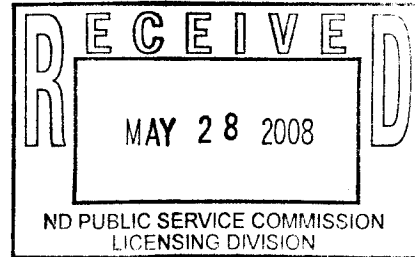


Richter, Susan K.

From: Binek, William W.
Sent: Wednesday, May 28, 2008 2:54 PM
To: -Grp-PSC Commissioners; -Grp-PSC Licensing
Cc: -Grp-PSC Legal
Subject: FW: Supreme Court Case No. 20080068
Attachments: Brief (numbered paragraphs).pdf

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I've attached a PDF of the corrected brief.

From: Binek, William W. [mailto:wbinek@nd.gov]
Sent: Wednesday, May 28, 2008 12:03 PM
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I am unable to open the file.

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Subject: Supreme Court Case No. 20080068

Attached is corrected Brief of Amicus Curiae North Dakota Grain Dealers Association in Support of Petitioner and Appellee.

135 GE-07-99 Filed: 5/28/2008 Pages: 18
Email re ND Grain Dealers Associations Corrected
Amicus Curiae Brief

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 Company,

Respondents and Appellees

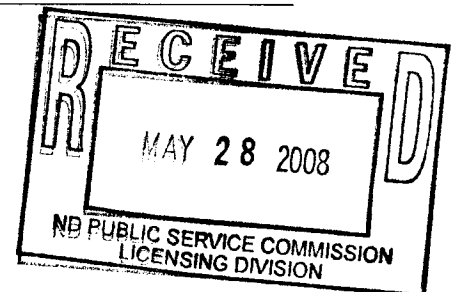
Jim Broten, Eric Broten, and
Broten Farms,

Appellants

**BRIEF OF *AMICUS CURIAE* NORTH DAKOTA GRAIN DEALERS
ASSOCIATION IN SUPPORT OF PETITIONER AND APPELLEE**

**APPEAL FROM ORDER DATED JANUARY 23, 2008, OF THE DISTRICT
COURT, BOWMAN COUNTY, SOUTHWEST JUDICIAL DISTRICT
THE HONORABLE ALLAN L. SCHMALENBERGER, PRESIDING**

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STATEMENT OF INTEREST

1. The North Dakota Grain Dealers Association (“NDGDA”) is a voluntary association of cooperatives, independent grain warehouses, and publicly-owned warehouses engaged in the handling, processing, and distribution of grain and other like commodities in the State of North Dakota. NDGDA’s bylaws offer three types of membership: (1) regular membership; (2) associate membership (affiliates of stations of regular members); and (3) allied members (companies or individuals interested in the Association and its regular members).
2. Association members receive the annual Directory of Licensed and Bonded Elevators in North Dakota, the monthly Grainmen’s Mirror magazine, and other important industry information. NDGDA operates a safety and health program of inspecting grain elevators for safety deficiencies and providing safety training to grain elevator employees. NDGDA operates health insurance plans covering more than 1,300 grain elevator employees and 2,000 additional dependents. NDGDA also operates an educational foundation providing scholarships to students entering agribusiness careers.
3. NDGDA has several standing committees, including, but not limited to, insurance, legislative issues, transportation, safety/health/environmental, and seed/ag input. NDGDA has 312 regular and associate grain elevators members located throughout North Dakota and has been in existence continually since 1911. In addition, there are 20 allied members in North Dakota and another 95 allied members

outside the State. NDGDA's office is located in Fargo, North Dakota, and its executive director is Steve Strege. The governing body is a board of directors.

4. Grain elevators that belong to NDGDA are required by North Dakota law to be bonded in accordance with North Dakota law. In keeping with the spirit of disclosure, NDGDA does offer bonds to its members. NDGDA has a compelling interest in this case as to two issues that have been raised by Appellants Jim Broten, Eric Broten, and Broten Farms ("Brotens"):

- A. Whether a warehouseman's bond required under N.D.C.C. § 60-02-09 applies only to grain warehouses licensed in North Dakota under N.D.C.C. § 60-02-07 or whether the bond also applies to sales made by North Dakota growers to a facility owned by the same warehouseman outside the State; and
- B. Whether the aggregate liability of a warehouseman's bond required under N.D.C.C. § 60-02-09 is limited to the annual license renewal period during which the bond is in force or whether the aggregate liability of the bond is extended beyond one year.

STATEMENT OF THE CASE

5. Brotens appeal from an order (App. 18) of the District Court, Bowman County, affirming the Report and Recommendations of the Public Service Commission that denied claims made by Brotens for payment from a trust established under Ch. 60-04, N.D.C.C., upon the insolvency of Minnesota Grain, Inc., a warehouseman licensed by the State of North Dakota. Brotens claim that they were owed a total of \$336,911.67 for barley purchased from the Brotens, but delivered to

Minnesota Grain's elevator in East Grand Forks, Minnesota. Minnesota Grain had only one station in North Dakota, located at Rhame. Brotens did not sell or deliver any grain to the Rhame facility, which is in southwestern North Dakota far from their farms in the eastern part of the state.

6. The PSC determined that Brotens were not eligible for even partial payment from the trust created for Minnesota Grain's Rhame facility because their grain was delivered out of state to Minnesota Grain's facility in East Grand Forks, and thus their claims were not covered by North Dakota law. (App. 4-5) The PSC also determined that the \$100,000 warehouse bond that was issued by The Hartford be applied to cover, on a pro-rated basis, claims made by "valid claimants." (App. 5) In an order dated January 23, 2008, the District Court approved the PSC's findings and recommendations, which resulted in this appeal by Brotens. NDGDA was allowed to file an *amicus curiae* brief in the District Court.

STATEMENT OF THE FACTS

7. Brotens sold barley to the Minnesota Grain facility in East Grand Forks, Minnesota. Minnesota Grain also maintained a facility at Rhame, North Dakota, in the extreme southwestern part of the State. The North Dakota surety bond for Minnesota Grain states that the "Principal" is Minnesota Grain, Inc. The surety bond was signed by Minnesota Grain's CEO, Thomas Mensing. Under a January 21, 2003, amendment, the amount of the bond is \$100,000. (App. 24)
8. After Minnesota Grain became insolvent, the PSC, as Trustee, rejected Brotens' claims against the surety bond as "Minnesota transactions" and moved the

District Court to approve and adopt its report. Brotens filed a motion for declaratory relief in which they objected to approval and adoption of the report and recommendations of the PSC as Trustee, and numerous briefs were filed in the District Court, including NDGDA's *amicus* brief. The issues raised by Brotens were whether they were included in the coverage of the insolvency action and the amount of the surety bond.

9. On January 4, 2008, the District Court issued an order "approving the PSC's report and recommendation of trustee and requiring Hartford Insurance Company to pay to the trustee for deposit in the trustee account the amount of \$100,000." The Court also rejected Brotens' argument that the liability of The Hartford, which issued the surety bond, should be \$200,000 instead of \$100,000 because their barley sales allegedly were in separate years.

ARGUMENT AND AUTHORITIES

10. All grain elevators and grain buyers seeking to operate in North Dakota are required to be bonded in accordance with state law. Most of these entities are members of NDGDA. Therefore, NDGDA has a compelling interest in the outcome of this case as to the issues raised in this *amicus* brief. The outcome as to these issues has significant implications for NDGDA members because if Brotens' arguments become law, a bonding company's obligations concerning an elevator located in North Dakota will be greatly expanded. This will affect who will qualify for bonds and/or the cost of obtaining bonds.

11. If the warehouseman's bond required under § 60-02-09 is construed to apply to sales made by a North Dakota grower to cover transactions in other states, the risk exposure to bonding companies increases. Obtaining a bond will become more difficult and/or the cost will increase. The same will be true if doubling the number of licensing periods covered by a bond is adopted as law as urged by Brotens.
12. The factors most important to the bonding company are the bond applicant's net worth, working capital, debt, debt to equity ratio, record of profitability, and credit line. These factors are balanced against the necessary bond amount in order to make a decision as to whether the bond should be issued. North Dakota warehouse bonds are based on the capacity of the warehouse under § 69-07-02-02, North Dakota Administrative Code, which specifies the limit of exposure to the bonding company. In most cases, there will be some grain in the elevator to be used to satisfy claims and mitigate the amount of the bond loss. The warehouse bond is determined by the total physical capacity licensed by the licensee in the State, and the capacity of each warehouse, bin, annex, or any additional space must be identified. Bond amounts range from \$50,000 for capacity to 100,000 bushels to \$250,000 for capacity from 475,001 bushels through 500,000 bushels. A licensee with capacity in excess of 500,000 bushels must furnish additional bond coverage of \$5,000 for each 25,000 bushels of capacity or fraction thereof. Unless the PSC determines that an increase is necessary to accomplish the purpose of Chapter 60-02, the bond of a warehouseman shall not exceed \$1.5 million.

13. Grain buyer bonds are determined by a three-year rolling average of purchases under § 69-07-02-02.1, North Dakota Administrative Code, and likewise range from \$50,000 to \$1.5 million.
14. Expanding a bonding company's exposure across state lines, such as into Minnesota as argued by Brotens, creates huge uncertainty for the bonding companies and among grain elevators in North Dakota. While the limit of the bond would not be increased, since it is fixed by law, expanding exposure would significantly increase the likelihood that the limit of the bond will be reached by the claims.
15. Brotens' new interpretation of state bonding laws will change the rules for bonding companies in the middle of the game. To assert that the protections of a bond on a North Dakota warehouse extend to Minnesota is somewhat like trying to extend a North Dakota resident's homeowner's insurance to cover an uninsured lake home in Minnesota, or giving a North Dakotan legal permission to carry with him to Minnesota the 75 mph Interstate highway speed limit when the limit in Minnesota is 70 mph.
16. At the same time, there would be no corresponding increase in a North Dakota elevator's financial balance sheet or in grain assets to mitigate a bond claim. While large, profitable grain companies might still qualify for surety bonds, the underwriting bar would be raised too high for some North Dakota elevators. For some, or perhaps many, elevators, it would become a matter of not qualifying at all for a surety bond. For others, posting collateral for a bond might be an option with bonding companies that offer it, but that increases cost. In these situations, the

possibility of loss is higher and recognized as such. A corresponding example in the automobile insurance industry is the higher risk insurance a driver must buy after several DUI's.

17. The dilution of bond protection in North Dakota by spreading it into other states might force the legislature or PSC to require higher bonds, and therefore higher premiums, in order to offer more protection to North Dakota grain growers. This result would not be equitable to customers who did business with North Dakota elevators in good faith, expecting bond protection to be available in case of a facility's insolvency, and not expecting that protection to be diluted by distribution to growers who choose to sell their grain in other states.

18. Without a bond, an elevator cannot obtain a license to operate. With fewer elevators, there is less competition for farmers' grain and fewer outlets for agricultural supplies such as seed, fertilizers, chemicals, and application services. The railroads have already forced consolidation of elevators into fewer larger companies. Construing the bonding laws as argued by Brotens would only exacerbate this process.

19. Brotens argue in their brief that the 1983 amendments to N.D.C.C. § 60-02-09(8) and the adoption of § 60-02-09.1 allow a bond amount to aggregate in successive licensing periods. However, § 60-02-09(8) 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.

20. Section 60-02-09.1 provides in part:

The surety on a bond is 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 or on a later date specified by the surety. This provision does not operate to relieve, release, or discharge the surety from any liability already accrued or which accrues before the expiration of the ninety-day period....

21. A plain reading of these statutes does not support the argument urged by Brotens, who assert that a bonding company that acts promptly on notice of default avoids the increased exposure of aggregating successive licensing periods because the surety can cancel the bond and avoid future liability by serving a notice of cancellation upon the PSC under § 60-02-09.1. It is inconsistent to argue, first, that a bond amount can be aggregated in successive licensing periods, then argue, second, that a bonding company can avoid this result simply by cancelling the bond. In addition, once there is a default, the PSC will call the bond and it is too late for the bonding company to extricate itself from its legal obligations under the bond. It cannot simply cancel the bond and walk away.

22. The scenario of a bonding company cancelling a bond on 90 days' notice and thereby insulating itself from liability for losses over two or more licensing periods

could happen, in theory, only if all the transactions covered by the bond fall into the first nine months of a 12-month licensing period, and the bonding company gives notice of cancellation at least 90 days before the end of the licensing period. Not only is this scenario highly unlikely, but to adopt the argument urged by Brotens would unfairly impact bonding companies, grain elevators, and grain sellers based solely on circumstance and nothing more. That is not the intent of North Dakota's bonding laws.

23. The issue, as framed by Brotens, is not whether the bonding company should cover losses for transactions in the previous licensing period; it is whether the bonds from different licensing periods can be "stacked" to double, triple, or even quadruple the liability of the bonding company. If the liability of a bond is stacked, bonding companies will be more likely to cancel bonds at the first sign of trouble with a grain elevator's insolvency, if they write bonds at all. This result can hardly be said to foster the goal of protecting North Dakota's grain producers. A corresponding example is homeowner's insurance. If an insurance policy expires at midnight on December 31, and a fire starts before midnight but burns into New Year's Day, the homeowner cannot collect double the amount of the policy simply because the fire occurs within two policy periods. The legislature already has spoken to this issue and has confined the obligations of a North Dakota warehouseman's bond to North Dakota and to one licensing period.

24. Brotens cite *Public Service Comm'n v. Wimbledon Grain Co.*, 2003 ND 104, 663 N.W.2d 186, and *North Dakota Pub. Serv. Comm'n v. Central States Grain, Inc.*,

371 N.W.2d 767 (N.D. 1985), for the proposition that the North Dakota legislature intended to provide protection to North Dakota grain sellers. While this might be true, the legislature did not intend to extend the liability of a warehouseman's bond to an out-of-state facility or to stack bond liability in the manner urged by Brotens. The protection afforded the State's grain sellers is not infinite, and they must come within the purview of the statutes in order to assert claims against a bond.

25. Regarding Brotens' assertion that the bond should be doubled or tripled or more to cover successive licensing periods, it has already been pointed out by the PSC that the clear language of § 60-02-09(8) limits the aggregate liability of a warehouseman's bond to one annual license renewal period:

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.)

26. In fact, the PSC has a warehouse bond form that complies with the language in § 60-02-09(8). The prohibition against aggregation would not have been included in § 60-02-09(8) had the legislature intended that a bond amount could be doubled or tripled as argued by Brotens. Words used in a statute are to be understood in their ordinary sense, unless a contrary intention clearly appears. N.D.C.C. § 1-02-02. When a wording of a statute is clear and free of all ambiguity, the letter of it is not

to be disregarded under the pretext of pursuing its spirit. N.D.C.C. § 1-02-05; *Wills v. Schroeder Aviation, Inc.*, 390 N.W.2d 544, 546 (N.D. 1986).

27. A bond is not the same as insurance, but is a completely different obligation. Insurance involves calculated risk by the insurance company, which knows it will incur some losses and calculates the cost of insurance accordingly. For example, an insurance company knows, based on statistical data, that 19-year-old drivers are a greater risk than 50-year-old drivers; therefore, the cost of insurance to a 19-year-old will typically be much greater than for a 50-year-old. However, the theory behind surety bonds is that underwriting will be adequate so that there should never be a loss. Moreover, whereas insurance involves just two parties (insurer and insured), surety bonds involve, in this case, three parties: the bonding company; the elevator (the principal); and the Public Service Commission, acting on behalf of claimants. But since no system can be perfect, sometimes the company issuing a surety bond has to pay losses.

28. Bond premiums are not collected to create a pool from which to pay losses, unlike insurance coverage. Rather, bond premiums are a service fee for the assets of the bonding company being obligated for the principal (elevator). Out of those premiums are paid home office expenses, underwriting costs, agents' fees, some profit, and, of course, some loss payments.

29. The bonding company through which NDGDA writes bonds charges a premium of \$4,000 for a \$500,000 bond. A loss that requires payment of the total

amount of the bond requires 125 such bonds to be written or 125 years of writing the bond at the same premium charge to recover—and that doesn't include the expenses.

30. NDGDA has sympathy for those not being fully paid, including a number of NDGDA members. This is an unfortunate result of business failures. But that does not justify reinterpreting North Dakota laws to include claimants who were not intended to be covered. If Brotens are brought under the bond in this case, the proceeds for claimants intended to be covered by the bond will be diluted. That is grossly unfair to them.

31. In this case, Brotens hauled grain to another state, Minnesota, which was a conscious decision. When their protections in Minnesota were exhausted, they attempted to seek protection under North Dakota law, even though North Dakota's protections do not apply to out-of-state grain sales. Had Brotens sold their grain in North Dakota, they could have taken advantage of the protections afforded by this State. The PSC's argument that it does not have jurisdiction over grain shipped out of state is legally correct.

CONCLUSION AND REQUEST FOR RELIEF

32. The Order of the District Court is correct and must be upheld.

Dated at Bismarck, North Dakota, this 27th day of May, 2008.

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