

After noting a split of authority among the jurisdictions,⁵²⁵ the Minnesota Supreme Court summarized the state of the case law: “many courts have concluded that each bond should be viewed as a separate undertaking by the surety to protect against the defaults of the principal which occur during that bonding period.”⁵²⁶

In response to St. Paul’s argument that it should not be held liable on all three bonds because the bond protected only “against loss during the period,” the Minnesota Supreme Court rejected the argument on the same basis that the identical argument had previously been rejected in a case by the United States Court of Appeals for the Tenth Circuit.⁵²⁷ The Tenth Circuit previously found that the surety was tied to the statute and the parties’ agreement rather than the elements of the tort of conversion at common law.⁵²⁸ Once the statute was violated, the agreement was breached and the obligation on the bond was triggered.⁵²⁹ As the Minnesota Supreme Court concluded, “[w]e fully agree with the court’s reasoning . . . [t]herefore, we hold that St. Paul is liable under its previous bonds for the defaults of its principal.”⁵³⁰ At the same time, the Minnesota Supreme Court has stated that it will liberally construe “these types of surety bonds in order that they accomplish their statutory purpose of protecting persons who deal with a publicly licensed warehouseman in normal and usual transactions from sustaining loss because of the warehouseman’s defaults.”⁵³¹ Albeit, the result in this case appears to have been legislatively changed.⁵³²

Similarly, the Minnesota Supreme Court rejected St. Paul’s argument that the bond did not protect the seller of grain.⁵³³ The court found no compelling distinction between a seller and a storer of grain. “A seller of grain places the same reliance on the warehouseman’s faithful performance of its duties as does a storer of grain. If the warehouseman defaults in its duties, we see no logical reason for excluding the seller from the protection of the bond.”⁵³⁴

525. *Id.* at 215-16.

526. *Id.* at 215 (citations omitted).

527. *Id.* at 216 (citing *Gen. Ins. Co. v. Commodity Credit Corp.*, 430 F.2d 916, 918 (10th Cir. 1970)).

528. *Id.*

529. *Id.*

530. *Id.*

531. *Id.* at 217 (citations omitted).

532. MINN. STAT. ANN. §§ 223.17(8)(d), 232.22(7)(f) (West 2003 & Supp. 2006).

533. *St. Paul Ins. Co.*, 245 N.W.2d at 216-17.

534. *Id.*

(c) Coverage for independent truckers

The Minnesota Court of Appeals has determined that when an independent trucker buys grain from various farmers and resells it to an elevator, a buyer of grain is not liable to the producer for the purchase price under Minnesota Statute section 336.2-403.⁵³⁵ In *Schulter v. United Farmers Elevator*, the farmers did not receive payment for their grain and commenced suit on the bond of the elevator.⁵³⁶ The elevator maintained that it was a buyer in ordinary course under Minnesota Statute section 336.2-403.⁵³⁷ Under Minnesota law, the test of good faith is a subjective rather than an objective one.⁵³⁸ Thus, based upon the trucker's conduct over time, he had gained a reputation in the community that would qualify him as a "merchant" within the meaning of the Uniform Commercial Code as adopted in Minnesota.⁵³⁹ Moreover, "the elevator did a lien check on the trucker."⁵⁴⁰

As a result, the Minnesota Court of Appeals concluded that since "the transaction between the trucker and the elevator was a sale with title shifting immediately, and because the elevator acted in good faith," the provisions of Minnesota Statute section 336.2-402(2) and (3) would apply to the facts of the case.⁵⁴¹ As succinctly summarized by the Minnesota Court of Appeals, "the UCC mandates that the farmers not the elevator, bear the loss."⁵⁴² At the same time, the Minnesota Court of Appeals rejected the argument that the Grain Storage Act would apply because there was no evidence in the record of a "storage agreement between the elevator and the farmers."⁵⁴³ Consequently, the trial court's grant of summary judgment was proper.⁵⁴⁴

(d) How Chapter 223 works

The Minnesota Court of Appeals has described Minnesota Statute section 223.17 as creating two types of grain sales.⁵⁴⁵ One is a cash sale where payment is required contemporaneous with the sale.⁵⁴⁶

535. *Schulter v. United Farmers Elevator*, 479 N.W.2d 82 (Minn. Ct. App. 1991).

536. *Schulter*, 479 N.W.2d at 83-84.

537. *Id.* at 84.

538. *Id.* at 85.

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.*

543. *Id.* at 86.

544. *Id.*

545. *In re Claims Against the Grain Buyer's Bond No. 877706-08624237*, 486 N.W.2d 466, 468 (Minn. Ct. App. 1992).

546. *Grain Buyer's Bond No. 877706-08624237*, 486 N.W.2d at 468.

The other type is a voluntary extension of credit sale.⁵⁴⁷ Voluntary extensions of credit will result in a loss of coverage under the grain buyer's bond.⁵⁴⁸

Therefore, in the Minnesota Court of Appeal's view, it is irrelevant whether the seller allows the buyer a grace period "because the buyer must give written confirmation of credit to the seller before the close of the next business day or the transaction fails as a credit sale."⁵⁴⁹ In short, mere failure to meet the statutory test for a cash sale, does not automatically create a voluntary extension of credit with resultant loss of bond coverage.⁵⁵⁰ Thus, it follows that if there is a breach of a cash sale grain contract, the grain producer must file a claim with the Commissioner within 180 days of the breach before the producer can recover on the bond.⁵⁵¹

Moreover, the subsequent incorporation of a principal will not relieve a surety of its obligations under the bond.⁵⁵² To allow a surety to avoid coverage based upon the subsequent incorporation of the principal would "thwart the legislature's intent in requiring a grain buyer to obtain a bond."⁵⁵³

Multiple shipments are entitled to a different treatment under the Chapter. The Minnesota Court of Appeals has determined with respect to multiple shipments pursuant to Minnesota Statute section 223.17(5), that payment must be made "within ten days after each shipment, *except that* all payments are due within forty-eight hours after completion of the entire sale."⁵⁵⁴

(e) Delivery as a defense to surety

In the commodity storage context, like other matters involving a surety, delivery of the bond is a critical component of suretyship and can constitute a defense by the surety.⁵⁵⁵ In *Larson v. National Surety Co.*, the facts demonstrated that the bond had not been delivered at the time the claim arose.⁵⁵⁶ As noted by the Minnesota Supreme Court, "it is almost an elementary principle laid down in all of

547. *Id.*

548. *Id.*

549. *Id.* at 469. See also MINN. STAT. ANN. § 223.175 (West 2003) (specifying contents for written agreement).

550. *Grain Buyer's Bond No. 877706-08624237*, 486 N.W.2d at 469.

551. *Id.* at 470.

552. *In re Claim Against the Grain Buyer's Bond No. MTC 182*, 1995 Minn. App. LEXIS 825, at *3-*4 (Minn. Ct. App. June 20, 1995).

553. *Grain Buyer's Bond No. MTC 182*, 1995 Minn. App. LEXIS 825, at *4 (citation omitted).

554. *In re Claim Against Grain Buyer's Bond of Mischel Grain & Seed*, 591 N.W.2d 734, 738 (Minn. Ct. App. 1999) (emphasis in original).

555. *Larson v. Nat'l Sur. Co.*, 214 N.W. 507 (Minn. 1927).

556. *Larson*, 214 N.W. at 508 (citation omitted).

the books that a bond is not 'executed' until it is delivered It takes effect only from execution, on delivery, and, until delivery, it is not a contract and is of no further value than the paper upon which it written."⁵⁵⁷ Thus, because the bond issued had never been executed and delivered in accordance with the law, it never became "operative for any purpose because of its nondelivery."⁵⁵⁸

(f) Evidentiary issues

Counsel would be well-advised to remember that in those states that have an administrative-type proceeding for resolution of claims, the rules of evidence may not fully apply before an administrative body. Frequently, hearsay may be admitted in an administrative proceeding, if it is the type of evidence upon which a reasonably prudent person would rely.⁵⁵⁹ The Minnesota Court of Appeals determined that an administrative law judge did not err when it allowed documentary evidence in the form of invoices and receipts to be received as evidence in support of a claim rather than live testimony.⁵⁶⁰

F. MISSOURI

1. Statutes

Missouri Revised Statute section 276.406 provides that the Director of the Missouri Department of Agriculture⁵⁶¹ shall be responsible for the approval of surety bonds required by sections 276.401-581.⁵⁶² Moreover, the Director may promulgate rules and regulations to accomplish the efficient and effective enforcement of the enumerated statutes.⁵⁶³ This power includes the authority to conduct administrative hearings for the purposes of determining the liabilities of sureties on bonds that have been issued on behalf of grain dealers.⁵⁶⁴

(a) Grain dealers

Missouri law requires that a grain dealer file with the Director a surety bond.⁵⁶⁵ The bond must be in favor of the State of Missouri, as

557. *Id.* at 506 (citation omitted).

558. *Id.* at 509.

559. *Grain Buyer's Bond No. MTC 182*, 1995 Minn. App. LEXIS 825, at *8-*9. *Cf.* IOWA CODE ANN. § 17A.14(1) (West 2005) ("A finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial").

560. *Grain Buyer's Bond No. MTC 182*, 1995 Minn. App. LEXIS 825, at *8-*9.

561. MO. ANN. STAT. § 276.401(3)(12), (14) (West 1993 & Supp. 2006).

562. *Id.* § 276.406(1)(3).

563. § 276.406(2)(1).

564. § 276.406(2)(8).

565. *Id.* § 276.426(1).

trustee, “for the benefit of all persons selling grain to the grain dealer”⁵⁶⁶ The bond shall be conditioned upon the following factors:

1. The dealer as a buyer paying to the seller the agreed-upon purchase price of the grain purchased from the seller where title to said grain transferred from the seller to the buyer within the state of Missouri;⁵⁶⁷
2. The grain dealer’s faithful performance of his duty as a licensed grain dealer⁵⁶⁸
3. The bond required by this section shall cover the agreed-upon minimum price of any valid minimum price contract⁵⁶⁹

The fourth factor is not so much a “factor” as it is a preclusion from coverage under the bond. The statute provides that the bond shall “not cover payment for any promissory note accepted by the seller of grain.”⁵⁷⁰

Surety bonds issued under the chapter are effective from the date of issue and cannot be affected by the expiration of the license period and “continue in full force and effect until canceled.”⁵⁷¹ Unlike some jurisdictions, Missouri’s statute specifically provides that the liability of the surety cannot be accumulated:

The continuous nature of a bond, however, shall in no event be construed to allow the liability of the surety under a bond to accumulate for each successive licensed period during which the bond is in force, but shall be limited in the aggregate to the amount stated on the bond . . . [or] appropriate endorsement or rider.⁵⁷²

The required bond is to be kept in force at all times; failure to maintain the bond is a basis for license revocation.⁵⁷³ Bonds may not be canceled without the prior written approval of the Director and the substitution of another bond.⁵⁷⁴

The statute also places specific requirements on the surety. Upon the Director’s written demand for payment,

the surety shall either pay over . . . the sum demanded up to the full face amount of the bond, or shall deposit the sum demanded in an interest-bearing escrow account at the highest

566. § 276.426(2).

567. § 276.426(2)(1).

568. § 276.426(2)(2).

569. § 276.426(2)(3).

570. § 276.426(2)(4).

571. § 276.426(3).

572. *Id.*

573. § 276.426(4).

574. *Id.*

rate of interest available. When a surety pays the director upon demand, the director shall either interplead the sum in court or hold an administrative hearing for the determination of the liability of the surety, and the validity of claims against the bond, and upon the conclusion thereof, the director shall distribute the bond proceeds accordingly.⁵⁷⁵

Yet, the surety maintains the right to appeal to the circuit court following the Director's determination.⁵⁷⁶ The surety's refusal to pay the sum demanded or failure to "deposit the sum demanded in a interest-bearing escrow account at the highest rate of interest available, shall be grounds for withdrawal of the surety's license and authorization to conduct business in this state . . ." with an additional penalty of twenty-five percent of the full face amount of the bond plus interest at the rate of nine percent or higher.⁵⁷⁷ Nonetheless, in the event the surety pays as demanded and the Director ultimately concludes that the surety is not liable, the Director is entitled to return to the surety the sum paid (or a proration of the sum paid plus all accumulated interest).⁵⁷⁸

No bond may be canceled without notice "via certified mail" to the Director at Jefferson City, Missouri, and the terms of the bond must so state.⁵⁷⁹ Cancellation of the bond does not affect the accrued liability of the surety or any liability which may accrue before the expiration of the statutory-required period prior to cancellation.⁵⁸⁰ Should the surety fail to follow the statutory procedures for cancellation, "the bond shall remain in full force and effect until properly canceled."⁵⁸¹

Moreover, failure to obtain a substitute surety in the event of notice to the Director of the surety's intent to cancel shall result in the automatic revocation of the dealer's license if a new bond is not received "within thirty days of receipt of the notice of intent to cancel."⁵⁸² If a substitute "bond is not received within sixty days of receipt of the notice of intent to cancel," the Director shall revoke the dealer's license and cause an inspection to take place with notice to sellers and claimants via the local news media.⁵⁸³

Contrary to other jurisdictions identified in these materials, Missouri recognizes the validity of a *verbal* or written surety bond binder

575. § 276.426(6).

576. *Id.*

577. *Id.*

578. *Id.*

579. § 276.426(7).

580. *Id.*

581. *Id.*

582. § 276.426(8).

583. *Id.*

as being legally effective.⁵⁸⁴ However, such agreements are not valid unless the bond meets the following conditions. First, “[t]he dealer or principal has paid, or has promised to pay the surety an agreed upon or tentatively agreed upon . . . premium” and the surety has agreed upon or “*tentatively* agreed upon premium or other consideration.”⁵⁸⁵ Next, the surety must provide all of the following information: a bond number; the amount of the bond; and the bond’s effective date.⁵⁸⁶ The Director is free to reject a binder depending upon the particular circumstances.⁵⁸⁷

The statute also allows for certificates of deposit and letters of credit in lieu of an actual surety bond.⁵⁸⁸ When the bank acts in lieu of a surety, it is subject to similar requirements as if it were acting as a surety.⁵⁸⁹ On the other hand, the statute allows a grain dealer with sufficient net worth to request relief from the Director that the dealer may only be required to post the minimum \$20,000 bond.⁵⁹⁰

A Missouri grain dealer is required to “make payment of the agreed-upon purchase price to the seller of grain upon delivery or demand of said seller or his authorized agent, unless a written grain purchase contract or valid deferred payment contract shall provide otherwise.”⁵⁹¹ Under the Missouri statute, it is contemplated that a class I dealer shall promptly document the agreed-upon purchase price of the grain and shall make payment upon demand.⁵⁹² In the event that a demand for payment is not made, a class I dealer has the option of entering the data onto a formal settlement sheet, which must occur within thirty days of delivery.⁵⁹³ If an account is entered on a formal settlement sheet, “payment shall be made the earlier of demand or one hundred eighty days from delivery.”⁵⁹⁴ If payment has not been made at the conclusion of the 180 day mark, a formal written contract shall be executed.⁵⁹⁵

Likewise, a class II dealer is required to document the agreed upon purchase price of grain and make payment upon demand.⁵⁹⁶ A class II dealer is also required to make use of a formal settlement

584. § 276.426(9).

585. § 276.426(9)(1) (emphasis added).

586. § 276.426(9)(2)(a)-(c).

587. § 276.426(9)(2)(d).

588. *Id.* § 276.431(1)-(2).

589. § 276.431(3).

590. *Id.* § 276.441(1).

591. *Id.* § 276.461(1).

592. § 276.461(2).

593. *Id.*

594. *Id.*

595. *Id.*

596. § 276.461(3).

sheet if no demand for payment is made.⁵⁹⁷ Once the account is marked on a formal settlement sheet, payment must be made either upon demand or within 180 days of delivery, whichever first occurs.⁵⁹⁸ A class II dealer is prohibited from entering into any type of credit sales contract.⁵⁹⁹ Persons holding a class III, IV, V, or VI license are not to enter into any type of credit sales contract.⁶⁰⁰

While a producer may make an oral demand from a dealer, the right to recover under a surety bond shall be based only upon a written demand to the surety.⁶⁰¹ Recovery on the bond is not a person's sole remedy and does not bar a subsequent "civil action based upon rights or obligations arising under the grain purchase contract."⁶⁰² Deferred price contracts are not eligible for recovery from the dealer's surety bond.⁶⁰³ Deferred price contracts must contain a statement concerning the absence of bond coverage. The written contract must specifically state that the grain dealer is "not required to carry bond on the grain for the benefit of the seller . . ."⁶⁰⁴

With respect to deferred payment contracts, a class I dealer must notify the seller that the class I dealer is required to carry a bond on the grain for the benefit of the seller only for "twelve months from the date the contract was entered into," and at the expiration of that time, "payment for the grain becomes a common claim against the dealer."⁶⁰⁵ Nonetheless, should the grain dealer's license be revoked by the Director "all deferred payment agreements executed within the twelve months prior to revocation shall be deemed priced unpaid obligations as of the effective date of the revocation and as such agreements are covered by the grain dealer's bond."⁶⁰⁶

Minimum price contracts may also be entered into by a class I dealer.⁶⁰⁷ However, the written agreement must provide a statement that the "specified minimum price is covered under the dealer's bond for the benefit of the seller, for, and only for, twelve months from the date the contract was entered; and that payment for any subsequent price gains, if any, is not covered by the bond."⁶⁰⁸ No other type of dealer may enter into minimum price contracts.⁶⁰⁹

597. *Id.*

598. *Id.*

599. *Id.*

600. § 276.461(4).

601. § 276.461(5).

602. § 276.461(6).

603. § 276.461(7).

604. *Id.*

605. § 276.461(8).

606. § 276.461(9).

607. § 276.461(10).

608. *Id.*

609. *Id.*

Upon revocation of a license, all claims shall be filed with the Director against the former licensee and the surety company within 120 days after the date of the revocation.⁶¹⁰ Failure to timely file a claim defeats recovery under the bond.⁶¹¹

If the Director believes that a dealer is insolvent or “unable to satisfy the claims of all sellers,” the Director may petition the circuit court for an *ex parte* order authorizing the Director to take control of the dealer and act as trustee.⁶¹² After taking possession, the Director shall give written notice of the action to the surety and any sellers as shown by the available records.⁶¹³ The Director, acting as trustee, shall remain in possession “until such time as the dealer or the surety on the bond shall have satisfied the claims of all sellers” or when the circuit court orders the surrender of possession.⁶¹⁴ While in possession, the Director is not authorized to operate the dealer’s business nor is the Director liable for any claims that could have arisen from the non-operation of the dealer’s facility.⁶¹⁵

(b) Warehouses

Missouri has also established the Director’s authority to act under the Missouri Grain Warehouse Law.⁶¹⁶ The Director’s authority extends to conducting hearings on the liability of sureties that have filed bonds on behalf of licensed warehouses with the Department.⁶¹⁷ Before a person may be issued a warehouse license, the person must file a bond (other than personal security) with the Director by a surety licensed to do business in Missouri.⁶¹⁸ “The bond shall be in favor of the state of Missouri for the benefit of all persons storing grain . . . conditioned upon the faithful performance of his duties as a public warehouseman relating to the storage of grain.”⁶¹⁹ Storage grain that has been priced is not covered by the warehouseman’s bond.⁶²⁰ Grain deemed storage grain is covered by the bond.⁶²¹

The statute specifically describes what are *not* defenses upon the bond.⁶²²

610. *Id.* § 276.491(6).

611. *Id.*

612. *Id.* § 276.501(1).

613. § 276.501(4).

614. § 276.501(5).

615. *Id.*

616. MO. ANN. STAT. § 411.070 (West 2001).

617. § 411.070(2)(9).

618. *Id.* § 411.275(1).

619. *Id.*

620. *Id.*

621. *Id.*

622. § 411.275(2).

Neither the issuance of warehouse receipts by a warehouseman to himself for grain owned in whole or in part by him; the commingling of grain owned by the warehouseman with grain stored for others or any violation by a warehouseman of this chapter or of the regulations . . . is a defense⁶²³

Indeed, the bond must provide this information.⁶²⁴ The bond issued under Chapter 411 shall become effective on the date of issue and "shall not be affected by the expiration of the license"⁶²⁵ The bond continues in full force and effect until canceled.⁶²⁶ A warehouse, when using multiple bonds, "shall utilize the same corporate surety for all bonds required for the operation" of multiple warehouses.⁶²⁷

Upon written demand by the Director for payment, the surety must either pay over the sum demanded up to the penal sum of the bond or deposit the funds in an interest bearing escrow account.⁶²⁸ Refusal or failure to pay on the behalf of the surety can result in onerous consequences.⁶²⁹

Grain warehouse bonds are to contain similar provisions with respect to cancellation and substitution of bonds.⁶³⁰ Moreover, verbal or written surety bond binders are valid, provided, however, that the documents meet the statutory test.⁶³¹

Certificates of deposit and irrevocable letters of credit may be used to satisfy the requirement of a surety bond under Chapter 411.⁶³² Chapter 411 also requires a bank, when acting as the surety, to obey the written demand of the Director.⁶³³

Like the provision regarding grain dealers, the Director has similar authority, under the Grain Warehouse Law, upon learning of the insolvency of a grain warehouse.⁶³⁴ The Director is required to give written notice of the action to the surety and "holders of record."⁶³⁵

Similarly, the Director is authorized to retain possession until such time as the surety satisfies all the claims of the depositors.⁶³⁶ No

623. *Id.*

624. *Id.*

625. § 411.275(3).

626. *Id.*

627. § 411.275(5).

628. § 411.275(7).

629. *Id.*

630. § 411.275(8)-(9).

631. § 411.275(12).

632. *Id.* § 411.277(1)-(2).

633. § 411.277(3).

634. *Id.* § 411.519.

635. § 411.519(6).

636. § 411.519(7).

liability attaches to the Director's possession nor must the Director operate the facility.⁶³⁷

2. Case law

(a) The common law and the Missouri statutes

When a milling concern handles and stores grain products in the ordinary course of its business, it is not a warehouseman, either at common law or under the Missouri statutes, because the business is not engaged in the business of storing or receiving goods.⁶³⁸

As previously determined by the Supreme Court of Missouri, there is no basis for a lawsuit against the State of Missouri, the Missouri Department of Agriculture, or the Missouri Division of Grain Inspection for deficiencies purportedly committed by the State that trigger coverage under a surety's bond.⁶³⁹ As stated by the Missouri Supreme Court, "[i]f they are suable entities at all, they partake of the state's sovereign immunity."⁶⁴⁰ Moreover, the state's interest in bonding grain storage facilities is based upon a public interest in maintaining the food supply. "The statutes exist, not purely in the interest of persons in the grain trade, but principally because of the public's interest in an abundant food supply."⁶⁴¹ It therefore follows that sovereign immunity was the exact type of doctrine to bar the instant claims against the public fisc.⁶⁴²

Under section 411.026(22), which defines interested person, when a company is acting as a custodian of pledged grain and is thereby compensated, the company is operating a public grain warehouse within the meaning of the statute.⁶⁴³ However, under the unique factual circumstances of *State ex rel. Kruse v. SLT Warehouse Co.*, the Missouri Court of Appeals found that the surety was insulated from claims by virtue of section 411.491.⁶⁴⁴ The Missouri Court of Appeals demonstrated this conclusion by means of a hypothetical situation:

Suppose a grain dealer, after receiving grain from sundry producers, stores it in a public grain warehouse operated by a third party several miles away. A week later the grain dealer returns to the warehouse, presents the receipt, and demands the grain, which is surrendered by the warehouse. The grain

637. *Id.*

638. *Nat'l Bank of Commerce v. Flanagan Mills & Elevator Co.*, 188 S.W. 117, 121 (Mo. 1916).

639. *State ex rel. Mo. Dep't of Agric. v. McHenry*, 687 S.W.2d 178, 180-81 (Mo. 1985).

640. *State ex rel. Mo. Dep't of Agric.*, 687 S.W.2d at 181.

641. *Id.* at 182.

642. *Id.*

643. *State ex rel. Kruse v. SLT Warehouse Co.*, 759 S.W.2d 314, 324 (Mo. Ct. App. 1988).

644. *State ex rel. Kruse*, 759 S.W.2d at 328.

dealer sells the grain but never pays the producers for it. Could it seriously be argued that the producers have any claim against the bond of the third party warehouseman? We believe the answer under § 411.491 is clearly no.⁶⁴⁵

As the warehouse never assumed any contractual obligations with the claimants nor had any dealings with the claimants, "there was never an occurrence of any condition triggering liability to any claimant under appellants' public grain warehouseman's bond."⁶⁴⁶

In another case, a corporate surety, as defendant, argued that because an elevator did not continue in business for 180 days, it had no further obligation under the bond.⁶⁴⁷ The Missouri high court rejected the argument, stating: "The bond by its terms, and by reason of the statutory requirements, continues in effect until terminated in the manner prescribed by law. No such termination is shown."⁶⁴⁸ As stated by the court, the circumstance, "even if established, makes no difference." Both the bond and the statute require the bond continue in effect until terminated as a matter of law.⁶⁴⁹

(b) Trial practice

In the same case, the trial court was correct in rejecting testimony proffered by the surety, as an offer of proof, that "present and former officials of the Missouri Department of Agriculture . . . had consistently construed the governing statutes in accordance with" the surety's contention.⁶⁵⁰ The trial court had sustained an objection to the testimony.⁶⁵¹

While the Missouri Court of Appeals considered the testimony under the premise that the testimony should have been received "as evidence to show the construction placed on this statute by the officials in charge of its administration," the Missouri Supreme Court agreed with the trial court.⁶⁵² The statute at the time did not allow the Department to serve as a tribunal for the adjudication of claims.⁶⁵³ As "[s]tatutory and contractual rights are to be adjudicated by the courts, not by bureaucrats," the testimony was properly ex-

645. *Id.* at 328-29.

646. *Id.* at 329.

647. *State ex rel. Neese v. IGF Ins. Co.*, 706 S.W.2d 856, 860 (Mo. 1986).

648. *State ex rel. Neese*, 706 S.W.2d at 859 (footnote omitted).

649. *Id.*

650. *Id.* at 858 (footnote omitted).

651. *Id.*

652. *Id.*

653. *Id.*

cluded.⁶⁵⁴ Albeit the result here appears to have been legislatively changed with respect to warehouses.⁶⁵⁵

(c) Interest

The Missouri Supreme Court determined that claimants were entitled to interest from the time their demand was made, even if the interest would exceed the penal sum of the bond.⁶⁵⁶ In the Missouri Supreme Court's view, the "surety has the use of the money until payment is made and will receive a windfall if excused from paying interest."⁶⁵⁷

(d) Attorney fees

Attorney fees are not guaranteed when a surety denies a claim. The Missouri Supreme Court has rejected the argument that claimants are entitled to attorney fees because of a surety's conduct in denying a claim.⁶⁵⁸ The court found "[b]ecause of the novelty of the point and the lack of authoritative construction, we are unwilling to say that the denial of payment was 'without just cause.'"⁶⁵⁹ Likewise, a surety's absence of a basis for denial of a claim will similarly not give rise to a claim for fees under the statute.⁶⁶⁰

G. NEBRASKA

1. Statutes

(a) Grain dealers

Under Nebraska law, all grain dealers in the state must be licensed by the Public Service Commission.⁶⁶¹ Nebraska also statutorily defined the required content of a grain dealer receipt.⁶⁶² Licensing in Nebraska includes, *inter alia*, the requirement of security that can be a bond issued by corporate surety companies.⁶⁶³

654. *Id.*

655. Compare MO. ANN. STAT. § 411.070(2)(9) (West 2001) (authorizing Director of the Missouri Department of Agriculture to conduct hearings and to adjudicate claims under chapters 411 and 536), with MO. ANN. STAT. § 276.501 (West Supp. 2006) (proceedings remain before circuit court).

656. *State ex rel. Neese*, 706 S.W.2d at 859.

657. *Id.* Nonetheless, section 411.275(6) can have a dramatic impact upon a surety that fails to perform as requested by the Director.

658. *Id.* at 861.

659. *Id.*

660. *Id.*

661. NEB. REV. STAT. ANN. § 75-903 (LexisNexis 2004 & Supp. 2005). See also *id.* § 75-101.

662. *Id.* § 75-904.

663. § 75-903(4).

The bond must be payable to the Public Service Commission "for the benefit of any producer or owner within this state who filed a valid claim arising from a sale to or purchase from a grain dealer."⁶⁶⁴ The "security shall be furnished on the condition that the licensee will pay for any grain purchased on demand, not later than thirty days after the date of the last shipment of any contract."⁶⁶⁵ The surety's liability "shall cover purchases and sales made or arranged by the grain dealer" for the period of time in which the bond is in place.⁶⁶⁶

The bond shall be "in continuous force and effect" until terminated by the surety.⁶⁶⁷ However, the surety's liability is not accumulative for successive periods.⁶⁶⁸

In the event the conditions of the security have been violated,⁶⁶⁹ the Commission may demand the security be forfeited and hold the proceeds of the security in an interest-bearing trust account until all claims have been determined.⁶⁷⁰ The Commission may also revoke or suspend the license for failure to comply with the Act or any regulations under the Act.⁶⁷¹

Should claims exceed the security, the "security shall be distributed pro rata among the claimants."⁶⁷² If the security is not turned over in ten days, the Commission may file suit and recover the security plus interest from the date the demand for the security was made "if the court finds that *any* claim determined by the commission against the grain dealer's security was valid."⁶⁷³

(b) Warehouses

Nebraska has also adopted a Grain Warehouse Act.⁶⁷⁴ Grain warehouses are subject to the jurisdiction of the Public Service Commission. The term "warehouse" means "any grain elevator, mill, grist mill, building, or receptacle in which grain is held in storage for more than ten consecutive days."⁶⁷⁵

664. *Id.* See also § 75-101.

665. § 75-903(4).

666. *Id.*

667. *Id.*

668. *Id.*

669. *Id.* § 75-905 (defining that seller shall have no recourse against the security unless the seller demands payment within thirty days of delivery, negotiates the instrument within thirty days of issuance, and notifies the Commission within thirty days of the apparent loss).

670. *Id.* § 75-906.

671. *Id.* § 75-903.01.

672. § 75-906.

673. *Id.* (emphasis added).

674. *Id.* § 88-525.

675. *Id.* § 88-526(9).

Nebraska's statute also attempts to reach those sales that take place beyond its borders. A grain "warehouseman" is a person or entity that receives or offers to store the grain of another for consideration or receives grain for shipment to other points for storage, consignment, or resale, either in or out of the state.⁶⁷⁶

No person shall act as a warehouseman without obtaining a license.⁶⁷⁷ Note that additional examinations may be performed by the Commission, and the Commission may charge for such examination only when the examination was a follow-through on "irregularities from the previous examination or if financial conditions warrant additional examinations."⁶⁷⁸

The statute provides the Commission with the authority to share data with the "United States Government or any of its agencies, including the Commodity Credit Corporation . . ." ⁶⁷⁹ Likewise, the Commission may enter into agreements with regulators in bordering states for examination or licensing purposes; however, the Commission "shall assume all jurisdiction over any warehouseman headquartered in Nebraska regarding . . . warehouse activity."⁶⁸⁰ Yet, a warehouseman "headquartered and licensed in another state which acquires facilities in Nebraska is under the jurisdiction of the headquarter state . . ." ⁶⁸¹

As part of the application process, each applicant must submit to a criminal record background check and fingerprinting.⁶⁸² The application must be accompanied by an "audited or reviewed fiscal year-end financial statement" prepared as required by the statute.⁶⁸³ The application must also reveal the "location of the warehouse to be used by the applicant, its relation to railroad trackage, its capacity, its general plan and equipment, and its ownership."⁶⁸⁴ The Nebraska annual license fee is driven by the storage capacity in bushels.⁶⁸⁵ Additional storage capacity cannot be added without Commission approval.⁶⁸⁶ The Commission can request additional financial documents.⁶⁸⁷

676. § 88-526(11).

677. *Id.* § 88-527(1).

678. § 88-527(2).

679. § 88-527(3).

680. § 88-527(6).

681. *Id.*

682. *Id.* § 88-528. *See also id.* § 88-528.01. A felony conviction may bar an applicant.

683. § 88-528.

684. *Id.*

685. *Id.* § 88-529.

686. *Id.* § 88-533.

687. *Id.* § 88-530.01.

Applicants are also to submit "a bond, a certificate of deposit, an irrevocable letter of credit, United States bonds or treasury notes, or other public debt obligations of the United States . . ." ⁶⁸⁸ The security is to be in an amount required by the Commission, but shall not be less than \$25,000, and shall run to the

State of Nebraska for the benefit of each person who stores grain in such warehouse and of each person who holds a check for purchase of grain stored in such warehouse which was issued by the warehouse licensee not more than five business days prior to the cutoff date of operation of the warehouse, which shall be the date the commission officially closes the warehouse. ⁶⁸⁹

One license may be used to operate multiple facilities if certain conditions are met. ⁶⁹⁰ Licenses must be renewed annually. ⁶⁹¹ The Commission also has the authority to set storage rates ⁶⁹² and inspect the books and records of a licensee. ⁶⁹³

A surety must be licensed to do business in the state. ⁶⁹⁴ The security is conditioned upon sufficient insurance to cover losses to the grain arising from "combustion, fire, lightning, and tornado." ⁶⁹⁵ Next, the security is conditioned upon delivery of grain in exchange for the receipt. ⁶⁹⁶ Finally, the security is conditioned upon faithful performance of all lawful provisions regarding the storage of grain. ⁶⁹⁷

Like some other jurisdictions, the statute specifically addresses the cumulative nature of the security. "The liability of the surety on a bond shall not accumulate for each successive license period which the bond covers. The liability of the surety shall be limited to the amount stated on the bond or on an appropriate rider or endorsement to the bond." ⁶⁹⁸

Payment for grain is to be made upon demand of the seller, unless a written or oral contract specifies otherwise. ⁶⁹⁹ At the time of delivery to the warehouse, each licensee is to provide a scale ticket to the owner or consignee of the grain, unless the grain arrived by water or rail. ⁷⁰⁰ Within fifteen days following demand, the warehouse is to is-

688. *Id.* § 88-530.

689. *Id.*

690. *Id.* § 88-531.

691. *Id.* § 88-532.

692. *Id.* § 88-541.

693. *Id.* § 88-542.

694. § 88-530.

695. *Id.*

696. *Id.*

697. *Id.*

698. *Id.*

699. *Id.* § 88-534.

700. *Id.* § 88-535.

sue either a negotiable or nonnegotiable receipt.⁷⁰¹ Commission approval is required for the issuance of duplicate negotiable receipts in the event the document is lost (provided that a bond is delivered).⁷⁰² A warehouse licensee can issue receipts to itself for grain that it owns, but such receipts must be registered with the Commission.⁷⁰³

When presented with the receipt and payment for lawful charges, the grain represented by the receipt must be delivered immediately.⁷⁰⁴ If a partial delivery of a unit represented by a receipt is made, the partial delivery must be shown upon the face of the receipt and acknowledged by the recipient.⁷⁰⁵ Failure to deliver any grain within twenty-four hours of demand subjects the warehouse and the security to damages of one cent per bushel per day.⁷⁰⁶ The statute sets out special rules for terminal delivery.⁷⁰⁷ However, both parties have the right to terminate the storage agreement.⁷⁰⁸

In Nebraska, it is a felony to issue a warehouse receipt for grain that was not actually received.⁷⁰⁹ The statute creates a presumption regarding missing grain. "If at any time there is less grain in a warehouse than outstanding receipts issued for grain, there shall be a presumption that the warehouse . . . has wrongfully removed grain . . . or has issued receipts for grain not actually received, and has violated this section."⁷¹⁰ Apparently, no reported cases exist challenging the constitutionality of the presumption. A strong argument could be made that the presumption required by the statute violates a defendant's right to due process.⁷¹¹ The Commission is also allowed to as-

701. *Id.* § 88-536(1).

702. *Id.* § 88-537. *See also id.* § 88-538 (requiring that the receipt be marked duplicate).

703. § 88-536(3).

704. *Id.* § 88-540.

705. *Id.*

706. *Id.*

707. *Id.*

708. *Id.* § 88-544.

709. *Id.* § 88-543. Other jurisdictions could reach the same result by means of an allegation of criminal fraud or false pretenses. *See e.g.*, IOWA CODE ANN. 714.8(1) (West 2003) (defining a criminal fraudulent practice as any person who "[m]akes, tenders or keeps for sale any warehouse receipt, bill of lading, or any other instrument purporting to represent any right to goods, with knowledge that the goods represented by such instrument do not exist"). Nebraska's statute appears to be unique among the jurisdictions under examination, as the statute actually declares the act to be a felony regardless of the value involved.

710. NEB. REV. STAT. ANN. § 88-543.

711. *See Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that a presumption instruction in a criminal trial violated the due process clause of the Fourteenth Amendment because in a criminal case the burden is on the government to prove every element of the case beyond a reasonable doubt).

sess a civil penalty,⁷¹² while the warehouse is liable for all damages suffered by the violation of the Grain Warehouse Act.⁷¹³

Should the need arise, the Commission also has the authority to suspend or revoke the license.⁷¹⁴ The Commission's power also allows it to close a warehouse.⁷¹⁵ As part of the liquidation authority, the Commission may distribute (either in grain or proceeds) the remaining grain to all depositors on a pro rata basis.⁷¹⁶ If a shortage exists, the Commission may require that all or part of the security be forfeited for subsequent distribution by the Commission following a hearing.⁷¹⁷ The Commission is also authorized to commence a suit in district court for the benefit of the depositors.⁷¹⁸ In any event, the depositors are paid before the licensee's claims are recognized.⁷¹⁹

The warehouse must notify the depositors, in writing, of the amount and type of grain stored.⁷²⁰ Failure to do so is a misdemeanor.⁷²¹

2. Case law

(a) Contract formation

Courts generally

will not permit a party to avoid a contract into which the party has entered on the grounds that he or she did not attend to its terms, that he or she did not read the document which was signed and supposed it was different from its terms, or that it was a mere form.⁷²²

Article Two of the Uniform Commercial Code generally governs contracts involving the sale of grain.⁷²³ A contract will not fail for indefiniteness under section 2-305(1) of the Uniform Commercial Code

712. NEB. REV. STAT. ANN. § 88-543.01 (LexisNexis Supp. 2005). Of course, counsel will want to contemplate whether the civil penalty and the imposition of a criminal penalty for the same act violates the defendant's right to be free from successive punishment for the same act. U.S. CONST. amend. V, and related state constitutional equivalents.

713. NEB. REV. STAT. ANN. § 88-545 (LexisNexis 2003).

714. *Id.* § 88-546.

715. *Id.* § 88-547.

716. § 88-547(1).

717. § 88-547(2).

718. § 88-547(3).

719. § 88-547(1).

720. *Id.* § 88-549.

721. *Id.*

722. *In re Claims Against Atlanta Elevator, Inc.*, 268 Neb. 598, 617, 685 N.W.2d 477, 493 (2004) (citing *Omaha Nat'l Bank v. Goddard Realty, Inc.*, 210 Neb. 604, 316 N.W.2d 306 (1982)).

723. *Atlanta Elevator, Inc.*, 268 Neb. at 618, 685 N.W.2d at 493.

even if the price is unsettled. "In such a case the price is a reasonable price at the time for delivery if . . . nothing is said as to price."⁷²⁴

(b) Inapplicability of the discretionary function

In *D.K. Buskirk & Sons, Inc. v. State*,⁷²⁵ nineteen plaintiffs brought suit against the Nebraska Public Service Commission alleging negligent regulation of Quality Processing, Inc. ("QPI"), a grain dealer.⁷²⁶ The gravamen of the plaintiffs' allegation was that the Public Service Commission was negligent in its duty to enforce the Nebraska Grain Warehouse Act and the Nebraska Grain Dealer Act.⁷²⁷ When QPI filed for bankruptcy in February of 1990, the plaintiffs, as a group, suffered losses in excess of \$400,000.⁷²⁸ QPI had not been licensed by the Public Service Commission as a grain warehouse pursuant to the Grain Warehouse Act and "was not permitted to accept grain for storage."⁷²⁹

The district court sustained the state's motion for summary judgment on the basis of the "discretionary function exemption" to the Nebraska State Tort Claims Act.⁷³⁰ The Nebraska Court of Appeals reversed the order of the district court.⁷³¹ The Nebraska Supreme Court affirmed the decision of the court of appeals "albeit on different grounds" from the court of appeals.⁷³²

The gist of the state's motion for summary judgment was that in 1989 the Grain Warehouse Director for the Public Service Commission learned that QPI was engaged in the storage of beans as a grain dealer.⁷³³ Under Nebraska law, as a grain dealer, it could purchase grain from producers to sell but was not "permitted to accept grain for storage."⁷³⁴

In an effort to bring QPI into compliance with state law, the Commission arranged for the appropriate forms to be sent to QPI.⁷³⁵ Also, two inspectors were sent to inspect two different storage facilities used

724. *Id.* (citing Neb. U.C.C. § 2-305(1)(Reissue 2001)).

725. 252 Neb. 84, 560 N.W.2d 462 (1997)

726. *D.K. Buskirk & Sons, Inc. v. State*, 252 Neb. 84, 85, 560 N.W.2d 462, 464 (1997).

727. *D.K. Buskirk & Sons, Inc.*, 252 Neb. at 85, 560 N.W.2d at 464 (citing NEB. REV. STAT. § 88-525 et seq. (Reissue 1987 & Cum. Supp. 1990) and NEB. REV. STAT. § 75-901 et seq. (Reissue 1990) respectively).

728. *Id.*

729. *Id.*

730. *Id.* at 87, 560 N.W.2d at 465 (citing NEB. REV. STAT. § 81-8, 219(1)).

731. *Id.* at 88, 560 N.W.2d at 465.

732. *Id.* at 94-95, 560 N.W.2d at 469.

733. *Id.* at 85-86, 560 N.W.2d at 464.

734. *Id.* at 85, 560 N.W.2d at 464.

735. *Id.* at 86, 560 N.W.2d at 464.

by QPI.⁷³⁶ QPI then failed to return the application in a timely manner.⁷³⁷ A public service staff accountant was directed to contact QPI's accountant to inquire as to the status of the application.⁷³⁸ QPI later informed the Public Service Commission that it had misplaced the application; another set was sent.⁷³⁹ Ultimately, QPI's application was submitted to the Public Service Commission; however, QPI failed to provide the necessary financial statements.⁷⁴⁰ QPI never corrected the omission nor did it purchase all the grain it was holding in storage.⁷⁴¹

The last straw occurred when the Public Service Commission was informed by a deputy sheriff that QPI issued insufficient funds checks.⁷⁴² Over two weeks later, the Public Service Commission began proceedings for the suspension of QPI's grain dealer license.⁷⁴³ During this entire period, the Public Service Commission allowed QPI to continue to function as a grain warehouse without a license.⁷⁴⁴

Thereafter, following the suspension of its license, QPI failed.⁷⁴⁵ Thirty-four businesses and individuals filed forty-four claims with the Public Service Commission seeking a share of QPI's grain dealer's bond.⁷⁴⁶ Only eight of the claims were allowed, and the bond covered only half of the allowed claims.⁷⁴⁷ The majority of the claims were denied for one of two reasons.⁷⁴⁸ Either the claim was submitted untimely or, in the alternative, the claim was based on a contract for grain storage and not for the sale of grain.⁷⁴⁹ The court stated "QPI's bond could reimburse only those contracts in which QPI acted in its capacity as a grain dealer."⁷⁵⁰ The bond did not cover losses caused by QPI's conduct as a "unlicensed grain warehouse."⁷⁵¹ Thus, the nineteen individual plaintiffs in *D.K. Buskirk & Sons, Inc.* were those individuals or entities whose claims were denied.⁷⁵²

736. *Id.*

737. *Id.*

738. *Id.*

739. *Id.*

740. *Id.*

741. *Id.*

742. *Id.*

743. *Id.*

744. *Id.*

745. *Id.*

746. *Id.*

747. *Id.*, 560 N.W.2d at 464-65.

748. *Id.*, 560 N.W.2d at 465.

749. *Id.*

750. *Id.* at 86-87, 560 N.W.2d at 465.

751. *Id.* at 87, 560 N.W.2d at 465.

752. *Id.*

The state's summary judgment motion was based upon "the discretionary function exception to the State Tort Claims Act."⁷⁵³ The district court granted the summary judgment and stated, in part:

No rules or regulations have been established by the PSC setting forth a procedure to be used in issuing a grain warehouse license to an applicant. No rule or regulation exists which says that an application must be filled out and received by the PSC within 'x' number of days after the PSC becomes aware that a person is operating without the appropriate license. No rule or regulation authorizes [PSC] to allow a person to operate as a grain warehouse while the application process is ongoing. Conversely, no rule or regulation prohibits [PSC] from trying to work with an operator while attempting to bring it into compliance.⁷⁵⁴

As the Nebraska Supreme Court stated, "[w]hen a statute does not prescribe the action to be taken, leaving the agency to make a judgment and this judgment is based upon social, economic or political considerations, it will be protected by the discretionary function."⁷⁵⁵ The Nebraska State Tort Claims Act immunizes conduct "based upon an act or omission of an employee of the state . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused."⁷⁵⁶

Only when the facts are undisputed is the applicability of the discretionary function exemption a question of law.⁷⁵⁷ Consequently, the Nebraska Supreme Court found the court of appeals erred in reversing the district court's judgment on the grounds that a genuine issue of material fact had been presented, as both sides acknowledged the facts were undisputed.⁷⁵⁸

However, the Nebraska Supreme Court continued in its analysis and found the Grain Warehouse Act contained a nondiscretionary term when it commanded that the Public Service Commission "shall enforce the Grain Warehouse Act' . . . and 'no person shall operate a warehouse nor act as a warehouseman without a license issued pursuant to the Grain Warehouse Act . . .'"⁷⁵⁹ The plaintiffs argued that the plain language of the statute made its terms mandatory and, as a result, the Public Service Commission was without discretion in its

753. *Id.*

754. *Id.*

755. *Id.* at 87-88, 560 N.W.2d at 465 (citations omitted).

756. *Id.* at 89, 560 N.W.2d at 466 (quoting NEB. REV. STAT. § 81-8,219(1)(a)).

757. *Id.* at 90, 560 N.W.2d at 467.

758. *Id.* at 91, 560 N.W.2d at 467.

759. *Id.* at 93, 560 N.W.2d at 468 (quoting NEB. REV. STAT. § 88-545 and NEB. REV. STAT. § 88-527).

duty to not allow QPI to act as a grain warehouse in the absence of the license.⁷⁶⁰ Thus, "a statute prescribes a clear course of conduct" for the Public Service Commission.⁷⁶¹ Consequently, "the discretionary function exemption is inapplicable."⁷⁶² In short, the statute mandates that the Public Service Commission not allow an unlicensed grain warehouse to operate.⁷⁶³

(c) How the statute works

On a different occasion, the Nebraska Supreme Court determined, pursuant to Nebraska Revised Statute section 75-905, that no seller of grain can have recourse to a grain dealer's security, unless the seller demands payment from the grain dealer within ten days of the date of delivery and upon non-payment notifies the Commission within ten days of the apparent loss to be covered under the terms of the security.⁷⁶⁴ Furthermore, the statute provides that when grain is delivered in multiple shipments but comprised of a single contract, the seller must notify the Commission of any apparent loss to be covered by the security within forty-five days of the date of the first shipment.⁷⁶⁵ Accordingly, the seller had no recourse to the security when the statute was not followed.⁷⁶⁶

The Nebraska Supreme Court also concluded that under the Nebraska Grain Warehouse Act, the Nebraska Public Service Commission had jurisdiction over public warehouses as limited by the statutory scheme set out in Nebraska Revised Statute Chapter 88, Article 5.⁷⁶⁷ Nebraska Revised Statute section 88-513(3) provides the Commission the authority to take title to all grain stored and distribute the same on a pro rata basis to all owners.⁷⁶⁸ The distribution can be made either in the form of grain or proceeds from the sale of grain.⁷⁶⁹ In the alternative, the Commission may bring "a suit . . . for the benefit of owners, depositors, or storers of grain."⁷⁷⁰ However, in-

760. *Id.*

761. *Id.* at 94, 560 N.W.2d at 468.

762. *Id.* (citation omitted).

763. *Id.*, 560 N.W.2d at 469.

764. *Fecht v. Quality Processing, Inc.*, 244 Neb. 522, 523-24, 508 N.W.2d 236, 237 (1993) (citing NEB. REV. STAT. § 75-905(1)(a)-(c) (Reissue 1990)).

765. *Quality Processing, Inc.*, 244 Neb. at 524-25, 508 N.W.2d at 237-38 (citing NEB. REV. STAT. § 75-905(2) (Reissue 1990)).

766. *Id.* at 525, 508 N.W.2d at 238.

767. *In re Complaint of Fecht*, 216 Neb. 535, 539, 344 N.W.2d 636, 639 (1984).

768. *Complaint of Fecht*, 216 Neb. at 540, 344 N.W.2d at 639 (quoting NEB. REV. STAT. § 88-515(3) (Reissue 1981)).

769. *Id.*

770. *Id.* (quoting NEB. REV. STAT. § 88-515(3) (Reissue 1981)).

demnitors on the bond have no standing before the Public Service Commission.⁷⁷¹

(d) Interest

The Nebraska Supreme Court has concluded that the producer delivering grain to a grain warehouse is entitled to interest from the date of the last delivery of the grain.⁷⁷²

(e) Surety law

While not expressly decided under either the Nebraska Grain Warehouse Act or the Nebraska Grain Dealer Act, the Nebraska Supreme Court previously found, with respect to a dispute between an elevator company and a railroad, that an indemnity bond executed by a elevator company to protect carriers from losses occasioned by the delivery of grain was not breached by a proper delivery of a consignment nor did the bond protect the carrier from loss resulting from its own negligence or mistakes.⁷⁷³

Furthermore, “*pro tanto*” discharge does not exist under Nebraska law.⁷⁷⁴ Nevertheless, the doctrine of subrogation will be recognized in Nebraska.⁷⁷⁵ However, the surety cannot collect attorney fees against the indemnitors.⁷⁷⁶

(f) Administrative procedure and the due process claim

Given the administrative-type hearings that take place to resolve the claims before a public agency, the elimination of cross-examination does not constitute a deprivation of due process.⁷⁷⁷

(g) Appellate practice

In Nebraska, the rules of error preservation apply. Failure to challenge an evidentiary finding from an administrative-type hearing will result in waiver of the claim on the appeal in the absence of as-

771. *Id.* at 541, 344 N.W.2d at 640.

772. *Mintken v. Neb. Sur. Co.*, 187 Neb. 215, 217, 188 N.W.2d 819, 821 (1971).

773. *Omaha Elevator Co. v. Chicago, Burlington & Quincy R.R. Co.*, 104 Neb. 566, 573-74, 178 N.W. 211, 215 (1920).

774. *Omaha Grain Exch. v. Nat'l Sur. Co.*, 103 Neb. 820, 824-25, 174 N.W. 426, 427-28 (1919).

775. *Omaha Grain Exch.*, 103 Neb. at 824-25, 174 N.W. at 427-28.

776. *Havelock Bank of Lincoln v. W. Sur. Co.*, 217 Neb. 560, 566-67, 352 N.W.2d 855, 859 (1984).

777. *In re Claims Against Atlanta Elevator, Inc.*, 268 Neb. 598, 620, 685 N.W.2d 477, 495 (2004).

signment of error and a specific argument in the brief of the party alleging the error.⁷⁷⁸

Likewise, Nebraska appellate courts will defer to an administrative agency's findings of fact. A finding will not be disturbed by an appellate court unless the finding was "arbitrary or unreasonable."⁷⁷⁹

(h) Statutory interpretation

With respect to statutory construction in this arena, the doctrine of *in pari materia* applies.⁷⁸⁰

H. NORTH DAKOTA

1. Statutes

(a) Grain warehouses

Under North Dakota law, before any license may be issued to a public warehouseman, the applicant must file a bond that must be in a sum of not less than \$5,000, be continuous, and run to the State of North Dakota.⁷⁸¹ The bond must be conditioned upon the faithful performance of the licensee's duties, compliance with the provisions of law and rules of the Public Service Commission, and specify the location of each warehouse covered by the bond.⁷⁸² Failure to keep the grain insured against specified risks will result in suspension of the license.⁷⁸³

The bond must be for the specific purpose of "protecting the holders of outstanding receipts" and cover the costs incurred by the Commission in the event of a licensee's insolvency.⁷⁸⁴ However, the bond does not accrue to the benefit "of any person entering into a credit-sale contract with a public warehouseman."⁷⁸⁵

The liability of the surety on the bond may 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."⁷⁸⁶ The Commission is empowered to require regular reports from the warehouse.⁷⁸⁷ In lieu of a surety

778. *Atlanta Elevator, Inc.*, 268 Neb. at 603-04, 685 N.W.2d at 484 (citing *Misle v. HJA, Inc.*, 267 Neb. 375, 382, 674 N.W.2d 257, 263 (2004)).

779. *Id.* at 610, 685 N.W.2d at 488.

780. *Id.* at 606, 685 N.W.2d at 486 (citations omitted).

781. N.D. CENT. CODE § 60-02-09(1)-(3) (2003).

782. § 60-02-09(4)-(5). See also *id.* § 60-02-01(1).

783. *Id.* §§ 60-02-35 to -35.1.

784. § 60-02-09(6)(a)-(b).

785. § 60-02-09(7).

786. § 60-02-09(8).

787. *Id.* § 60-02-24.

bond, the Commission may accept cash, negotiable instruments, or a bond executed by personal sureties if the Commission believes it will protect the holders of outstanding receipts.⁷⁸⁸

The statute provides the means by which a surety bond may be canceled. The surety is released from future liability ninety days after notice is given to the Commission.⁷⁸⁹ Failure to have security and insurance in place will result in suspension and may result in revocation of the license.⁷⁹⁰ Statutory requirements exist for the closure⁷⁹¹ or transfer of a warehouse.⁷⁹²

The statute does not require that the surety information be posted. Instead, only the license must be posted.⁷⁹³

North Dakota statutorily defines the content of scale tickets.⁷⁹⁴ In the event stored grain is purchased by the warehouse, a specific receipt is required, the format for which is set out in the statute.⁷⁹⁵ Warehouse receipt and documentation requirements are denominated per the Code.⁷⁹⁶ The storage contract must be on the receipt as well.⁷⁹⁷ Failure to issue a receipt or the issuance of an incorrect receipt is a misdemeanor.⁷⁹⁸ A warehouse may include a covenant against liens in the warehouse receipt.⁷⁹⁹ In any event, a warehouse is liable to the owner of the grain to deliver the exact "kind, grade, quality, and quantity of grain called for by the warehouse receipt."⁸⁰⁰ The receipt holder has a "first priority lien" on both the grain contained in the warehouse and grain owned by the warehouse.⁸⁰¹ The lien is preferred over the liens and security interests of other creditors regardless of the time in which the creditor's lien attached.⁸⁰²

The state also tightly regulates credit-sales contracts. The contracts may only be entered into as allowed and as defined by the statute.⁸⁰³

788. § 60-02-09(8).

789. *Id.* § 60-02-09.1.

790. *Id.* § 60-02-10.1.

791. *Id.* §§ 60-02-39, 60-02-41.

792. *Id.* § 60-02-40.

793. *Id.* § 60-02-10.

794. *Id.* § 60-02-11.

795. *Id.* § 60-02-13.

796. *Id.* §§ 60-02-14, 60-02-16 (2003 & Supp. 2005). *See also id.* § 60-02-23.

797. *Id.* § 60-02-17.

798. *Id.* § 60-02-21.

799. *Id.* § 60-02-18.

800. *Id.* § 60-02-22.

801. *Id.* § 60-02-25.1. *See also id.* § 60-02-36.

802. § 60-02-25.1.

803. *Id.* § 60-02-19.1.

North Dakota, like some other jurisdictions, provides that delivery of grain to a warehouse constitutes a bailment.⁸⁰⁴ As such, the grain is exempt from execution, except in an action by the owner of the subject grain.⁸⁰⁵ The statute also defines how storage contracts terminate⁸⁰⁶ and the required notice to be provided to the owner.⁸⁰⁷ If the storage contract is renewed, a new receipt must issue.⁸⁰⁸

Insolvent warehouses are subject to coverage in a different Chapter.⁸⁰⁹ The provisions are very similar to those concerning North Dakota grain buyers, which are discussed *infra*.⁸¹⁰ Insolvency is broadly defined. "A licensee is insolvent when the licensee refuses, neglects, or is unable upon proper demand to make payment for grain purchased or marketed by the licensee or to make redelivery or payment for grain stored."⁸¹¹

Upon the insolvency of a warehouse, the Commission is appointed trustee of the warehouse.⁸¹² In this proceeding, the surety must be joined.⁸¹³ The trust includes various assets, claims, and property of an insolvent grain warehouse.⁸¹⁴ The trust consists of the following assets:

1. The grain in the warehouse of the insolvent warehouseman or the proceeds as obtained through the sale of such grain.
2. The proceeds, including accounts receivable, from any grain sold from the time of the filing of the claim that precipitated an insolvency until the commission is appointed trustee must be remitted to the commission and included in the trust fund.
3. The proceeds of insurance policies upon grain destroyed in the elevator.
4. The claims for relief, and proceeds therefrom, for damages upon any bond given by the warehouseman to ensure faithful performance of the duties of a warehouseman.
5. The claim for relief, and proceeds therefrom, for the conversion of any grain stored in the warehouse.
6. Unencumbered accounts receivable for grain sold prior to the filing of the claim that precipitated an insolvency.

804. *Id.* § 60-02-25.

805. *Id.*

806. *Id.* § 60-02-30.

807. *Id.* § 60-02-31.

808. *Id.* § 60-02-32.

809. N. D. CENT. CODE § 60-04-01 to -10 (2003).

810. See *infra* § III(H)(1)(B) and accompanying text.

811. N. D. CENT. CODE § 60-04-02.

812. *Id.* § 60-04-03.

813. *Id.* § 60-04-03.3.

814. *Id.* § 60-04-03.1.

7. Unencumbered equity in grain hedging accounts.
8. Unencumbered grain product assets.⁸¹⁵

The statute specifically provides that grain on hand is to be sold, and the proceeds are to be included in the trust fund.⁸¹⁶ The Commission has the authority to marshal the trust assets⁸¹⁷ and prosecute or compromise claims.⁸¹⁸

The statute restricts the remedies of receiptholders by barring separate claims for relief upon the warehouse's bond unless certain exceptions are met.⁸¹⁹ The receiptholder must, after notice, timely file a claim or the claim may be barred.⁸²⁰

(b) Grain buyers

Grain buyers are also regulated by the Commission⁸²¹ and are required to be licensed.⁸²² Similar to a warehouse, the grain buyer, as part of the licensing process, must provide a bond⁸²³ and financial statements.⁸²⁴ Like the warehouse bond, the grain buyer's bond must "run to the State of North Dakota for the benefit of all persons selling grain to or through the grain buyer."⁸²⁵ The grain buyer's bond is conditioned upon the licensee faithfully performing his duties in compliance with the law and regulations concerning grain buyers.⁸²⁶

The grain buyer provisions are very similar to the warehouse provisions. For instance, the grain buyer statute addresses cancellation of the bond,⁸²⁷ posting of the license,⁸²⁸ revocation and suspension of the license,⁸²⁹ credit-sale contracts,⁸³⁰ and scale ticket contents.⁸³¹ Grain buyers are also subject to record keeping requirements⁸³² and are required to make routine reports to the Commission.⁸³³ The grain buyer is to be insured,⁸³⁴ and failure to do so will result in suspension

815. *Id.*

816. *Id.* § 60-04-03.2.

817. *Id.* § 60-04-06.

818. *Id.* § 60-04-07.

819. *Id.* § 60-04-05.

820. *Id.* § 60-04-04.

821. *Id.* § 60-02.1-1 to -40 (2003 & Supp. 2005).

822. *Id.* § 60-02.1-07.

823. *Id.* § 60-02.1-08.

824. § 60-02.1-07.

825. § 60-02.1-08(3). *Cf. Id.* § 60-02-09(3) (warehouse bonding obligations).

826. § 60-02.1-08(4).

827. § 60-02.1-09.

828. *Id.* § 60-02.1-10.

829. *Id.* § 60-02.1-11.

830. *Id.* § 60-02.1-14.

831. *Id.* § 60-02.1-12.

832. *Id.* § 60-02.1-16.

833. *Id.* § 60-02.1-17(1)-(2).

834. *Id.* § 60-02.1-21.

of the buyer's license.⁸³⁵ Liens are statutorily provided to the holders of scale tickets.⁸³⁶ The statute also creates a framework in which facilities are closed⁸³⁷ or transferred.⁸³⁸

Once a licensee becomes insolvent,⁸³⁹ upon application or an order of the district court,⁸⁴⁰ a trust fund is established by the Commission for the benefit of all claimants and to pay any costs the Commission might incur in administering the insolvency proceedings.⁸⁴¹

The trust fund shall consist of "[n]onwarehouse receipt grain . . . held in storage or the proceeds obtained from the conversion of such grain."⁸⁴² Also, the fund shall include "[t]he proceeds, including accounts receivable, from any grain sold from the time of the filing of the claim that precipitated an insolvency"⁸⁴³ The proceeds of any insurance policies on destroyed grain are included in the trust.⁸⁴⁴ The claims for relief of damages on any bond are also included in the trust.⁸⁴⁵ This includes a "claim for relief, and proceeds therefrom, for the conversion of any grain stored in the warehouse."⁸⁴⁶ Moreover, the trust funds shall include, "[u]nencumbered accounts receivable for grain sold prior to the filing of the claim that precipitated an insolvency."⁸⁴⁷ The fund shall also include unencumbered equity in grain hedge accounts as well as the unencumbered grain product assets.⁸⁴⁸

Claimants do not have a claim for separate relief on the bond or any person converting grain.⁸⁴⁹ The surety must be joined as a party in a proceeding regarding an insolvent grain buyer.⁸⁵⁰ Receipt holders are to be notified by publication and failure to file a claim within the time allotted will result in the claim being barred.⁸⁵¹ Albeit, "receipholders are not parties to the insolvency action unless admitted by the court upon a motion for intervention."⁸⁵²

835. *Id.* § 60-02.1-22.

836. *Id.* § 60-02.1-23.

837. *Id.* §§ 60-02.1-25, 60-02.1-27.

838. *Id.* § 60-02.1-26.

839. *Id.* § 60-02.1-28.

840. *Id.* § 60-02.1-29.

841. *Id.* § 60-02.1-30.

842. § 60-02.1-30(1).

843. § 60-02.1-30(2).

844. § 60-02.1-30(3).

845. § 60-02.1-30(4).

846. § 60-02.1-30(5).

847. § 60-02.1-30(6).

848. § 60-02.1-30(7)-(8).

849. *Id.* § 60-02.1-33.

850. *Id.* § 60-02.1-31.

851. *Id.* § 60-02.1-32.

852. *Id.*

The Commission has the authority to prosecute and compromise claims.⁸⁵³ Although, “[u]pon payment of the amount of any settlement or of the full amount of any bond, [the Commission may] exonerate the person so paying from further liability growing out of the action.”⁸⁵⁴

2. Case law

(a) The common law and the statute

Under the common law of the State of North Dakota, as between the holder of the storage ticket and the warehouseman, there exists a bailment.⁸⁵⁵ The statutes still require as much:

The holders of warehouse receipts are owners in common of the grain in the warehouse up to the quantity required to redeem the receipts. There is nothing in our statutes which can reasonably be construed as a recognition of an actual authority in the warehouseman to sell stored grain required for the redemption of outstanding receipts.⁸⁵⁶

Nonetheless, it is “plain that the ticket holder has no claim or right to the identical grain stored by him.”⁸⁵⁷

The authority of the Commission is also quite clear in the case law. “The commission is the holder of the receipt for the purpose of enforcing the storage contract and has all the rights and privileges of the party to whom the receipt was issued.”⁸⁵⁸

(b) The claimant

A recent North Dakota case discusses the definition of “claimant” for purposes of the North Dakota Century Code.⁸⁵⁹ As observed by the North Dakota Supreme Court, the term “claimant” is not defined in section 60-02.1 of the North Dakota Century Code.⁸⁶⁰ Employing the plain, ordinary, and commonly understood meaning, the court concluded that “[a] ‘claimant’ is one who claims or asserts a right or demand.”⁸⁶¹ Thus, “[u]nder the plain meaning of the term, a claimant is a person who asserts a right to payment for grain sold to a licen-

853. *Id.* § 60-02.1-35(3).

854. § 60-02.1-35(4).

855. *State ex rel. Ertelt v. Daniels*, 159 N.W.17, 18 (N.D. 1916).

856. *Kastner v. Andrews*, 194 N.W. 824, 829 (N.D. 1923).

857. *Stutsman v. Cook*, 204 N.W. 976, 981 (N.D. 1925).

858. *State ex rel. Larkin v. Wheat Growers Warehouse Co.*, 249 N.W. 718, 723 (N.D. 1933).

859. *Pub. Serv. Comm’n v. Wimbledon Grain Co.*, 663 N.W.2d 186, 193-94 (N.D. 2003).

860. *Wimbledon Grain Co.*, 663 N.W.2d at 194.

861. *Id.* (quoting *Weisgerber v. Workmen’s Comp. Bureau*, 292 N.W. 627, 630 (1940)).

see”⁸⁶² It follows, therefore, that a person entering into credit sale contracts may be eligible to participate in the Commission’s trusts funds other than bond proceeds.⁸⁶³

(c) The surety and the principal

Under North Dakota law, a judgment for conversion against the principal is admissible evidence against the surety.⁸⁶⁴

(d) The surety and the roving grain buyer

Pooling agreements whereby members of a production cooperative are paid the net proceeds from all sales on a quarterly basis would defeat a claim on a “roving grain or hay buyers” bond.⁸⁶⁵

(e) The surety and the banker

The North Dakota Supreme Court has also concluded that “warehouse receipts” given by a production association to a bank to secure the bank’s line of credit with the association are not warehouse receipts within the meaning of the statute and, consequently, the bank is not entitled to share in the trust fund assets marshaled upon the insolvency of the warehouse.⁸⁶⁶

(f) Conversion

North Dakota has found that conversion may occur when the warehouse ships out grain and sells it without substituting other grain, though the default may be cured before demand.⁸⁶⁷ As acknowledged by the North Dakota Supreme Court, its holding is different from that reached on the same point by the South Dakota Supreme Court.⁸⁶⁸

(g) Invalid defenses

The North Dakota Supreme Court has previously determined that when the warehouseman fails to produce grain because of a fire that

862. *Id.*

863. *Id.* at 194, 196.

864. *State ex rel. Coan v. Plaza Equity Elevator Co.*, 261 N.W. 46, 50 (N.D. 1935).

865. *Pub. Serv. Comm’n v. Am. Grain & Cattle, Inc.*, 281 N.W.2d 48, 49, 51 (N.D. 1979).

866. *N.D. Pub. Serv. Comm’n v. Valley Farmers Bean Ass’n*, 365 N.W.2d 528, 538 (N.D. 1985).

867. *State ex rel. Harding v. Hoover Grain Co.*, 248 N.W. 275, 279 (N.D. 1933) (citations omitted).

868. *Cf. id.* (distinguishing *S.D. Wheat Growers’ Ass’n v. Farmers’ Grain Co.*, 237 N.W. 723 (S.D. 1931) (wherein South Dakota Supreme Court holds that conversion does not take place until failure or refusal to deliver on demand)).

destroys the stored grain, the warehouseman is liable notwithstanding the failure of the parties to reach an agreement with respect to the degree of care required of the warehouse.⁸⁶⁹ Moreover, the failure to convert scale tickets into storage tickets will not defeat the warehouse's (and ultimately the surety's) liability because the failure to do so is placed upon the warehouse.⁸⁷⁰

Under North Dakota law, it is not a valid defense to a bond claim that notice of the acceptance of a bond is required in order to make a binding surety contract.⁸⁷¹ Thus, the law of guarantees is inapplicable to a delivered surety bond.

(h) Damages

When determining the loss arising from a conversion, the court will use the value of the grain on the date of the demand; that is, the date on which the conversion occurred.⁸⁷²

(i) Contribution and subrogation

There is no right of contribution among successive sureties, but the paying surety is subrogated to the rights of its principal.⁸⁷³

(j) Interest

Interest begins to run on a claim from the date the warehouseman fails to redeem a receipt upon proper demand (that is, the date on which the insolvency occurred), rather than the date upon which the district court signs the order that the warehouse is insolvent.⁸⁷⁴

(k) The surety and the bankruptcy wrinkle

The North Dakota Supreme Court has concluded the surety is not liable for damages to the grain when the grain is in the care and custody of the trustee for the bankruptcy estate following the principal's bankruptcy.⁸⁷⁵

At a subsequent time, however, the North Dakota Supreme Court rejected the argument that a surety's liability on a bond is determined

869. *Larkin v. Doerr*, 255 N.W. 567, 568 (N.D. 1934).

870. *Larkin*, 255 N.W. at 568-69.

871. *State ex rel. Harding v. Lane*, 236 N.W. 353, 355 (N.D. 1931). Cf. § III(E)(2)(e) *supra* (discussing case law regarding obligation of delivery of a surety bond).

872. *Huether v. McCaull-Dinsmore Co.*, 204 N.W. 614, 620 (N.D. 1925), *overruled in part by Sollin v. Wangler*, 627 N.W.2d 159 (N.D. 2001).

873. *Stutsman*, 204 N.W. at 983.

874. *Valley Farmers Bean Ass'n*, 365 N.W.2d at 548 (citing N.D. CENT. CODE §§ 60-04-09, 60-04-02).

875. *N.D. Pub. Serv. Comm'n v. Jamestown Farmers Elevator, Inc.*, 422 N.W.2d 405, 407-08 (N.D. 1988).

by state law irrespective of the bankruptcy court's determination of the grain ownership claim.⁸⁷⁶ Ordinarily, the North Dakota courts "give effect" to bankruptcy court decisions as a matter of comity to avoid the prospect of "state and federal courts . . . reaching different results, ultimately resulting in unseemly and unnecessary conflict as each properly sought to enforce its determinations."⁸⁷⁷ In any event, to the extent the surety in *North Dakota Public Service Commission v. Central States Grain* believed it was entitled to a credit, the surety's remedy was in the federal bankruptcy proceeding and not in state court. In the North Dakota Supreme Court's view the surety was not without a remedy; once the surety had paid the receiptholders' claims it could seek relief from the bankruptcy proceedings and acquire the right of subrogation pursuant to 11 U.S.C. § 509(a).⁸⁷⁸

However, on another occasion, the North Dakota Supreme Court rejected the argument that the Commission should be required to seek relief from the bankruptcy court to acquire the proceeds of sunflower inventories.⁸⁷⁹

(l) Laches as an equitable defense

The claim on a storage ticket can be barred by the doctrine of laches.⁸⁸⁰

I. SOUTH DAKOTA

1. Statutes

(a) Warehouses

South Dakota has defined by statute that delivery of grain to a warehouse is a bailment and not a sale.

If any grain is delivered to any person doing a public grain warehouse business in this state, and a receipt is issued therefor providing for delivery of a like kind, amount and grade to the holder of the receipt in return, such delivery is a bailment and not a sale of the grain so delivered.⁸⁸¹

Grain held pursuant to a storage receipt is not "liable to seizure upon process of any court in any action against the bailee, except an action

876. N.D. Pub. Serv. Comm'n v. Woods Farmers Coop. Elevator, Co., 488 N.W.2d 860 (N.D. 1992).

877. *Woods Farmers Coop. Elevator, Co.*, 488 N.W.2d at 863 (citations omitted).

878. *Id.* at 865-66.

879. N.D. Pub. Serv. Comm'n v. Cent. States Grain, 371 N.W.2d 767, 774-75 (N.D. 1985).

880. *State ex rel. Reilly v. Farmers' Coop. Elevator Co.*, 167 N.W. 223, 225 (N.D. 1918).

881. S.D. CODIFIED LAWS § 49-43-2 (2004).

by the owner or holder of such warehouse receipt to enforce the terms of the same."⁸⁸²

Upon initial delivery, the warehouse must indicate in a writing whether the grain should be sold or stored.⁸⁸³ The statute defines the contents of the receipt.⁸⁸⁴ A warehouse storing its own grain must comply with the statute as well.⁸⁸⁵

Warehouses are subject to licensing and an application process.⁸⁸⁶ Pooling agreements between competing companies are prohibited.⁸⁸⁷ The Public Utilities Commission also has the authority to investigate and set storage rates.⁸⁸⁸ Once licensed, warehouses must make monthly reports to the Commission.⁸⁸⁹

A bond is required for the purpose of protecting those persons storing the grain with the warehouse.⁸⁹⁰ The bond must have a minimum value of \$25,000 per location and particularly describe the exact locations of any warehouses to be covered.⁸⁹¹ The fact that the bond is issued on a per location basis does not diminish the security available to depositors. "Such minimum bond amounts . . ." do not "limit the bond coverage available to depositors at any one warehouse location. The entire bond, up to the amount on its face, shall provide coverage to a depositor conducting business at any of the warehouse's locations."⁸⁹² Should the surety fail or cease to do business in South Dakota, by rule, other financial documents may be received instead of a corporate surety bond.⁸⁹³

In South Dakota, an injured depositor has the right to sue in the depositor's own name for damages sustained by the depositor.⁸⁹⁴ The action may be brought directly against the surety.⁸⁹⁵

In the event that the Public Utilities Commission takes over the facility, notice is to be given to the surety.⁸⁹⁶ Also, an immediate audit is to take place.⁸⁹⁷

882. *Id.* § 49-43-3.

883. *Id.* § 49-43-1.

884. *Id.* § 49-43-2.1.

885. *Id.* § 49-43-4.

886. *Id.* § 49-43-5.1.

887. *Id.* § 49-43-33.

888. *Id.* § 49-43-7.

889. *Id.* § 49-43-9.

890. *Id.* § 49-43-5.3.

891. *Id.*

892. *Id.*

893. *Id.* § 49-43-5.5.

894. *Id.* § 49-43-5.7.

895. *Id.*

896. *Id.* § 49-43-5.8(2); *see also id.* § 49-43-1.1(1).

897. § 49-43-5.8(1).

Once a warehouse license is revoked, terminated, or canceled, any claim against the warehouse must be made in writing with the Commission, surety and warehousemen within six months of receiving notice of any termination, cancellation, or revocation.⁸⁹⁸ Failure to make a claim will relieve the surety of all obligations to the claimants, but such failure to make a claim will not reduce the aggregate liability on the bond.⁸⁹⁹ The statute defines the specific notice that the Commission must provide to the holders of grain storage receipts and scale tickets.⁹⁰⁰ However, the provisions do not apply if a receiver is appointed before the expiration of six months after receiving the cancellation, revocation, or termination notice.⁹⁰¹ The statute also commands that, "grain on hand in the public grain warehouse shall first be applied to the redemption and satisfaction of outstanding receipts . . ." upon failure or insolvency of the bailee.⁹⁰²

South Dakota's legislation only allows for a one-year storage contract.⁹⁰³ After the expiration of one year, the product is sold and funds are provided to the owner (minus storage charges and advances) "upon surrender of the storage receipt."⁹⁰⁴

South Dakota statutorily prohibits a grain warehouse that has issued receipts for the storage of grain from denying that the grain represented by the receipt is the property of the person to whom the receipt was issued.⁹⁰⁵ Under the state's law, the receipt is "conclusive evidence of the fact that the person to whom the receipt was issued," or assigned, "is the owner of such grain and is the person entitled to make surrender of such receipt and receive the grain thereby promised to be delivered."⁹⁰⁶ No modification of the warehouse's liability may be placed on the receipt.⁹⁰⁷

Once the receipt is received by the warehouse, the receipt must be marked canceled⁹⁰⁸ and "such grain or an equal quantity of the same grade, kind and quality shall immediately be delivered . . ."⁹⁰⁹ Willful refusal to deliver constitutes theft.⁹¹⁰ Delivery contrary to the

898. *Id.* § 49-43-5.9.

899. *Id.*

900. *Id.*

901. *Id.*

902. *Id.* § 49-43-3.

903. *Id.* § 49-43-13.

904. *Id.*

905. *Id.* § 49-43-21.

906. *Id.*

907. *Id.* § 49-43-17.

908. *Id.* § 49-43-18.

909. *Id.* § 49-43-22.

910. *Id.* § 49-43-25.

owner's instruction is a misdemeanor.⁹¹¹ Partial deliveries require a new receipt.⁹¹²

(b) Grain dealers

South Dakota separately regulates grain dealers. A person is subject to both a civil penalty and a misdemeanor for dealing in grain without a license.⁹¹³ The Commission has the authority to issue and suspend licenses⁹¹⁴ as well as conduct inspections of facilities.⁹¹⁵ Licenses expire annually.⁹¹⁶

Reports must be provided to the Commission by the dealer.⁹¹⁷ Failure to do so constitutes a misdemeanor.⁹¹⁸ The licensee is also required to post the statutes and rules regarding their conduct.⁹¹⁹ Failure to post is also a misdemeanor.⁹²⁰

Upon receipt of the application and the bond, a license may be issued.⁹²¹ The bond must be in a minimum amount of \$50,000, which may be increased upon order of the Commission.⁹²² The bond is conditioned upon the "faithful performance of the applicant's obligations as a grain dealer and full and unreserved compliance with the laws" of South Dakota and the Commission's regulations.⁹²³ The bond is only for the protection of those selling grain to the grain dealer; credit sales are not covered.⁹²⁴ It is a misdemeanor not to have a bond in place, *and* each day of operation without the bond constitutes a separate offense.⁹²⁵

In the event of a credit sale, the payment must be made in accordance with the statute and the Commission's regulations.⁹²⁶ The agreement must also be in writing.⁹²⁷

Payment for grain must be upon demand of either the owner or agent.⁹²⁸ Failure to redeem the receipt or the loss of bond coverage

911. *Id.* § 49-43-32.

912. *Id.* § 49-43-19. *See also id.* § 49-43-20 (regarding consolidation).

913. *Id.* § 49-45-1. *See supra* note 774 and accompanying text (regarding potential constitutional violation arising from successive punishments).

914. § 49-45-1.

915. *Id.* § 49-45-13.

916. *Id.* § 49-45-3.

917. *Id.* § 49-45-14.

918. *Id.*

919. *Id.* § 49-45-20.

920. *Id.*

921. *Id.* § 49-45-7.

922. *Id.* § 49-45-9.

923. *Id.*

924. *Id.*

925. *Id.*

926. *Id.* § 49-45-10.

927. *Id.* § 49-45-11.

928. § 49-45-10.

will result in the Commission requesting a county circuit court to appoint a receiver that will have the powers and duties provided to it by the circuit court.⁹²⁹ In addition, the Commission must take possession of the facility, conduct an audit, and notify the surety.⁹³⁰ Simultaneously with steps taken by the Commission, the injured party may bring an action against the surety directly to recover damages.⁹³¹

The state's provision for claims against dealers is almost identical to the provision regarding warehouses. Once the dealer's license is revoked, terminated, or canceled, any claim against the dealer must be made in writing with the Commission and others; such claim shall be made within six months after receiving notice of the termination, cancellation, or revocation.⁹³² Failure to make a claim relieves the surety of any obligation to the claimant.⁹³³ Yet, failure of a claimant to make a claim will not reduce the aggregate liability on the bond.⁹³⁴ The statute defines the specific notice that the Commission must provide to the holders of scale tickets.⁹³⁵ However, if a receiver is appointed before the expiration of six months after receiving the cancellation, revocation, or termination notice, the provisions do not apply.⁹³⁶

It is noteworthy that the grain dealer statute does not command the Commission to use grain on hand to satisfy any outstanding claims.⁹³⁷ Presumably, this is the case because the grain dealer would not have grain on hand.

Finally, South Dakota's statute has a unique provision among those midwestern states that are the subject of this Article. The statute specifically allows the Commission to contract with the following South Dakota commissions to determine compliance with assessment and check off requirements: Wheat Commission, Oilseeds Council, Soybean Research and Promotion Council, Corn Utilization Council, and the South Dakota Pulse Crop Council.⁹³⁸

929. *Id.* § 49-45-16.

930. *Id.* § 49-45-18(1)-(2).

931. *Id.* § 49-45-17.

932. *Id.* § 49-45-19.

933. *Id.*

934. *Id.*

935. *Id.*

936. *Id.*

937. *See id.* *Cf. id.* § 49-43-3 (grain on hand shall be applied to satisfy outstanding receipts).

938. S.D. CODIFIED LAWS § 49-45-21 (2006).

2. Case law

(a) Surety coverage

While the case of *Farmers' Elevator Co. v. Swanson*⁹³⁹ predates the existing South Dakota statutory scheme, the case is nonetheless instructive. In *Farmers' Elevator Co. v. Swanson*, F.M. Swanson ("Swanson") was employed as a manager and grain buyer.⁹⁴⁰ Swanson provided a bond that he would well and faithfully discharge his duties as a grain buyer with his employer as obligee under the bond.⁹⁴¹

During his tenure as a grain buyer, Swanson engaged in options trading, which resulted in a net loss to the elevator.⁹⁴² Thereafter, his employer filed suit on the bond.⁹⁴³ A specific resolution of the elevator company's board of directors that prohibited dealing in options was presented at trial.⁹⁴⁴ The situation was compounded when Swanson, in order to make good his loss, settled losses by means of misappropriation of moneys and grain held by the employer.⁹⁴⁵

In affirming the decision of the trial court, the South Dakota Supreme Court concluded under the circumstances present in the record that Swanson had violated the terms of the bond.⁹⁴⁶ The evidence supported the fact that he could not account for the employer's grain and moneys.⁹⁴⁷ Thus, liability fell upon Swanson and the sureties.⁹⁴⁸

Under South Dakota law, merely being a stockholder and a holder of a storage ticket will not preclude a party from recovering on the bond.⁹⁴⁹ When a party deposits grain prior to issuance of the bond and is aware that the warehouseman has not yet obtained a permit to store grain, there can be no liability under the bond.⁹⁵⁰

While the result may vary from state to state, the South Dakota Supreme Court has determined that a separate bond is not required for each building where grain might be stored by a particular warehouseman.⁹⁵¹ However, the statute now clarifies the requirement.⁹⁵²

939. 146 N.W. 586 (S.D. 1914).

940. *Farmers' Elevator Co. v. Swanson*, 146 N.W. 586, 586 (S.D. 1914).

941. *Swanson*, 146 N.W. at 586.

942. *Id.*

943. *Id.*

944. *Id.*

945. *Id.* The employer's net loss totaled \$980. *Id.*

946. *Id.* at 586-87.

947. *Id.*

948. *Id.* at 586.

949. *State ex rel. Sommers v. Interstate Sur. Co.*, 201 N.W. 717, 719-20 (S.D. 1924).

950. *State ex rel. Vojta v. Deibert*, 240 N.W. 332, 334 (S.D. 1932).

951. *Sommers*, 201 N.W. at 720-21.

952. S.D. CODIFIED LAWS § 49-43-5.3 (2004).

(b) Interest

Counsel should also be cautioned that a client may waive its right to interest by acceptance of the payment of the principal.⁹⁵³

J. WISCONSIN

1. *Statutes*

Wisconsin regulates a number of agriculturally related storage facilities under the broad notion of "agricultural producer security."⁹⁵⁴ Wisconsin state law requires the Department of Agriculture, Trade and Consumer Protection to procure "contingent financial backing to secure payment" from milk contractors, grain dealers, grain warehouse keepers, and vegetable contractors.⁹⁵⁵ The balance of this discussion will focus on grain dealers and grain warehouse keepers.⁹⁵⁶

At the same time, some provisions are common to the statute. The statute requires that the Department procure surety bonds or "contract to provide a cash loan" to a subject fund.⁹⁵⁷ To accomplish this end, the legislature appropriated a start-up loan of \$2,000,000 to the Agricultural Producer Security Fund, which is to be repaid in installments back to the Agrichemical Management Fund.⁹⁵⁸ The Agricultural Producer Security Fund is a public trust that secures payments to producers.⁹⁵⁹

(a) Grain dealers

Grain dealers are not to procure grain from producers unless the dealer is licensed, subject to two exceptions.⁹⁶⁰ An entity need not be licensed if it pays cash on delivery for producer grain or the dealer acquires less than \$400,000 annually for grain that is used by the dealer for feed or seed.⁹⁶¹ Licenses expire on an annual basis and are not transferable or assignable.⁹⁶²

953. S.D. Pub. Utils. Comm'n v. Barzen Int'l Inc., 479 N.W.2d 910, 912 (S.D. 1992).

954. WIS. STAT. ANN. §§ 126.01-.90 (West Supp. 2006).

955. WIS. STAT. ANN. §§ 126.06, 126.01(8) (West Supp. 2006). *See also* § 126.01(5) (defining contractors).

956. *See* WIS. STAT. ANN. §§ 126.10-.21 (West Supp. 2006) (addressing grain dealers); WIS. STAT. ANN. §§ 126.25-.34 (West Supp. 2006) (addressing grain warehouse keepers).

957. § 126.06(1)(a)-(b).

958. *Id.* § 126.08.

959. *Id.* § 126.05(1).

960. *Id.* § 126.11(1).

961. § 126.11(2)(a)-(b).

962. § 126.11(2m).

The license application is defined by statute.⁹⁶³ The process includes a review of financial information.⁹⁶⁴ Wisconsin now charges a license fee.⁹⁶⁵ Once established as a dealer, the dealer must pay annual fund assessments.⁹⁶⁶ It is the annual fund assessments that now drive the system.

Simultaneously, if certain conditions apply, the dealer must also post security in the form of cash or a surety bond.⁹⁶⁷ If a commercial surety is used, the bond must be made payable to the Department "for the benefit of grain producers and producer agents."⁹⁶⁸ The bond may be canceled only upon permission of the Department or upon ninety days notice to the Department.⁹⁶⁹ The Department must physically hold the security.⁹⁷⁰ If security is required under the Code, additional reports are required by the Department.⁹⁷¹ The security may be released as provided for in the Code.⁹⁷²

At the same time, the dealer is required to carry insurance as specified in the statute.⁹⁷³ Grain dealers are required to display the license⁹⁷⁴ and keep certain records.⁹⁷⁵ The receipt used by the dealer is statutorily defined.⁹⁷⁶ Deferred payment contracts must also be in writing,⁹⁷⁷ contain a special notice,⁹⁷⁸ and are subject to a special assessment.⁹⁷⁹

The statute also specifies required and prohibited business practices of the grain dealer.⁹⁸⁰ These include a duty of accuracy, timely payment to producers, and maintenance of a permanent business location that is open during hours the Chicago Board of Trade is open for trading.⁹⁸¹ Meanwhile, a grain dealer may not, *inter alia*, misrepresent the amount of grain delivered or received, falsify records, make false statements to the Department or producers, or fail to file security

963. § 126.11(3).

964. § 126.11(3)(g). *See also id.* § 126.13.

965. § 126.11(4).

966. *Id.* § 126.15. Wisconsin's system formerly utilized surety bonds exclusively before the adoption of the new system in 2001. *See id.* § 126.06.

967. *Id.* § 126.16(4)(a)-(b).

968. § 126.16(4)(b)(1).

969. § 126.16(4)(b)(3).

970. § 126.16(5).

971. § 126.16(6).

972. § 126.16(8).

973. *Id.* § 126.12(1).

974. *Id.* § 126.11(11).

975. *Id.* § 126.17.

976. *Id.* § 126.18.

977. *Id.* § 126.19(1)-(2).

978. § 126.19(4).

979. § 126.19(5).

980. *Id.* § 126.20.

981. § 126.20(1)-(3).

(if required).⁹⁸² On the other hand, the dealer can require that the producer or the producer's agent disclose the existence of any liens or security interest in the grain.⁹⁸³ Likewise, if the producer contracted to sell at a certain price, the producer cannot refuse to deliver.⁹⁸⁴

(b) Grain warehouses

Grain warehouse keepers must also be licensed if their capacity exceeds 50,000 bushels of grain stored for others, unless the entity proves it is not holding more than 50,000 bushels.⁹⁸⁵ The grain warehouse is, likewise, subject to an application process along with the subject fees and surcharges.⁹⁸⁶ Financial statements must be submitted.⁹⁸⁷ Insurance also must be maintained.⁹⁸⁸ So too must the warehouse pay assessments into the fund⁹⁸⁹ and post security, if required by the statute.⁹⁹⁰ The security requirements are identical to the grain dealer provisions.⁹⁹¹ The grain warehouse is statutorily required to keep certain records.⁹⁹²

The warehouse is duty-bound to use the receipt prescribed by statute.⁹⁹³ In addition to other duties enumerated in the statute,⁹⁹⁴ the warehouse has a duty to protect the grain from "loss or abnormal deterioration."⁹⁹⁵ To that end, the warehouse must keep adequate equipment and facilities.⁹⁹⁶

(c) Recovery proceedings

In Wisconsin, claims against both the dealer and the warehouse are dealt with by means of a recovery proceeding.⁹⁹⁷ The claim is triggered when a producer or depositor is not paid.⁹⁹⁸ The claim must be filed with the Department within thirty days of the claimant's knowl-

982. § 126.20(4).

983. *Id.* § 126.21(2).

984. § 126.21(1).

985. *Id.* § 126.26(1).

986. § 126.26(3).

987. *Id.* § 126.28.

988. *Id.* § 126.27.

989. *Id.* § 126.30.

990. *Id.* § 126.31.

991. *See supra* § III(J)(1)(a) and accompanying text.

992. WIS. STAT. ANN. § 126.32 (West Supp. 2006).

993. *Id.* § 126.33.

994. *Id.* § 126.34.

995. § 126.34(2).

996. *Id.*

997. *Id.* § 126.70.

998. § 126.70(1)(a)-(b).

edge of the default.⁹⁹⁹ If the Department believes that others are unpaid, it may provide broader notice to other potential claimants.¹⁰⁰⁰

Once a claim has been filed, the Department is to review the claim and, if necessary, disallow it.¹⁰⁰¹ Under either circumstance, the Department will issue a proposed decision.¹⁰⁰² If no objections are filed, the decision becomes the final decision of the Department; otherwise, upon objection, a public hearing is performed.¹⁰⁰³

Claims are paid first from the security, if applicable.¹⁰⁰⁴ If the contractor is not a contributor to the fund, then the claims are paid from the security on a prorated basis.¹⁰⁰⁵ If the contractor is both a contributor and has security, the security is used to reimburse the fund when the security exceeds the claims.¹⁰⁰⁶ If the security is insufficient to pay all claims on a contributing contractor, the Department is to pay the claimants on a prorated basis.¹⁰⁰⁷ The claimant is still entitled, under any scenario, to pursue the contractor.¹⁰⁰⁸

The statute preserves the surety's right to subrogation against its principal.¹⁰⁰⁹ However, the surety is obligated to give notice of its demand upon the principal to the Department.¹⁰¹⁰

2. Case law

At the time this Article was submitted for publication, Wisconsin had no published cases discussing Chapter 126 in its present state or former Chapter 127 (which regulated warehouses prior to the rewrite of Chapter 126).¹⁰¹¹ Nonetheless, the Wisconsin Supreme Court has previously determined that a grain buyer can be considered a merchant for purposes of the Uniform Commercial Code (as adopted in Wisconsin).¹⁰¹²

IV. CONCLUSION

The foregoing Article has discussed the obligations imposed upon warehouses, grain dealers, and various other agricultural enterprises

999. § 126.70(2).

1000. § 126.70(3)(b).

1001. § 126.70(4).

1002. § 126.70(6).

1003. § 126.70(7)-(8).

1004. *Id.* § 126.71.

1005. § 126.71(2)(a).

1006. § 126.71(2)(b).

1007. § 126.71(2)(c).

1008. § 126.71(4).

1009. *Id.* § 126.73(2).

1010. *Id.*

1011. WIS. STAT. ANN. §§ 127.01-18 (West 2001) (repealed 2002).

1012. *Cargill, Inc. v. Gaard*, 267 N.W.2d 22, 24 (Wis. 1978).

under both federal and state law. Counsel can benefit from an analysis of the various obligations imposed upon all of the players in the industry. Most of all, counsel's client is well-served when counsel (be it for a claimant or a surety) understands the limits and preconditions to obtaining surety coverage for such transactions.