The same holds true here. Intended beneficiaries of the trust like the Brotens should not be penalized because the PSC did not recognize until quite late in the game that Minnesota Grain, Inc. was insolvent.

108. Even if, *arguendo*, N.D.C.C. §60-02-09(8) were ambiguous, the application of the various considerations listed in N.D.C.C. §1-02-39, **Aids in construction of ambiguous statutes**, compel a determination that the appropriate amount of the bond is $200,000.

109. The "object sought to be obtained" by the law in ch. 60-04 is the payment of claims of "noncredit-sale receiptholders" for whose benefit the trust is established. In construing the statute's bond coverage, the overarching principal to be kept in mind is that the purpose of this statute and this statutory bond is remedial. Any ambiguity must be

resolved in favor of coverage and protection of claimants whose interests the bond is to protect. *See, e.g.,* State for Use and Benefit of First Am. Bank & Trust Co. v. General Ins. Co. of America, 179 N.W.2d 123, 126 (N.D. 1970) ("In any case, since our rule of statutory construction requires that our statutes be liberally construed with a view to effecting their objectives, and, as the bond in this case is a statutory bond, the bond, as well as the statute, must be liberally construed with a view to effecting its objectives.") *See also,* CJS PRINCSURTY §91, "Ambiguous language ordinarily will be construed against the surety, if it is employed by him or her, and in favor of those intended to be benefited by the protection of the bond." (Internal footnotes omitted.) Since only a small fraction of the recognized claims have been paid from the $100,000 made available without consideration of Brotens claims, this consideration is especially supportive of Brotens' position.

110. Two additional considerations that may be considered if §60-02-09(8) is ambiguous are the former statutory provisions and the legislative history. These considerations also support Brotens' interpretation.

111. Prior to 1983, the language of N.D.C.C. §60-02-09(8) read as follows:

> In no event shall the aggregate liability of the surety under a bond accumulate for each successive annual license renewal period during which such bond is in force but shall be limited in the aggregate to the bond amount stated or changed by appropriate endorsement or rider.

App.161.

112. In 1983, the Legislature passed a comprehensive overhaul of the statute to enhance protection to farmers. *See,* App.159-204. This legislative history was submitted to the court as Exhibit E to Brotens' "Supplemental Brief ... in Support of a $200,000 Bond".

Docket 35 and 40. The language of N.D.C.C. §60-02-09(8), after the 1983 amendment, is as follows:

> In no event shall the aggregate liability of the surety under a bond 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. (Emphasis added to show new language.)

App.161. See also App.172 and App.186-187 (new language added by Agriculture Committee).

113. The insertion of the italicized language in 1983 meant that the meaning was changed. "Statutes must be construed as a whole and harmonized to give meaning to related provisions, and are interpreted in context to give meaning and effect to every word, phrase, and sentence." Wimbledon Grain Co., 2003 ND 104, ¶21. Further, "[t]he law neither does nor requires idle acts, and [courts] will not assume that any statutory language was intended to be useless rhetoric." Blackburn, Nickels & Smith, Inc. v. National Farmers Union Property & Cass. Co., 452 N.W.2d 319, 322 (N.D. 1990). The insertion of the new phrase "for losses during any annual license period" is treated as simply "useless rhetoric" by the PSC. Brotens' interpretation that if losses are suffered in two separate licensing periods there is an aggregation for those two periods is the only rational interpretation of the amendment that does not make the amendment mere surplusage.

114. The legislative history also shows that the 1983 amendments were intended to "require the Commission to set the bond requirements at a level to accomplish" the purposes of the 1983 amendments. App.195. These purposes included "protecting the holders of outstanding receipts" N.D.C.C. §60-02-06(a). Thus, the considerations of prior statutory

language and the legislative history are supportive of Brotens' position that there should be a $200,000 bond.

115. A fourth factor to be considered under N.D.C.C. §1-02-39 is the administrative construction of the statute. In this case, the PSC's interpretation and subsequent request for only $100,000 is inconsistent with the intent and purposes of the statute, and also with the new language added in 1983. Because the PSC's interpretation of the statute ignores the insertion of new language added by the 1983 amendment to N.D.C.C. §60-02-09(8), its interpretation is not persuasive. *See*, Western Gas Resources, Inc. v. Heitkamp, 489 N.W.2d 869, 872 (N.D. 1992).

116. The consequences of a particular construction can also be considered under N.D.C.C. §1-02-39. If Brotens' interpretation is adopted, the result may influence better and more timely monitoring of the fiscal soundness of warehousemen by sureties so as to reduce it's the surety's potential liability. While this may require more attention by sureties, the result would be that the insolvency of a warehousemen might be detected earlier and losses to North Dakota farmers averted. Further, the burden of reviewing the warehouseman's fiscal soundness is more appropriately placed on bond companies than on farmers. Much of the data regarding purchases by licensed warehouses is categorized as exempt from public disclosure. *See* N.D.C.C. §60-02-04 (information on grain handled by a warehouse is "confidential trade secret"). Farmers are not in a strong position to review the solvency of any licensed warehouse because they lack access to data and reports that can be obtained by the surety.

117. And, should such monitoring disclose significant concerns about solvency, a surety could reduce its future exposure to risk by providing timely notice of bond cancellation to the

PSC. The 1983 Legislature also added N.D.C.C. §60-02-09.1, which provides that a "surety on a bond shall be released from all future liability accruing on the bond after the expiration of ninety days from the date of receipt by the commission of notice of cancellation by the surety." App.195-96. *See also*, App.31 (cancellation of bond by Hartford.) Thus, any concerns by sureties on bond aggregations can be addressed by monitoring the principals and canceling the bond when a risk of insolvency is discovered.

CONCLUSION

118. Chapter 60-04 controls this insolvency proceeding. Minnesota Grain, Inc. is an insolvent warehouseman that has purchased grain from the Brotens and is liable to them for the payment of that grain. The Brotens are holders of receipts, within the meaning of ch. 60-04, and are among the intended beneficiaries of the trust established pursuant to the insolvency. Accordingly, the PSC and the Trial Court erred by deeming the Brotens ineligible for the protection of the trust fund and the decision below must be reversed.

119. Further, the PSC's Report and Recommendation and the Order of the trial court that Hartford need pay only $100,000 in bond proceeds must be reversed. Hartford must be directed to provide $100,000 for each of two licensing periods because the insolvency records of the PSC show there are two licensing periods in which losses to receiptholders occurred. N.D.C.C. §60-02-09(8) requires payment of the face amount of the bond for "any" licensing period during which losses occurred. The minimum amount of bond proceeds for distribution to the claimants is $200,000.

Word Count: 10,473

Dated this 21st day of April, 2008.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 20080068
Bowman County District Court No.: 06-07-C-18-1
PSC Case No.: GE-07-99

The following document was electronically served on this date to John J. McDonald and Joel Wiegert of Meagher & Geer, P.L.L.P. at jwiegert@meagher.com and William W. Binek at wbinek@nd.gov.

Appellants' Brief

The above-noted document was also served by U.S. Mail on this date to:

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A copy of the Appellants' Appendix was served by U.S. Mail on this date to:

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