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State of North Dakota

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June 2, 2008

Ms. Penny Miller  
Clerk of North Dakota Supreme Court  
State Capitol  
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600 E. Blvd. Ave., Dept. 180  
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Re: Public Service Commission vs. Minnesota Grain, Inc. & Hartford Fire Ins. Co.  
& Jim Broten, Eric Broten, and Broten Farms  
Supreme Court Case No. 20080068  
Bowman County District Court No. 06-C-18-1

Dear Ms. Miller:

Enclosed for filing is the original and seven copies of a corrected Table of Authorities, pages iv and v and corrected pages 2, 3, 4, 5, 6, 7, 30, and 33 of the North Dakota Public Service Commission brief together with a corrected disk. The attached disk has been scanned by a virus protection program and I certify that it is virus free.

Thank you.

Sincerely,



William W. Binek

skr  
Enclosure

cc: Sarah Vogel & Derrick Braaten (w/encl.)  
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Gary R. Wolberg (w/encl.)

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Cover Letter & Corrected Table of Authorities &  
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Public Service Commission

Bill Binek

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**I. Whether Chapter 60-04 of the North Dakota Century Code Controls these Proceedings and Controls the Administration of a Trust Created to Settle the Affairs of an Insolvent Grain Warehouseman.**

A. Chapter 60-04 cannot be looked at in isolation in determining the valid claimants in an insolvency proceeding.

Brotens' first argument is that N.D.C.C. chapter 60-04 is a remedial statute intended to protect North Dakota farmers holding receipts, and that the PSC is to implement the trust fund for the "benefit of noncredit-sale receipt holders of the insolvent warehouseman." [*Brotens Br. pp 13-14*].

Brotens state the legislative goal of the insolvency statutes is to protect North Dakota farmers from the risks of non-payment for grain that is sold or loss of stored grain. [*Brotens brief, p 14*]. Brotens basically contend that the trust fund and the bond are for the benefit of anyone who sold grain to Minnesota Grain, Inc. whether the grain was sold to or through the licensed and bonded warehouse facility in Rhame, North Dakota or whether it was sold to a warehouse facility owned and operated by Minnesota Grain, Inc. in East Grand Forks, Minnesota. Brotens cite Public Service Commission v. Wimbleton Grain Co., 2003 ND 104, ¶21, 663 N.W. 2d 186. and North Dakota Public Service Commission v. Central States Grain, Inc., 371 N.W.2d 767, 799 (N.D. 1985) in support of that claim.

Wimbleton does not support Brotens' claim. The legislative goal set forth in Wimbleton is to protect North Dakota farmers who sell their grain to or through a facility *that is licensed under North Dakota law*. In Wimbleton, the

question was whether the holders of credit-sale contracts *issued by the insolvent elevator* could be valid claimants in the insolvency proceeding. The Court made it clear that the purpose of the law was for “settling the legitimate demands of owners of *grain delivered to an insolvent elevator . . .*” *Id.* (Emphasis added). In order for a demand to be legitimate, the grain has to be delivered to the “insolvent elevator.” All of the claimants in Wimbledon sold their grain to facilities that were located in North Dakota and licensed by Wimbledon Grain Co. under North Dakota law. Likewise, in Central States, protection was afforded to farmers who sold their grain to or through the facility that was licensed in North Dakota. The Court stated that “[s]ection 60-02-09(3), N.D.C.C., specifically provides that a warehouseman’s bond shall “[r]un to the state of North Dakota for the benefit of all persons storing or selling grain *in such warehouse.*” (Emphasis added).

Brotens quote a statement by the Court in North Dakota Public Service Commission v. Valley Farmers Bean Association, 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) and State v. Hoover Grain Co., 248 N.W. 275, 278 (N.D. 1933) as further support of their position. The statement by the Court in Valley Farmers and Hoover cases (but not in Gunkelman) is that “[i]t 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 grain. The law was intended for the benefit of the claimants and must be construed with sufficient liberality to effectuate its purposes without doing injury to those who are liable.” *[Brotens brief p. 15]*. The Court was clear in its statement that the law only covers “legitimate” claims for grain that is delivered to the “insolvent elevator company.” Brotens’ demands are not “legitimate” because Brotens did not deliver their grain to the “insolvent elevator company.” The insolvent elevator company is the public warehouse facility at Rhame, North Dakota owned and operated by Minnesota Grain, Inc. which is licensed and bonded under the laws of North Dakota.

The PSC generally agrees that the statutes contained in chapter 60-04 are remedial, but they only provide a remedy for farmers holding receipts that constitute valid claims against an insolvent public warehouse licensed under North Dakota law.

Where the PSC and Brotens differ is in the determination of who the noncredit-sale receipt holders of the insolvent warehouseman are. That determination is made by interpreting and applying not only the provisions of chapter 60-04 regarding the remedies of noncredit-sale receipt holders, but also applying provisions of chapter 60-02 regarding the licensing and bonding of public warehouses.

B. Chapter 60-02 governs licensing and bonding of a public warehouse.

Brotens argue that chapter 60-02 governs licensing and operation of grain warehouses and warehousemen, but does not govern insolvencies. *[Brotens*

*brief, p 17].* Brotens argue that chapter 60-04 is the controlling law that the PSC must follow in administering the estate of an insolvent warehouseman. Brotens' interpretation of the statutes would require the Court to disregard relevant statutes relating to licensing and bonding of grain warehouses in an insolvency proceeding. Since chapter 60-04 does not address licensing and bonding, it would be impossible to determine what entity is licensed and bonded and who is entitled to coverage under the bond without application of provisions of chapter 60-02.

Brotens contend that under North Dakota law it is the warehouseman that is licensed and bonded. Brotens' purpose for their argument is to support their position that purchases of grain by any out-of-state grain warehouse facility owned by Minnesota Grain, Inc. that purchases grain from North Dakota farmers is covered by the bond that was in place for the Rhame, North Dakota warehouse facility owned and operated by Minnesota Grain, Inc. as a public warehouseman.

Brotens want the Court to accept their theory that the phrase "*for the benefit of noncredit-sale receipt holders of the insolvent warehouseman*" contained in N.D.C.C. §60-04-03.1 should apply to every person who sold grain to any grain warehouse owned by Minnesota Grain, Inc., even if the grain warehouse facility that purchased their grain was located in the state of Minnesota and licensed as a grain warehouse by the state of Minnesota. Brotens want the Court to believe that under North Dakota law it does not matter that the warehouse they sold grain to was not licensed as a public warehouse in

North Dakota or that the bond on file with the PSC did not identify that out-of-state warehouse facility as a facility covered by the bond. Under Brotens' theory, if a company has a warehouse licensed and bonded anywhere in North Dakota, the bond covers sales by North Dakota farmers to grain warehouses owned or operated by that company wherever those facilities are located, whether in Minnesota, South Dakota, Montana, Wisconsin, or anywhere in the world. That is not the purpose of North Dakota law.

In order to resolve this issue, the Court must first determine what entity is licensed, and to do that the Court must look at the definitions and licensing requirements contained in chapter 60-02.

"Public warehouse," as defined in N.D.C.C. §60-02-01(5), "means any elevator, mill, warehouse, subterminal, grain warehouse, terminal warehouse, or other structure or facility not licensed under the United States Warehouse Act [7 U.S.C. 241-273] in which grain is received for storing, buying, selling, shipping, or processing for compensation." Except for reference to the United States Warehouse Act, it is the same as the insolvency definition at N.D.C.C. §60-04-01(4).

"Public warehouseman" as defined in N.D.C.C. §60-02-01(6) "means the person operating a public warehouse that is located or doing business within this state, whether or not such owner or operator resides within this state." That is the same as the insolvency definition at N.D.C.C. §60-04-01(5). What the language simply means is that the operator of a public warehouse that is licensed under North Dakota law is the warehouseman, and the warehouseman

may be a resident of another state. In other words, a corporation such as Minnesota Grain, Inc. has the right under North Dakota law to own and operate a public warehouse in North Dakota and to have that facility licensed as a public warehouse in North Dakota. Minnesota Grain, Inc. then becomes a “public warehouseman” as the operator of that specific grain elevator at the location described in the warehouse license and has the right to purchase grain by or through that facility, and only that facility, that is licensed in North Dakota.

The purpose and limitations in the use of the term “warehouseman” is clearly and unmistakably provided in the law that first established the insolvency procedures in North Dakota where it states that “the word ‘warehouseman’ shall be held to mean and include all public elevators licensed under the laws of this state to store grain . . . .” 1927 N.D.S.L. ch. 156. What this means under current law is that when the term “warehouseman” is used in the insolvency provisions of chapter 60-04 or the licensing and bonding provisions of chapter 60-02 it means “warehouse” since elevator is included in the definition of “public warehouse.”

It should be noted that there was no legislative provision for the codification of laws from 1925 to 1939. In 1939 the Legislature provided for a revision of statutes which ultimately led to the codification of the North Dakota Revised Code of 1943. See 1939 N.D.S.L. ch. 110. The definition of “warehouseman” that appears in N.D.R.C. 1943 §60-0401(3) provides that “[w]arehouseman’ shall mean all public elevators licensed under the laws of this state to store grain.”

C. A public warehouse must be licensed to do business in North Dakota.

by personal sureties in lieu of a surety bond. If cash were accepted in lieu of the surety bond, the cash amount paid is the amount of the bond. The Commission could not ask for additional amount of cash to be given for each successive annual license period. Yet that would be required to satisfy claims under Brotens' theory. The same would apply to a negotiable instrument. For instance, if a bank cashier's check is given in lieu of a surety bond, the bank may have an exposure of liability that may double or triple or more. There would be no limit to the exposure that bonding companies or other sureties could face. Following Brotens' logic, liability under the \$100,000 bond in this proceeding could be as much as \$500,000. It is unlikely that any bonding company will write bonds in North Dakota under that kind of exposure, and it is doubtful that anyone would be foolish enough to put up cash, negotiable instruments or be a personal surety under those circumstances.

The language in N.D.C.C. §60-02-09(8) is clear on its face. The aggregate liability of the surety shall not accumulate for each successive annual license period. Application of Brotens' reasoning would require accumulation of the bond amounts. "Statutes must be construed as a whole and harmonized to give meaning to related provisions, and are to be interpreted in context to give meaning and effect to every word, phrase, and sentence." Public Service Commission v. Wimbledon Grain Co., 2003 ND 104, ¶21, 663 N.W. 186. The presumption is that the Legislature did not intend an absurd or ludicrous result or unjust consequences. Id.

## CONCLUSION

**CERTIFICATE OF SERVICE**

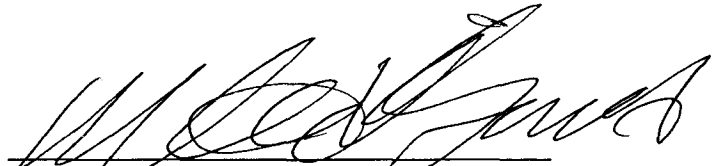
I HEREBY CERTIFY, that on June 2, 2008, true and correct copies of the foregoing **corrected Table of Authorities, pages iv and v and corrected pages 2, 3, 4, 5, 6, 7, 30, and 33 of the APPELLEE BRIEF** have been served upon the following individuals by placing a true and correct copy thereof in envelopes addressed as follows:

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