

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

Public Service Commission

Petitioner,

vs.

Anderson Seed Co., Inc.

and

Auto-Owners Insurance Company

Respondents.

PSC Case No. GE-12-78

CIVIL NO. 09-2012-CV-00693

PUBLIC SERVICE  
COMMISSION RESPONSE TO  
GLENN GERVING AND  
LISA GERVING'S OBJECTION  
TO PETITONER'S MOTION  
TO APPROVE SETTLEMENT,  
APPROVE REPORT AND  
RECOMMENDATION OF  
TRUSTEE, REQUIRE DEPOSIT  
OF BOND PROCEEDS,  
APPROVE PAYMENTS AND  
DISCHARGE TRUSTEE

1. The objections filed by Glenn Gerving and Lisa Gerving are untimely, and further, are without merit.
2. Under North Dakota Century Code section 60-04-09 any aggrieved person having an objection to the commission's report shall file the objection with the court and serve copies on the commission, the warehouseman, and the surety at least ten days before the hearing. Failure to file and serve objections in the time set is a waiver of the objection.
3. The hearing on this matter was originally scheduled for 6 January 2014 at 9:00 a.m. CST. Therefore, the deadline for filing objections was 26 December 2013. Objections should have been filed and served no later than 26 December 2013.

4. The purpose for requiring the filing of any objections at least ten days before the hearing is to allow sufficient time for parties to respond to objections and adequately prepare for hearing.
5. In the instant case, the hearing originally scheduled for 6 January 2014 was rescheduled, but the rescheduling was not done prior to the deadline for filing objections. The Notice of Rescheduled Hearing was filed 6 January 2014. Consequently, the rescheduling of the hearing did not change or affect in any way the statutory deadline for filing objections.
6. Glenn Gerving and Lisa Gerving's objection was not filed until 31 January 2014, which was well beyond the time required by statute. The failure of the Gervings to file and serve a timely objection in this matters is a waiver of their right to an objection. N.D.C.C. section 60-04-09.
7. North Dakota Century Code section 60-04-05 provides

**60-04-05. Remedy of receiptholders.** No receiptholder has a separate claim for relief upon the warehouseman's bond, nor for insurance, nor against any person converting grain, nor against any other receiptholder, except through the trustee, unless, upon demand of five or more receiptholders, the commission fails or refuses to apply for its own appointment from the district court or unless the district court denies the application for appointment. This chapter does not prohibit or prevent any receiptholder, either individually or in conjunction with other receiptholders, from pursuing concurrently such other remedy against the person or property of such warehouseman, for the whole, or any deficiency occurring in the redemption, of the receipts.

8. Further, North Dakota Century Code section 60-04-09 provides "If the trust fund is insufficient to redeem all claims in full, the fund must be shown prorated in the report in the manner the commission deems fair and equitable." Diluting the amount of funds that all remaining cash claimants would receive to make one cash claimant 100% whole is not fair and not equitable. If the Public Service

Commission were to do so, it would be breaching its fiduciary responsibility as trustee.

9. North Dakota Century Code chapter 60-04, on which this case is founded, “is designed to provide a prompt procedure for claims recovery by receipt holders through a process of state court appointment of the state public service commission as trustee. Its provisions closely parallel the very objective of Chapter 7 of the Bankruptcy Code.” *In re Woods Farmers Coop. Elevator Co.*, 107 B.R. 678, 682, 683 (Bankr. D.N.D. 1989). Although the court in *Woods* made those comments when concluding that state insolvency proceedings are preempted by federal bankruptcy proceedings, the statement is relevant because it shows that funds in a state warehouse insolvency trust account, like a bankruptcy proceeding, cannot be accessed by creditors except through the trust proceeding itself. The *Woods* court continued “Once a bankruptcy case is filed, the bankruptcy court acquires exclusive jurisdiction over the estate created, and this jurisdiction preempts state solvency proceedings.” *Id.*, 683.
10. In the instant case, there is no bankruptcy, but the warehouse insolvency process envisioned by North Dakota Century Code chapter 60-04 parallels the objective of the bankruptcy process. It follows that exclusive jurisdiction over the estate created by the trust fund in the instant case lies with the court that is supervising the insolvency proceeding in the instant case.
11. The statute cited by the *Gervings* does not contradict this conclusion. Even though the cited statute, North Dakota Century Code section 28-21-06, mentions the word “trustee” it cannot be read to mean a trustee under North Dakota

Century Code chapter 60-04, whose powers and authority are subject to the jurisdiction of the district court. According to the rules of statutory interpretation applicable in North Dakota, the word "trustee" must be given its ordinary meaning in the context of the statute in which it is used. N.D.C.C. chapter 1-02. In N.D.C.C. section 28-21-06 (1), the word "trustee," as part of a statutory list that includes such other terms as "heir," "devisee," "personal representative," and "legatee," clearly means a trustee of a trust created by an instrument or document, not, as in this case, a conventional trustee appointed by a court.

12. This interpretation is consistent with the insolvency/bankruptcy analysis of the *Woods* court, above, and other case law. The Gervings' judgment is evidence of the debt. It supports their claim to their portion of the trust assets. However, their judgment does not elevate their debt above other creditors of equal status as beneficiaries of the trust estate. *In re Midwest Agri Development Corp, v. Kip M. Kaler, Trustee*, 387 B.R. 580 8<sup>th</sup> Cir.BAP (N.D.), 2008.
13. For all of these reasons, the Gervings' objection is untimely and without merit.
14. Bismarck, North Dakota, this **7th day of February 2014**.



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