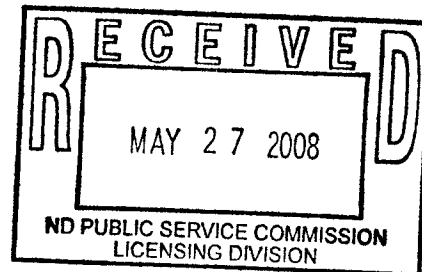


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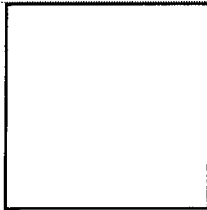
Re: Public Service Commission v. Minnesota Grain, Inc., and Hartford Fire Insurance Co.,
Jim Broten, Eric Broten, and Broten Farms
Supreme Court Case No. 20080068
Bowman County District Court No.: 06-07-C-18-1
PSC Case No.: GE-07-99

Dear Clerk of Court:

On behalf of Hartford Fire Insurance Company, please find the attached Appellee Brief. A check in the amount of \$28.50 is being deposited in tomorrow's mail to cover the cost of the electronic filing. Thank you.

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134 GE-07-99 Filed: 5/27/2008 Pages: 30
Appellee Brief



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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

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.

BRIEF OF APPELLEE HARTFORD FIRE INSURANCE COMPANY

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

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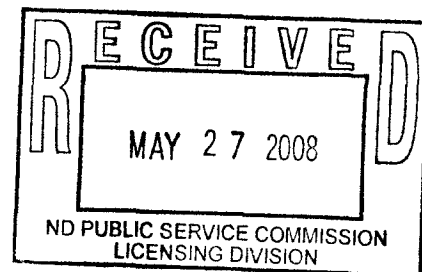


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STATEMENT OF ISSUES

- I. Hartford Fire acted as surety on a Grain Elevator Warehouse Bond covering a warehouse operated by Minnesota Grain located in Rhame, North Dakota. Minnesota Grain's obligation to the Brotens was not incurred at or through the operation of its Rhame warehouse, nor did the Brotens receive scale tickets or other receipts with the Rhame warehouse designation. Does the Grain Elevator Warehouse Bond at issue here apply to such transactions?

- II. The Grain Elevator Warehouse Bond carries a penal sum of \$100,000. The Bond and applicable statute provide that in no event shall the aggregate liability of the surety accumulate for each successive annual license renewal period during which the Bond is in force but, for losses during any annual license renewal period, shall be limited in the aggregate to the stated Bond amount. Can the Bond amount be aggregated to provide more than \$100,000?

STATEMENT OF THE CASE

1. This matter involves the sufficiency of the Public Service Commission's ("PSC") Report and Recommendation arising out of the insolvency of Minnesota Grain, Inc.'s Rhame, North Dakota warehouse and the application of the statutory Grain Elevator Warehouse Bond to that insolvency. The PSC filed its Report and Recommendation around June 27, 2007, which among other things, excluded transactions that were not at or through the Rhame, North Dakota warehouse. Jim Broten, Eric Broten, and Broten Farms (collectively the "Brotens") objected to the Report and Recommendation, arguing their transactions at or through a warehouse Minnesota Grain operated in East Grand Forks, Minnesota entitled them to the trust fund assets marshaled by the PSC in connection with Minnesota Grain's Rhame, North Dakota warehouse. The Brotens further argued the Grain Elevator Warehouse Bond covering the Rhame warehouse, issued by Hartford Fire, also provided payment beyond its \$100,000 penal sum. After briefing by the PSC, Brotens, Hartford Fire and *amicus curiae* briefs filed the North Dakota Grain Dealer's

Association, the Bowman County District Court, Judge Allan Schmalenberger presiding, approved the PSC's Report and Recommendation and held the Brotens were not eligible for distribution of the trust fund assets in light of their transactions with the East Grand Forks, Minnesota warehouse, and further held the Bond was limited to the \$100,000 penal sum. This appeal followed.

STATEMENT OF THE FACTS

2. Minnesota Grain, Inc. was a Minnesota corporation authorized to do business in North Dakota, and operated a grain warehouse at Rhame, North Dakota. (App. at 3). On March 12, 2007, the Public Service Commission received a telephone call from a farmer advising that he had been unable to receive payment for grain delivered to Minnesota Grain, Inc. (*Id.*) The next day, the PSC received a letter from the farmer requesting the PSC's assistance in collecting the money owed. (*Id.*) Thereafter, on March 16, 2007, the PSC applied to the Bowman County District Court for an Order finding Minnesota Grain, Inc. insolvent, appointing the PSC as trustee of the Minnesota Grain, Inc. estate, and joining Hartford Fire Insurance Company, as the surety, as a respondent in the action. (*Id.*)

3. On March 16, 2007, Grain Elevator Warehouse Bond No. 41BSBBL3293, was on file with the PSC (the "Bond"). (App. at 4; 24). The Bond, required by N.D.C.C § 60-02-09, identifies Minnesota Grain, Inc. as the Principal, and Hartford Fire Insurance Company as Surety. (App. at 24). On March 16, 2007, the penal sum on the Bond was \$100,000. (App. at 25). In relevant part, the Bond reads as follows:

The PRINCIPAL is the operator of a public warehouse(s) doing business in North Dakota. The warehouse(s) operated by the PRINCIPAL is(are) located as follows: #1 HIGHWAY 12, RHAME, ND 58651. The warehouse(s)

described above is(are) to be operated pursuant to the law for receiving grain for buying, selling, storing, or shipping for compensation. The surety bond shall cover the warehouse(s) operated by the PRINCIPAL as a whole and not a specific amount for each.

The condition of this obligation is as follows: 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 contract with the PRINCIPAL.

Liability for this undertaking commences on AUGUST 8, 2002, and shall be continuous unless the SURETY by certified mail notifies the PRINCIPAL and the Commission that the surety bond has been cancelled. The cancellation notice shall state that the surety bond will be cancelled ninety (90) days after the receipt of the cancellation notice or on a later date specified by the SURETY. In no event shall the aggregate liability of the SURETY accumulate for each successive annual license renewal period during which the 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.

* * *

This bond, including definitions of the terms used herein, is governed by the provisions of Chapters 60-02 and 60-04 of the North Dakota Century Code.

(App. at 24).

4. On April 9, 2007, the Bowman County District Court declared Minnesota Grain, Inc. insolvent and appointed the PSC trustee of the estate. (App. at 4). Hartford Fire was joined as a respondent in the action. Notice of appointment as trustee and notice to file claims was published by the PSC on April 20 and April 27, 2007, and was sent by regular mail to those persons the PSC identified from Minnesota Grain, Inc.'s records as potential claimants. (*Id.*). Of those claims filed with the PSC, five were for grain purchased by Minnesota Grain, Inc. through its East Grand Forks, Minnesota facility for delivery to

East Grand Forks. (*Id.*). On June 27, 2007, the PSC filed its Report and Recommendation, and recommended the transactions through the East Grand Forks warehouse, which included the Brotens' claims, be denied, stating

[c]laims 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. at 4-5). The PSC recommended the other claims be deemed valid. (App. at 5).

5. The PSC advised in its Report and Recommendation that there were no grain assets in the estate. (*Id.*). Further, it stated the surety bond in the amount of \$100,000 was needed to redeem the outstanding claims for grain purchased for cash by Minnesota Grain, Inc. through its Rhame, North Dakota facility. (*Id.*).
6. On or around August 7, 2007, the Brotens filed an objection to approval and adoption of the Report and Recommendation, contesting the PSC's position that their transactions were "Minnesota transactions" and the Bond was limited to the \$100,000 penal sum. (Docket no. 19). Briefing by the PSC, Hartford Fire, as well as the North Dakota Grain Dealers' Association as *amicus curiae*, followed, each supporting the PSC's position.
7. On January 4, 2008, the Bowman County District Court issued a Memorandum approving the PSC's Report and Recommendation, and requiring Hartford Fire to pay to the trustee the amount of \$100,000. (App. at 18). The Order was executed by the Court on January 23, 2008, and duly entered on January 24, 2008. (App. at 15). This appeal followed.

STANDARD OF REVIEW

8. Application and interpretation of statutes are questions of law. *See Olson v. Workforce Safety & Ins.*, 2008 ND 59, ¶ 9, 747 N.W.2d 71 (N.D. 2008). Interpretation of a contract is also a question of law. *See Langer v. Bartholomay*, 745 N.W.2d 649, 655 (N.D. 2008). Questions of law are reviewed de novo. *See Rojas v. Workforce Safety & Ins.*, 2006 ND 221, ¶ 13, 723 N.W.2d 403.

ARGUMENT

9. Although Hartford Fire’s brief likely focuses more directly on the Bond itself, and while the PSC and Hartford Fire may frame the issues slightly different, their positions are aligned. N.D.C.C. §§ 60-02 and 60-04 are unambiguous, and a plain reading of their application, as well as the plain language of the Bond, make clear the Brotens’ transactions with the East Grand Forks, Minnesota warehouse—albeit owned by Minnesota Grain, Inc.—are not covered transactions under the Bond, or transactions within the PSC’s jurisdiction. Secondary to the failure of the Brotens’ claim is their demand that the surety’s liability under the Bond be aggregated. This assumes, of course, that the Bond applies to the Brotens’ claims. As set forth below, North Dakota statutory and case law are clear that in this matter only \$100,000 is available under the Bond, and that \$100,000 applies only to those transactions that took place at or through the Rhame, North Dakota warehouse.

- I. The Bond applies only to those transactions at or through the Rhame, ND warehouse**
- A. The location of each warehouse intended to be covered by the Bond must be specified in the Bond**

10. Section 60-02-09 of the North Dakota Century Code requires that any public warehouseman operating in North Dakota must file a bond with the PSC before the warehouseman will be issued a license.¹ The bond is statutory, and the North Dakota Legislature has placed several requirements on its content. For example, the bond must be “continuous,” “[r]un to the state of North Dakota for the benefit of all persons storing or selling grain in such warehouse,” “[s]pecify the location of each public warehouse intended to be covered,” and be for the “specific purpose of: [p]rotecting the holders of outstanding receipts.” *See, e.g.*, N.D.C.C. § 60-02-09(2), (3), (5) & (6), respectively.

11. The Bond at issue in this matter does not cover the activities of the principal, Minnesota Grain, Inc., but rather, the obligations of the principal incurred through the operation of its public warehouse doing business in North Dakota. The language in the Bond itself is unequivocal in this regard:

The PRINCIPAL is the operator of a public warehouse doing business in North Dakota. The warehouse operated by the PRINCIPAL is located as follows: #1 Highway 12, Rhame, ND 58651. *The warehouse described above is to be operated pursuant to the law for receiving grain for buying, selling, storing, or shipping for compensation. The surety bond shall cover the warehouse operated by the PRINCIPAL as a whole and not a specific amount for each.*

(*See App. at 24*) (emphasis added) (plural variations omitted).

12. To avoid the unambiguous language in the Bond and statute, the Brotens employ a “tunnel-vision” strategy in an attempt to incorporate ambiguities and purported contrasting requirements, arguing the last paragraph of the statute somehow provides “the bond covers the entire line of Minnesota Grain, Inc. public warehouses and any receiving stations located in the state.” (Appellants’ Br. at 27). But reading the statute as a whole

¹ Pursuant to N.D.R.App.P. 28(g), § 60-02-09 is reproduced in the addendum to this Brief.

quickly destroys such attempts. The argument contradicts North Dakota's long-standing law with respect to the statutory bonds covering warehouses:

It is not the intent of the Bond, in the instant case, to cover all of the elevators and warehouses owned and operated by the Wheat Growers Company, for this corporation had another line of elevators, which were bonded in another surety company, *and, of course, the Bond in the instant case covers only the warehouses described.*

Larkin v. Wheat Growers' Warehouse Co., 249 N.W. 718, 720-21 (N.D. 1933) (emphasis added). It is irrelevant that the principal may operate other lines of warehouses. What matters, for purposes of the Bond, are those specifically warehouses described in the Bond.

13. The Brotens' interpretation not only ignores the plain language of the Bond, but also the statutory requirement that the Bond "[s]pecify the location of each public warehouse *intended to be covered by such bond.*" N.D.C.C. § 60-02-09(5). Subsection 5 makes it clear that it is the principal's activities at or through the specified warehouse, not simply the principal, that is covered under the Bond. If the Bond merely covered the principal's activities there would be no need to identify the location of any public warehouse; rather, the bond need simply be issued in the name of the principal. But this is not a fidelity bond, it is a surety bond, and it is the principal's obligations arising out of the activities at or through the specified warehouse that are covered.² The transactions

² Further support that the Bond covers only the activities at or through the specified warehouse(s), and not the principal as a whole, is the fact the amount of coverage North Dakota requires under the Bond is determined by the grain storage capacity licensed by the licensee *in the state*, and the capacity of each warehouse, etc., must be specifically identified. *See* N.D. Admin. Code § 69-07-02-02. The amount of the Bond is based on the physical capacity of the Rhame, ND facility, and does not take into account the East Grand Forks facility.

involving the Brotens' grain did not take place at or through the Rhame, North Dakota warehouse specified in the Bond.

14. The holding in *PSC v. Valley Farmers Bean Ass'n* lends further support as to why the Bond does not apply to the Brotens' transactions. In *Valley Farmers* the principal operated three elevators which were bonded by the surety (Millers) under three separate bonds. See *PSC v. Valley Farmers Bean Ass'n*, 365 N.W.2d 528, 547 (N.D. 1985). The principal also accepted deliveries at two additional warehouses that were not covered under any bond issued by Millers. See *id.* However, producers that made deliveries to the two additional locations received scale tickets that had printed on them warehouse designations of the bonded elevators. See *id.* This Court concluded “that a surety is responsible for the obligations of the warehouseman incurred *through the operation of its warehouse* regardless of where the physical acceptance and control of the grain took place.” *Id.* (Emphasis added). As such, producers who delivered to locations other than the bonded warehouses, “*but who received scale tickets with a warehouse designation [that was bonded]*, have valid claims against the trust fund and the warehouseman’s bonds.” *Id.* (Emphasis added).

15. There is a significant—and dispositive—difference between *Valley Farmers* and the present matter. Although courts have held it is possible to assert a valid claim against a bond even though delivery was not made to the bonded warehouse,³ two inter-related

³ The PSC was undoubtedly cognizant of this possibility and the relevant law, noting below that it “agrees that sales can be made to or through the Rhame warehouse for delivery to another location. A sale or contract for sale of grain that identifies the purchaser as Minnesota Grain, Inc. at the Rhame, North Dakota warehouse constitutes a valid claim against the Rhame facility because the contract specifically states that it is with Minnesota Grain, Inc. at its Rhame, North Dakota warehouse.” (Docket no. 22, at 17-18). But again, the Brotens' transaction does not fall within these parameters.

prerequisites must be present: The warehouseman's obligation must be incurred "through the operation of its [bonded] warehouse" and the producer must receive "scale tickets with a [bonded] warehouse designation." Neither of these two prerequisites are present with respect to the Brotens' transactions. Minnesota Grain's obligation to the Brotens was not incurred through the operation of its Rhame warehouse, nor did Brotens receive scale tickets or other receipts with a Rhame warehouse designation. To the contrary, Minnesota Grain's obligation to the Brotens was incurred through its operation of the East Grand Forks, Minnesota warehouse, and the receipts provided to the Brotens clearly designate that warehouse.

16. The two pre-requisites noted by this Court in *Valley Farmers* also underscore the requirement that the location of the warehouse intended to be covered by the Bond be specified. Again, if the Bond merely covered all actions by the principal, regardless of location, this Court's analysis in *Valley Farmers* was entirely moot, as is the statutory requirement that the locations be specified. As this Court clearly understood in *Valley Farmers*, if the location of a warehouse is not specified in the bond, it is not covered.

B. As the PSC cannot marshal assets from the East Grand Forks warehouse for the benefit of receipt-holders, payment for those transactions would unfairly dilute the trust fund

17. The Brotens' argument that their transactions with the East Grand Forks warehouse create access to the trust fund assets (of which the Bond is subject) simply because the sales were to Minnesota Grain falls short on a very practical level as well. If, upon proper demand, a licensee is unable to pay for grain, it is insolvent. *See* N.D.C.C. § 60-04-02. Upon the insolvency, "the commission shall apply to the district court of a county in which the warehouseman operates a licensed warehouse for authority to take all action

necessary and appropriate to secure and act as trustee of the trust fund.” N.D.C.C. § 60-04-03. A trust fund is then established “for the benefit of noncredit-sale receipt holders of the insolvent warehouseman” which must consist of, among other assets, “[t]he grain in the warehouse of the insolvent warehouseman or the proceeds as obtained through the sale of such grain.” N.D.C.C. § 60-04-03.1. “Upon its appointment by the district court, the commission shall seek possession of the grain to be included in the trust fund. Upon its possession of any grain in the warehouse, the commission shall sell such grain and apply the proceeds to the trust fund.” N.D.C.C. § 60-04-03.2.

18. The PSC, a North Dakota administrative agency, has no jurisdiction to cross the border and seize assets maintained in the East Grand Forks, Minnesota warehouse. *See* N.D.C.C. § 60-02-03 (“The commission shall have the duty and power to: (1) Exercise general supervision of the public warehouses *of this state*...”); N.D. Admin. Code § 69-01-01-01 (“The commission has jurisdiction over . . . grain elevators and warehouses . . . engaged in business *in this state*.”). As the PSC has no ability to even marshal a trust fund consisting of the East Grand Forks, Minnesota warehouse’s assets, it would be inequitable to allow the Brotens to dilute the assets (any existing grain and Bond proceeds) of the Rhame, North Dakota warehouse at the expense of producers that actually delivered grain thereto.⁴ However, this does not mean North Dakota producers who sell their grain to out-of-state warehouses are without recourse. Their recourse is with the warehouse to which

⁴ The fact the amount of the Bond itself is determined based on the storage capacity of the Rhame warehouse, the purpose behind the penal sum amount would also be defeated if it applied to the Minnesota transactions in that while the overall exposure would certainly increase, the penal sum or premium charged would not.

their grain was sold, which is bonded as well.⁵ With respect to the Brotens, their recourse here is with the East Grand Forks, Minnesota warehouse and its bond carrier.

C. There is no “conflict” between §§ 60-02 and 60-04

19. Certainly the statutory requirements of the Bond—how it applies, when it applies, its conditions, and purpose—are specific, not general, so even if there was a “conflict” between §§ 60-02 and 60-04, as the Brotens claim, § 60-02 would apply to interpreting the application of the Bond. Under the Brotens’ line of reasoning, the Bond and its statutory requirements are only relevant when the principal is solvent, but when the principal becomes insolvent (that is, the Bond is triggered), the Bond’s parameters and requirements are irrelevant. To suggest that when there is an insolvency § 60-04 somehow renders the requirements of § 60-02 useless simply has no legal basis. Although the principal may be acting illegally through an out-of-state warehouse, nothing in any statute provides that a Grain Elevator Warehouse Bond applies to such conduct. The Bond’s requirements are clear—“[s]pecify the location of each public warehouse intended to be covered by the such bond.” N.D.C.C. § 60-02-09(5). The Bond’s application to only those activities at or through the public warehouse specifically identified is as equally clear. The only warehouse identified in the Bond is “Rhame, North Dakota.”

II. The Bond is limited to the \$100,000 Penal Sum

A. “In no event” is the penal sum aggregated

⁵ The inverse is also true. A North Dakota warehouse bond does not preclude coverage for out-of-state receipt-holders. To the contrary, it runs to the state of North Dakota “for the benefit of *all* persons storing or selling grain *in such warehouse.*” N.D.C.C. § 60-02-09(3) (emphasis added).

20. Another issue the North Dakota Legislature specifically addressed in § 60-02-09 is the aggregate liability of the surety on the bonds. The operative language controlling the outcome to the question of whether multiple limits are available is found in Subsection 8, which reads 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.

This language is incorporated, nearly verbatim, in the fourth paragraph of the Bond itself.⁶

21. A court's duty in interpreting a statute is to ascertain the Legislature's intent, "which initially must be sought from the statutory language itself, giving it its plain, ordinary and commonly understood meaning." *Public Service Commission v. Wimbledon Grain Co.*, 663 N.W.2d 186, 193 (N.D. 2003) (citing N.D.C.C. §§ 1-02-02 & 03). "If statutory language is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit, because the Legislature's intent is presumed clear from the face of the statute." *Id.* (citing N.D.C.C. § 1-02-05). Although a statute can be ambiguous, it is so only if it is susceptible to meanings that are different, *but rational*. *See id.* That is, courts are to construe the statute in a practical manner and "presume the Legislature did not intend an absurd or ludicrous result or unjust consequences." *Id.* Further, the statute "must be construed as a whole and harmonized to give meaning to related provisions, and [is] interpreted in context to give meaning and effect to every

⁶ The sole exceptions are that "surety" is capitalized in the language of the Bond, and rather than, as in the statute, referring to "such" bond, the actual Bond refers to "the" bond.

word, phrase, and sentence.” *Id.* Applying these guidelines to the interpretation of § 60-02-09(8), it is clear Hartford Fire’s aggregate liability under the Bond, as surety, is limited to \$100,000.

22. The Brotens’ ends-justifies-the-means interpretation renders the entire first clause of Subsection 8 inutile. They essentially argue that the statute is intended to read that “in no event, *except when there are losses over successive annual license renewal periods*, shall the aggregate liability of the surety accumulate.” But that is precisely what statute is designed to prevent—accumulating liability. As they did below, the Brotens argue that the “general rule” in North Dakota *requiring* accumulation does not apply here, unless there are losses during an annual license period; thus, if there are losses, the general rule applies (that is, the surety’s aggregate liability accumulates). (Appellants’ Br. ¶103). What the Brotens attempt to argue is that the North Dakota Legislature has stated to the sureties of grain warehousemen operating in North Dakota that in no event will the surety’s aggregate liability accumulate beyond the stated amount of the Bond...as long as there are no losses. If, however, there are losses, then the surety will be exposed to multiple limits. This begs the obvious question: When would the prohibition on aggregating the surety’s liability ever apply? Obviously, the surety never has exposure *unless there are losses*. That such a loss would then trigger aggregate liability over the duration of the Bond, as Brotens argue, is simply illogical, irrational, and entirely disregards the letter of the statute as provided in the first clause of Subsection 8.

23. The Legislature’s intent to limit the surety’s exposure to the face amount of the Bond can be made no more clear when reading the entirety of subsection 8, which includes the first clause – “*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.” § 60-02-09(8) (emphasis added). The Brotens attempt to write out that language by arguing it only applies in “years without losses.” (Appellants’ Br. ¶ 103). But that argument is a red-herring—the Bond does not apply if there are no losses. Despite the Brotens’ attempt to argue the opposite below and here, the second clause is not by any means an exception to the first, it is a clarification of the first. The word “but” is used in the transitional sense, transitioning the first clause to the second clause and harmonizing both. The first clause is stated in the negative and the second clause is stated in the positive. Thus the transition. The Legislature merely clarified that in no event does the surety’s aggregate liability accumulate under the Bond; rather, for losses during any annual license renewal period, the aggregate liability is limited to the amount stated on the face of the Bond.⁷

24. Indeed, the use of the word “any” before “annual license renewal period” in the second clause reinforces the Legislature’s intent that “In no event shall the aggregate liability of the surety under a bond accumulate for each successive annual license renewal period.” The provision makes clear that for losses during *any* annual license renewal period (i.e., potentially more than one), the aggregate liability of the surety is still limited in the aggregate to the amount stated on the Bond. It is significant that the Legislature did not state “for losses during *one* annual license renewal period” or “for losses during *each* annual license renewal period.” It matters not whether any particular period is specified,

⁷ Due to changes in storage capacity, as well as fluctuating prices, the PSC may require modification to the penal sum amount during the course of the continuous Bond. Where, as here, the penal sum changes, the Legislature provided the modified amount applies regardless of when the loss occurs.

in no event does the aggregate liability of the surety accumulate for each successive annual license period. For losses (plural) during any annual license renewal period (i.e., one or more and successive or not), the surety's liability shall be limited *in the aggregate* to the penal sum. The Legislature clearly accounted for the situation where losses may occur during several renewal periods but nonetheless, the aggregate liability is still limited to the amount stated in the Bond.

25. Further, the Brotens' very basis for arguing two limits of liability apply in this matter is flawed and demonstrate why the Legislature intended to limit the surety's exposure in such situations. The Brotens argue they are entitled to a \$100,000 limit because Minnesota Grain failed to timely pay them for the grain they sold to Minnesota Grain during the July 31, 2005 to July 31, 2006 license period. (Appellants' Br. ¶ 105). Additionally, the Brotens allege they are entitled to another \$100,000 limit because, during the subsequent license period (August 1, 2006 to July 31, 2007), Minnesota Grain still did not pay them for the grain they sold during the *previous* license period. Under the Brotens' line of reasoning, when a producer sells grain to the warehouse but is not paid, it need merely wait until enough annual license periods have accrued before filing a claim such to ensure enough coverage is available under the applicable bond. This is precisely the situation the Legislature intended to disallow—the Brotens seek to stack the Bond's limit onto the same transaction.

26. The cases the Brotens rely on do not support their argument. They argue *Giese v. Engelhardt*, 175 N.W.2d 578 (N.D. 1970) suggests a "general rule" is in place in North Dakota advocating for the accumulation of limits based upon the number of policy periods a bond is in force. (Appellants' Br. ¶ 101). No such general rule can be found in *Giese*,

much less a general rule that would apply to this case. *Giese* dealt with a securities bond and its corresponding statutory requirements. The statutory requirements in *Giese* were silent as to the accumulation issue. To the contrary, § 60-02-09(8) speaks precisely to the issue at hand and controls.

27. Nor does *St. Paul Insurance Cos. v. Fireman's Fund American Insurance Cos.*, 245 N.W. 2d 209 (Minn. 1976) provide support for the Brotens. (Appellants' Br. ¶ 107). *St. Paul* involved a Minnesota statute that was silent on the issue of accumulation. The only limitation as to liability in that case was found in the bond language itself, which provided that "the maximum aggregate liability of the surety shall not, in any event, exceed the sum of (\$140,000)." *Id.* at 215. The dispositive issue in *St. Paul* was whether the surety's three successive bonds constituted a single continuing contract or separate contracts. The Minnesota Supreme Court noted that

[i]f viewed as a continuing contract which is kept in force by the payment of annual premiums, then the surety's liability under the entire contract is limited to its specified amount regardless of when the default occurred. On the other hand, if the bonds are viewed as a series of separate contracts, then the surety is liable on each bond up to its stated limit for defaults which occur during the period each is in force, regardless of when the loss is actually discovered.

Id. Finding that the three bonds were separate individual contracts, the Minnesota court held limits of liability were available under each separate contract. *See id.*

28. The Minnesota Supreme Court's analysis in *St. Paul* does not support aggregate limits as the Brotens argue. Whereas the bonds at issue in *St. Paul* were found to be separate contracts, the Bond at issue in this matter is continuous. In fact, it is *statutorily-required* to be continuous. *See* § 60-02-09(2). Thus, even apart from the anti-accumulation provision found in Subsection 8, the fact the Bond is a continuing contract

limits liability to the stated amount regardless of when any loss occurs or is discovered. *See, e.g., St. Paul Ins. Cos.*, 245 N.W.2d at 215. Indeed, that is what Subsection 8 explicitly provides, and reading the statute as a whole reinforces.

B. There is no ambiguity in the statute, but even so, rules of construction do not support cumulative liability.

29. Even if this Court were to consider the Brotens' interpretation of the meaning of § 60-02-09(8) rational, the rules of statutory construction of an ambiguous statute do not support multiple limits of liability. The "object sought to be obtained" is payment to the receipt-holders of a transaction at or through the bonded warehouse from the trust fund for which the PSC is able to marshal specifically-identified assets. That the trust fund is insufficient to fully repay all claimants, much less claimants that did not transact with the warehouse from which the trust assets were obtained, does not warrant re-writing the statute and contractual requirements of the Bond.

30. The Brotens also argue the language added in 1983 was intended to expand the bond carrier's liability in that any additional statutory language must, apparently, inherently change the meaning of that statute or else it is "useless rhetoric." (Appellants' Br. at ¶ 113). Rather than "change" the meaning, the amendment merely clarified it. The Brotens' argument defies the stated purpose of the amendments as provided in House Bill No. 1213. Contrary to the Brotens' suggestions that the bill was a comprehensive overhaul and created a 180-degree turn in a bond carrier's exposure, the bill text indicates otherwise. The explanatory testimony regarding the purpose of the changes to § 60-02-09 is clear: "The revisions *clarify and strengthen* certain areas of the law and also attempt to resolve certain problems related to grain warehouse insolvencies.... While many of the

revisions are housekeeping and self-explanatory, I will point out some of the major revisions.” (App. at 190) (emphasis added). The explanations as to the “major revisions” pointed out do not include any discussion of the Subsection 8 addition. (*See id.* at 194-95). Thus the additional language supports Hartford Fire’s and the PSC’s argument that it clarifies the intent of the subparagraph—indeed, it “clarifies and strengthens” the law; it does not change it.

31. The Brotens also argue the PSC’s interpretation of the statute contradicts the intent and purpose of Subsection 8 and the 1983 amendment, and thus is not entitled to any deference. (Appellants’ Br. ¶ 115). To the contrary, the PSC’s interpretation follows the letter of the law. Additionally, the very amendments provided in House Bill No. 1213 that Brotens rely upon to support their argument were made “at the request of the Public Service Commission.” (*See App.* at 159). The PSC was the bill’s sponsor. (*See App.* at 190, 192). A representative of the PSC provided written and oral testimony with respect to the purpose of the amendments. (*See id.* at 190-204). Certainly, the PSC’s interpretation of those amendments—one that has not changed for 24 years—as well as the effect of the statute as a whole, is entitled to deference. *See, e.g., Western Gas Resources, Inc. v. Heitkamp*, 489 N.W.2d 869, 872 (N.D. 1992) (noting the practical construction of a statute by the agency administering the law is entitled to deference in construing the statute, especially where the interpretation does not contradict clear and unambiguous statutory language); N.D.C.C. § 1-02-39.

32. Finally, the Brotens argue that, if their “interpretation is adopted, the result may influence better and more timely monitoring of the fiscal soundness of warehouseman by sureties” and that the surety could merely “reduce its future exposure to risk by providing

timely notice of bond cancellation to the PSC.” (Appellants’ Br. ¶¶ 116 & 117). This suggestion that the bond carriers merely need adequately monitor the grain warehouses and then cancel the bond any time there is a whiff of nonpayment is simply a catastrophic solution. One of the reasons bond carriers underwrite this risk is the amount of coverage required is merely a mathematical equation and the bond carrier’s exposure is static. The underwriters know that, at the time they issue the bond, in no situation will they be exposed to liability above the penal sum. The premium charged does not reflect what, as the Brotens propose, would require daily monitoring of each warehouse bonded in this state to ensure timely payment, and as soon as there is any indication to the contrary, immediate notice of cancellation. Such daily monitoring—which would be necessary to ensure non-accumulation of losses—flies in the face of the purpose of the bond: to provide continuous protection to the producers/receipt-holders.⁸

33. Being able to cancel the bond merely based upon non-payment of any particular delivery would grind the industry to a halt. Grain warehouses cannot operate without bond coverage. *See* N.D. Admin. Code § 69-07-01-08 (“The license of a licensee who fails to maintain adequate insurance and bond coverage will be suspended automatically.”). If a bond has been cancelled due to the principal’s failure to pay for the grain, certainly no other bond carrier will pick up the canceled coverage. As such, the warehouse must suspend its operation when the cancellation takes effect. The Brotens propose to empower the surety with the ability to immediately cancel any bond at first

⁸ As a practical matter, if the statutory bond provided multiple limits it would no doubt trigger more intense and constant underwriting, a task the Brotens concede does not occur now. Hartford Fire submits that the very fact there is no such underwriting, nor has there been, lends credibility as to how the Bond is intended to operate, and always has, with respect to the aggregate limit.

blush of non-payment, even if that is merely a \$1,000 obligation, to protect its liability and exposure. This is a power even Hartford Fire recognizes would be precarious for the surety to possess.

34. Rather than placing the obligation to monitor the warehouse's daily business on the surety, the rational check and balance falls on the producers. If they are not timely paid for their delivery, they are to report their claim to the PSC, which then undertakes its administrative duties in investigating the warehouse and, if appropriate, asking the district court to declare it insolvent. Shifting the burden on to the bond carrier to unilaterally declare the warehouse insolvent and cancel the bond places an enormous power upon the bond carrier without any corresponding check or balance. Further, the premiums required to offset the costs of actively monitoring each warehouse would increase exponentially, even without considering the additional premium that would be necessary to offset the accumulated risk exposed to with regard to multiple annual license periods. Rather than having the ability to cancel the bond when it is too late, bond carriers simply will not write them or the warehouse will simply not be able to afford them.

35. The Brotens also argue that farmers are not in a strong position to review the solvency of a warehouse "because they lack data and reports that can be obtained by the surety." (Appellants' Br. ¶116). The Brotens do not indicate how a surety has any more access than a farmer, or what data and reports available only to sureties will indicate insolvency. But that is a non-issue. There can be no serious dispute that no one is in more privity with the warehouse's solvency than the farmer. It is obvious that a farmer who has not been paid—which the Brotens argue means the warehouse is insolvent—is in a much

superior position to provide timely notice to the PSC directly rather than waiting to be contacted by a surety inquiring as to whether payment was received.

CONCLUSION

36. Hartford Fire did not accept a premium with respect to all of Minnesota Grain's obligations. Hartford Fire's responsibility is limited to Minnesota Grain's obligations with respect to its operation of the warehouse specified in the Bond: #1 Highway 12, Rhame, ND 58651. It is the activities and obligations arising at or through that warehouse upon which the premium was based. That premium is set because there is a finite amount of exposure that is itself based upon the amount of coverage North Dakota requires in light of the storage capacity at the specific facility identified in the Bond, not the storage capacity of Minnesota Grain as a whole.

37. With respect to the amount of coverage available, Subsection 8 cannot be more clear: "In no event shall the aggregate liability of the surety under a bond accumulate for each successive annual license renewal period." There is no aggregate liability under any circumstances. The limitation and prohibition on aggregating liability has been consistently applied in North Dakota. The resolution to this matter is not to allow bond carriers to simply cancel their bonds upon the suggestion of any non-payment; the resolution is to continue interpreting the unambiguous statute and not disrupt the flow of commerce in North Dakota.

38. The district court correctly applied the law and provisions of the Bond, and Hartford Fire respectfully requests this Court affirm the district court's holding.

Word Count: 7,087

Dated this 27th day of May, 2008.



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ADDENDUM

Pursuant to N.D.R.App.P. 28(g), N.D.C.C. § 60-02-09 is reproduced as follows:

60-02-09 Bond filed by public warehouseman.

Before any license is issued to any public warehouseman under this chapter, the applicant for such license shall file a bond with the commission which shall:

1. Be in a sum not less than five thousand dollars for any one warehouse.
2. Be continuous, unless the corporate surety by certified mail notifies the licensee and the commission that the surety bond will be canceled ninety days after receipt of the notice of cancellation.
3. Run to the state of North Dakota for the benefit of all persons storing or selling grain in such warehouse.
4. Be conditioned:
 - a. For the faithful performance of the licensee's duties as a public warehouseman.
 - b. For compliance with the provisions of law and the rules of the commission relating to the storage and purchase of grain by such warehouseman.
5. Specify the location of each public warehouse intended to be covered by such bond.
6. Be for the specific purpose of:
 - a. Protecting the holders of outstanding receipts:
 - b. Covering the costs incurred by the commission in the administration of chapter 60-04 in the event of the licensee's insolvency.
7. Not accrue to the benefit of any person entering into a credit-sale contract with a public warehouseman.
8. 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.

The commission shall set the amount of the bond and may require an increase in the amount of any bond, from time to time, as it shall, in its discretion, deem necessary to accomplish the purposes of this section. The surety on such a bond must be a corporate surety company, approved by the commission, and authorized to do business within the state. The commission may accept cash, a negotiable instrument, or a bond executed by personal sureties in lieu of a surety bond when, in its judgment, such cash, negotiable instrument, or personal surety bond properly will protect the holders of outstanding receipts. One 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.

CERTIFICATE OF SERVICE

The following documents was electronically served this date upon Sarah Vogel of Sarah Vogel Law Firm, P.C., at sarahv@svogellaw.com; upon William W. Binek of the Public Service Commission at wbinek@nd.gov; and upon Gary R. Wolberg at gwolberg@flecklaw.com.

BRIEF OF APPELLEE HARTFORD FIRE INSURANCE COMPANY

The above document was also served by U.S. Mail this date upon:

Mr. Thomas Mensing
Minnesota Grain, Inc.
P.O. Box 69
Afton, MN 55403

Dated this 27th day May, 2008.



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