

COPY

STATE OF NORTH DAKOTA
COUNTY OF WALSH

IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

Public Service Commission,)
)
)
Petitioner,)
)
vs.)
)
Grabanski Grain LLC)
and)
Platte River Insurance Company,)
)
Respondents.)

Civil Case No. 50-2011-CV-00029

AFFIDAVIT OF SERVICE BY MAIL



STATE OF NORTH DAKOTA)
)SS.
COUNTY OF CAVALIER)

Shelley Gratton, being of legal age and being first duly sworn, deposes and says that on the 19th day of July, 2012, she served the attached **Intervener's Brief** upon **Illona A. Jeffcoat-Sacco, Attorney for Public Service Commission; Gordon W. Myerchin, Attorney for Platte River Insurance Company; and DeWayne Johnston, Attorney for Louis Slominski, Jr. and Merlyn Grabanski** by placing a true and correct copy thereof in an envelope addressed as follows:

Illona A. Jeffcoat-Sacco
Special Assistant Attorney General
Public Service Commission
State Capitol – 12th Floor
600 E Boulevard Avenue – Dept 408
Bismarck, ND 58505-0480

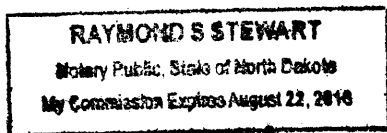
DeWayne Johnston
Attorney at Law
Johnston Law Office
221 South 4th Street
Grand Forks, ND 58201

Gordon W. Myerchin
Attorney at Law
Camrud, Maddock, Olson & Larson, Ltd.
P.O. Box 5849
Grand Forks, ND 58201

and depositing the same with postage prepaid in the United States mails at Langdon, North Dakota.

Shelley Gratton

Subscribed and sworn to before me this 19th day of July, 2012.



Raymond S. Stewart, Notary Public
State of North Dakota
My Commission Expires: 08/22/16

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INTERVENER'S BRIEF

F A C T S

Grabanski Grain LLC (Grabanski) operated a public grain warehouse in Grafton, North Dakota and was licensed under NDCC Chapters 60-02 and 60-04. Grabanski encountered financial difficulties and had its license cancelled. On February 25, 2011, the Public Service Commission (PSC) filed an Application for Appointment as Trustee and to join Platte River Insurance Company (Platte River) as a party. The Court granted PSC's Application.

The PSC completed all required notifications to farmers of who it was aware had sold grain to Grabanski and who had not been paid, including John Schumacher (Schumacher).

Schumacher had entered into a Basis Fixed Grain Purchase Agreement with Grabanski on October 15, 2009. It was a credit-sale contract. Schumacher delivered 6135.27 bushels of #2 yellow corn at the Grafton site of Grabanski. Price was later determined to be \$2.92/bushel. After deduction of drying charges, test weight charges and corn tax, Schumacher was to be paid \$12,000.44. Schumacher never received payment from Grabanski.

Schumacher failed to file his claim. Upon receipt of the Notice of Motion and Notice of Hearing dated May 18, 2012 along with the Report and Recommendation of Trustee, Schumacher filed a Motion to Intervene with notice to all parties on June 4, 2012. The Motion to Intervene was not objected to and the Court granted Schumacher's Motion.

LAW AND ARGUMENT

NDCC Chapter 60-04 establishes the procedure for dealing with insolvent grain warehousemen. This chapter establishes a trust fund for non-credit-sale receipt holders only. NDCC 60-04-03.1.

In 2003, the Legislature enacted NDCC Chapter 60-10. It created an indemnity fund to protect farmers who sold on a credit-sale and who are unpaid as a result of the grain buyer's insolvency. NDCC 60-10-05. The PSC shall act as Trustee of the fund. Ibid.

The indemnity fund source of funds is a 2/10ths of 1 percent assessment on all grain sold in the state paid by the seller of grain. NDCC 60-10-01. The fund shall be a minimum of \$3 million and not to exceed \$6 million. NDCC 60-10-03.

The PSC has been appointed by the Court to act as Trustee under the provisions of NDCC Chapters 60-04 and 60-10.

NDCC § 60-10-04 provides a person is eligible to receive indemnity payments from the credit-sale contract indemnity fund if:

1. After August 1, 2003, the person sold grain to a licensed warehouse or grain buyer in this state under the provisions of a credit-sale contract;
2. The licensed warehouse to which the person sold grain or the grain buyer to whom the person sold grain becomes insolvent; and
3. The licensed warehouse or grain buyer, as a result of the insolvency, does not fully compensate the person in accordance with the credit-sale contract.

Schumacher's sale to Grabanski was after August 1, 2003. It was a credit-sale. Grabanski was licensed at the time and became insolvent. Schumacher was not paid for his grain.

Schumacher acknowledges he was remiss in not timely filing his claim. Our Supreme Court has allowed for a late claim when the claimant was known to the PSC. North Dakota Public Service Commission v. Central States Grain, Inc., 371 NW2d 767,779 (ND 1985). Central States was prior to the enactment of NDCC Chapter 60-10 however the process of paying customers of insolvent grain buyers is substantially the same.¹

The Court pointed out that the "overriding purpose of the process is to pay all persons who deliver grain." Ibid. The Court allowed the late filing under NDCC § 60-04-04 even though the statute stated that the claimant shall be barred from participation if the claimant had not filed its claim. (emphasis added) Ibid.

NDCC § 60-04-04 was amended and liberalized in 1985 to provide that a claimant may be barred from participation in the trust fund for his or her failure to file a claim. (emphasis added)

The legislative history of the 1985 revision of NDCC § 60-04-04 states that changing the language from "must be barred" to "may be barred" gives the district court discretion to allow a late claim. Legislative History, page 6. (A copy of the legislative history is attached.) The changes were supported in all respects by the PSC. Ibid.

Schumacher does not dispute that the PSC mailed him notices. He does not remember receiving them. The notices would have been sent during the busiest time of his season. Schumacher testified he farms small grains, beans, potatoes, corn and sugar beets on 4,000 to 5000 acres. His neglect dealing with these matters is understandable and he asks the Court to excuse his failure to file a claim.

¹Schumacher was included in all notices sent by the PSC.

Schumacher's claim will not jeopardize other claimants. His status as a claimant was known to the PSC. He promptly filed a Motion to Intervene upon receipt of the PSC's Notice of Hearing scheduled for June 20, 2012. Further, Schumacher would have paid into the fund since its inception.

The law relating to grain insolvencies was intended for the benefit of claimants. Public Service Commission v. Wimbledon Grain, 663 NW2d 186,193 (ND 2003). Schumacher respectfully requests the Court allow his claim of \$12,000.44 subject to the 80% of limitations of NDCC § 60-10-06.

Dated this the 18 day of July, 2012.



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TESTIMONY ON SENATE BILL NO. 2132

Dan Kuntz
PSC 2132

Presented by Public Service Commission

Before Senate Agriculture Committee

DATE: January 10, 1985

This bill was introduced at the request of the Public Service Commission and proposes changes in the procedure governing grain warehouse insolvencies. In the 1983 session of the legislature the Commission sponsored bills dealing with grain warehousing licensing and insolvencies. Those laws were enacted and substantially improved the regulation of North Dakota grain warehouses. Since that time the State has experienced other warehouse insolvencies or bankruptcies which have brought to light additional changes or clarifications that need to be made to the warehouse licensing and insolvency statutes. This particular bill proposes changes to the grain warehouse insolvency statutes. HB 1202 proposes changes in the warehouse licensing laws.

SECTION 1.

This section amends Section 60-01, N.D.C.C., which contains the definitions for the grain warehouse insolvency laws. Subsection 2 of the present law contains the definition for a credit-sale contract. Generally, a credit-sale contract includes contracts such as deferred payment or price later contracts. The definition for a credit-sale contract is important because the law provides that these types of contracts are not protected by the warehouseman's bond. The present statute provides that a credit-sale contract is a written contract where the sale price for grain is to be paid at a date after delivery or release of the grain for sale. As a practical matter, especially for certain specialty crops where various quality tests may be necessary, there is often a delay between release of the grain and the date payment is received even though an extension of credit isn't intended. That delay is usually anywhere from a few days up to a month. In order to extend protection of the bond to these contracts, the bill would redefine a credit-sale contract as one in which the price is to be paid or may be paid more than 30 days after release or delivery of the grain for sale. Any contract in which payment was to be made within 30 days after release or delivery of the grain would be protected by the bond.

Because some deferred payment or pice-later contracts could require payment within 30 days and therefore not be credit-sale contracts, reference to those types of contracts would be removed from the definition.

Section 60-02-19.1, N.D.C.C., contains a requirement that a credit-sale contract must have a notice printed on it that the contract is not covered by the bond. A problem arises, however, when the warehouseman fails to put this notice on the contract. The Commission believes that if the notice isn't on the contract, then the contract should not be considered a credit-sale contract and therefore should be covered by the bond. The bill would accomplish that.

The bill also clarifies the situation where a contract calls for part of the payment to be made in cash and part to be deferred or paid later. It is the Commission's position that the cash portion of the contract is protected by the bond even though a portion of the contract is to be paid later. So far the Courts have agreed with the Commission's position; however, it remains a gray area in the law. The bill would clear up this issue to make any part of the contract that is payable within 30 days from delivery of the grain protected by the bond.

Subsection 4 of Section 60-02-01, N.D.C.C., is also amended. The word "public" is removed from describing from whom a warehouse receives grain. Certain processing companies for exmample limit the people they buy grain from. The

Commission doesn't believe such a restriction or limitation of customers should be used to avoid the licensing and bonding requirements. The other changes in that subsection are simply grammatical changes.

SECTION 2.

This section would create a new section to Chapter 60-04. The new section would require the bonding company be made a party to the insolvency proceeding once the Commission determines that proceeds from the bond may be necessary to redeem claims. Presently, the law is unclear as to whether the Commission is to sue the bonding company first and then file a report with the Court or vice versa. In addition, the law can be construed to require two separate proceedings. This section would require the bonding company to be a party to the insolvency proceeding. Determination of claim validity and the bonding company's liability would be made by the district court all in one proceeding. This will help reduce the time and expense required of these proceedings.

This section also would allow the Court to order the bonding company to deposit the bond proceeds with the PSC pending a determination of the bonding company's ultimate liability. This is particularly important where the amount of the claims could exceed the size of the bond. In such cases, and where the bonding company didn't deposit the bond proceeds with the PSC, the most interest the bonding company would be

required to pay to the claimants would be 6 percent on the size of the bond which is the statutory rate for prejudgment interest. On the other hand, if the bond proceeds were deposited with the Commission, the Commission could deposit those proceeds at a higher rate of interest pending the final determination of the bonding company's liability. This added interest could then be used to assist in paying the claimants a greater portion of their claims.

SECTION 3.

This section proposes some changes to the notice procedure for people to file claims. The first change would allow the Commission to seek possession of the company's books and records rather than require the Commission to seek the books and records. In most cases, it is not necessary for the Commission to seek physical possession of the books. Rather, an on-site inspection of those books is all that is necessary. In cases where a bankruptcy has been filed, which is the usual situation, the Commission probably wouldn't be able to take possession of the books and attempt to obtain them would be a useless effort.

The balance of the changes in this section are intended to streamline and shorten the notice procedure. The proposed language would no longer require the Commission to seek delivery of all the outstanding receipts. Rather, the Commission could simply require the claimants to submit a

claim with whatever evidence to support the claim the Commission deems necessary. Where there is no disagreement as to the amount of a producer's claim, there is no need for the Commission to seek the outstanding receipts.

The new language also reduces the number of weeks the Commission would publish notice to file claims from 3 to 2. It also reduces from 60 days to 45 days the length of time a claimant must submit a claim. The combination of these changes will reduce the notice period and therefore, the length of the insolvency by 3 weeks. It will still allow producers almost 2 months to submit claims. Experience has shown that producers actually file their claims well within this 2 month period. Furthermore, the Commission reviews the books of the company and if it finds that a potential claimant has not filed a claim, the Commission can notify that person by mail and extend the period to file claims.

The present language of the statute states that if a person fails to file a claim within the prescribed time period, the person is barred from participating in the trust fund. The proposed language changes this to provide that the claimant may be barred from participating in the fund. This will give the district court the discretion to allow the claim of a producer who neglects to submit a claim within the statutory time period but then later requests payment before the district court. If the claim is valid and the neglect excusable, the Commission believes the court should have this discretion.

Finally, this section provides that claimants are not parties to the insolvency proceeding unless they file a motion of intervention. In an insolvency proceeding there can be hundreds of individual claimants. It is not necessary that the claimants participate in the insolvency proceeding although they should have the right to do so. Furthermore, it should not be necessary to file all the legal papers and briefs on those claimants that do not want to participate formally. This section would clarify that claimants are not formal parties to the proceeding unless they file a motion to intervene.

SECTION 4.

Section 4 proposes changes and clarifications to Section 60-04-09, N.D.C.C., which governs the Commission's report to the district court, approval of the report, and distribution of the trust fund. Presently, the law requires the Commission to collect all the assets of the trust fund and then file its report with the court. This is often impractical, however, since the bonding company's liability is dependent upon the validity of the claims. Until the district court determines which claims are valid, one can't determine the liability of the bonding company so as to collect the bond proceeds. The Commission is proposing that it be required to file its report after it has received and evaluated the claims. District Court determination of the validity of the claims and the

bonding company's liability would then be determined at the same time in one proceeding.

The new language would continue the practice of the district court holding a hearing on the Commission's report; however, it would require that objections to the report must be served on the parties at least 10 days before the hearing. This will allow the Commission to gather the necessary evidence and supporting arguments to support its report if an objection is raised rather than not knowing if an objection is going to be raised until the day of the hearing.

Finally, this section would authorize the district court to order payment by the bonding company of the bond proceeds into the trust fund and distribution of the trust fund to the claimants.

COPY

1985 TESTIMONY

SB 2132