Grain Elevators
Legal Issues Surrounding the Storage of Grain in Kansas

Executive Summary

The frequency of grain elevator failures and bankruptcies continues to plague farmers. This liability exposure needs to be addressed. This writer offers a number of solutions to provide greater protection to farmers. First, allow the state and federal agencies to regulate elevators more closely. Second, change federal laws to give relief to farmers in bankruptcy courts. Third, states could increase the bonds that elevators use to insure coverage in case of loss. Fourth is the implementation of an indemnity fund. Finally, the farmer can choose to purchase insurance to protect against loss, which would work similar to a producer buying crop insurance.

On the face of all of the different solutions offered by the different states, it is this writer's opinion that Illinois seems to have the best solution or plan that addresses the exposure farmers face. It is complex, but offers tremendous control over this situation. The question is how we would make the changes without opposition in this state. Illinois used triggering events (a number of grain elevator failures over different periods of time) to seek change with the Illinois Legislature.

In the alternative, a number of states offer an indemnity plan that will protect farmers in the event of a loss or failure, but questions loom whether the funds are substantial enough to withstand multiple failures within those states.

Nebraska and Missouri continue their search for solutions, but have not found the magic wand. We can learn from these two states as we watch their efforts to develop a new plan. No matter what efforts are made, it needs to move carefully, so that everyone in the industry buys into the proposal.

It should be assumed that increased regulations will increase cost, which will eventually be borne by the farmers who deal with the elevators. A change in the bankruptcy laws, at least on which is comprehensive enough to be genuinely helpful, will also end up costing farmers. This is due to the increased cost of financing which elevators will have to pay because of changes in the priority of those entitled to certain assets. Indemnity funds may be the most costly of the options but yield the best results.

Perhaps the most important question to be asked, but cannot be answered, is whether farmers should be forced to spend money to buy insurance or pay into an indemnification fund because of the failure of those responsible for the regulation of elevators to regulate successfully.

Introduction

When a farmer delivers grain to an elevator, what guarantee does he have that he will be paid for his commodity if the elevator fails? Since the 1980's, grain elevator failures have plagued many rural communities around the United States. Over the years, elevators have failed a myriad of reasons. The causes are beyond the discussion in this paper, but the primary reason why such facilities fail is usually poor record keeping. This contributes to a net shortage of grain from which a financially strapped operator cannot recover. Other causes are lack of discipline with the future markets, hedge-to-arrive contracts, surge in commodity prices and even the rapid rise and fall of input costs.

This paper will provide an overview of grain elevator operations; explore the role they serve in the distribution of commodities and the protections afforded farmers in this agricultural industry. Also, we will discuss statutory schemes from Kansas as well as other states that regulate this activity.

Overview of Elevator Operations

Before we describe the protections Kansas producers have, it may be wise to understand some of the basic challenges grain elevators face.

Grain Elevators 101

Grain elevators play a crucial role in agricultural commodity markets through the storage, marketing, and transportation of grain. Since the mid-1800's, grain elevators have expedited the flow of grain from farm to market. The elevators in many cases provide facilities to store grain until the farmer decides to either sell or use the grain.

Through their storage and merchandising functions, they enhance the efficiency in price discovery and transportation of grain. Furthermore, grain elevators provide some risk-management options for producers.

Grain elevators are large business ventures in rural communities, especially in the Midwest. According to the 2002 Economic Census, grain elevators operated in almost 6,000 locations and employed over 61,000 workers. Grain elevators generated almost $90 billion in sales and revenue. Illinois had the largest number of commercial facilities (660), followed by Iowa (579), Kansas (493), Nebraska (348), and Minnesota (297).

It is important to note that grain merchandising is the traditional business activity of grain elevators. Other sources of income for an elevator are storage charges, input products and merchandising the grain and other goods. But, of particularly importance for this paper is the income from the spread, or difference, between the price it pays locally to farmers for their grain and the price it sells the grain to the next step in the marketing chain. Because grain merchandising is a spread business, and the spread between the purchase price and sale price can be only a few cents per bushel, elevators need to move large volumes to profit from their merchandising.

Elevators purchase grain from producers with a number of contractual arrangements. These methods can be either cash, forward, deferred payment or deferred price contracts. This arrangement will be discussed in more detail in the next section of this paper. But for now we want to discuss the concept of forward contracts.

In a forward contract, an elevator agrees to buy a set amount of grain from a farmer at a specified quality or grade, when it is to be delivered and an agreed price. This type of contract usually is set up prior to harvest. This allows farmers the opportunity to guarantee a crop price and eliminate the risk of falling prices at or after harvest.

Forward contracts, however, pose a risk to the grain elevators when prices fall. To offset or hedge this price risk, the elevator needs to sell a contract on the futures market. If the futures price falls, the grain elevators can earn a profit. However, if futures prices rise, the elevators can lose money. Profits and losses in the futures market can cause an elevator to flourish or fail.

The main causes of grain elevator are general mismanagement of the operation, which can take the company down. General mismanagement includes:

- Failure to make good judgments in the futures market,
- Understanding capitalization,
- Poor record keeping and accounting, and
- Unwise or misuse of funds.

This paper is designed to concentrate on the lack of fundamental protections for farmers after a facility fails. Consequently, the areas of mismanagement described above will only be referenced but will not be the focus of the information provided.

Grain Elevator Financing

Grain is typically an elevators most important asset when the need arises for collateral to finance the elevator's operations. During periods of rising farm input cost and surging crop prices, the financial needs of grain elevators rise. Cash needs for elevators surge during the seasons and often strain the cash position of cooperative elevators. Managing these large financing needs is cause for financial institutions to require collateral, especially when dealing in futures contracts.

Unlike forward contracts with producers, futures contracts used by the elevator are subject to collateral requirements, or margins. Lenders require the elevators to cover the risk exposure of the party purchasing the futures contract from the elevator with the margin collateral. Obviously, there is a risk the grain elevator may not deliver the commodity, or they may not cover their losses on these types of trades or option positions.

Grain Elevators - Warehouses

When grain elevators store grain for a farmer, the elevator is acting as a "warehouse". The producer usually receives a warehouse receipt as evidence the elevator is storing the

farmer's grain. In the alternative, the producer might receive a scale ticket indicating the amount of grain that is stored in the elevator.

One function the warehouse/scale ticket serve is to show or account for the grain being stored by the elevator. In addition, banks can use the warehouse receipts as security for loans made to the producer or the elevator. Finally, the state or federal government can regulate the warehouse system (storing grain) through the issuance of these tickets.

When an elevator purchases grain from a producer, it is acting as a grain dealer. This function has typically been regulated by states. In fact, most grain warehouses in Kansas are licensed by the Kansas Department of Agriculture (KDA) and are subject to the requirements of the Kansas Grain Code. It is important to understand that a federally licensed warehouse may not be covered by our state's code. It would however be regulated by the Commodity Credit Corporation (CCC). Our discussion will center on warehouses that are governed by state regulations.

Farmers traditionally sell grain to an elevator under four types of transactions.

1. **Spot Sale** - Farmers deliver grain at the current price to the elevator. The farmer would receive a check as soon as the elevator's staff can process the trade.
2. **Deferred Payment Sale** - A farmer sells his grain to the elevator at the current price, but the contract for sale does not call for a payment until a future date. At times this allows the farmer to push receipt of the income into the next tax year.
3. **Price Later Sale** – Farmers in this arrangement sell grain under a contract, also known as "deferred pricing" or "delayed pricing," whereby ownership of the grain passes to the elevator at the time of delivery, but the price to be received by the farmer is determined at a future time and with the final payment to be made at a later date.
4. **Forward Contract** – Farmers sell their grain by a contract which calls for the delivery of grain in the future at a price described in the agreement.

Where does this leave the farmer if an elevator has a shortage of grain, fails or goes bankrupt? What is a farmer's right with regard to payment for his grain?

Impact on Farmers

During the farm crisis of the 1980's, grain elevator failures became a common occurrence in many rural communities. These failures often leave farmers in a quagmire. Producers have significant cause for concern if the commodity they sweated months to produce could be lost overnight.

The problem associated with grain elevator failures affect both the farmers and the farming industry. The economic effect on the grain producer from grain elevator bankruptcies is not easy to determine. Some states in the past have reported the economic impact on communities was severe, with many farmers being economically ruined. Some farmers have had to sell their farms because of the financial hardships surrounding a single grain elevator failure.

So what are farmers rights and/or protections?

Grain in Storage – Bailments

A farmer who ***stores*** grain in an elevator that fails or files bankruptcy is ***not*** a creditor of the elevator. The grain that is delivered to be stored remains the property of the farmer who delivered the grain. The storage is evidenced by the warehouse receipts/scale tickets. The relationship created between the farmer and the elevator is a ***bailment.***

As a result of the elevator commingling grain from producers, it is deemed to be owned in common. The bailment relationship allows the farmer to retrieve grain of like quality from the elevator at reasonable time, minus a fee for storage. If the elevator files bankruptcy, the owner of stored grain is entitled to the commodity as long as there are no shortages. This is because the bankruptcy trustee can only seize the property the bankrupt elevator possessed. Therefore, the stored grain is not property of the elevator and once the farmer can prove ownership and pays storage and any other costs, he is entitled to his grain.

The bailment arrangement sounds great. However, problems usually arise when there is a shortage of grain in the elevator. In this case, the producer would receive a pro rata share in the remaining grain. Farmers who are not fully compensated become a general unsecured creditor of the elevator in bankruptcy court.

Grain Sold on Contract

Farmers typically sell grain to an elevator under the four types of transactions mentioned above. These are considered ***contractual agreements*** as opposed to the bailment relationship discussed above. Consequently, the grain producers who have delivered their grain to the elevator before it failed and entered into forward, deferred payment or deferred pricing contracts have ***relinquished*** their ownership of the grain to the elevator.

In essence, the title to the grain has passed to the elevator and the seller becomes a general creditor with a limited right to reclaim the delivered commodity. Usually, grain producers under contract, except for a limited priority in bankruptcy, are considered unsecured creditors and typically do not fare well in this situation.

Bankruptcy Priorities

Congress in 1984, authorized a limited priority for grain producers. Under the provision, unsecured claims of grain producers, up to $4,300 per producer for grain or the proceeds of grain against a debtor owning or operating a grain storage facility were given a priority for purpose of distributions in bankruptcy of the grain storage facility. The priority is fifth in line after administration expenses, wages, salaries etc. The problem is the $4,300 priority is of only limited benefit to most affected farmers, and is not available if the grain producer has transferred title to the elevator.

Except for the limited priority in bankruptcy described above, the farmer would be an unsecured creditor if the commodity was delivered under one of the four types of transactions referred to above. The reason is the farmer's grain has been delivered under contract and title passes to the elevator, with no right to reclaim the delivered grain.

Equity Holders in the Elevators

As a side note, many equity holders in grain elevators worry if they will be drawn into the bankruptcy with the elevator. Usually, the grain elevators are structured under the agricultural cooperatives. Accordingly, equity holders are afforded limited liability protection similar to shareholders in a corporation.

Grain Elevator Regulation

Figures showing the number of federally regulated elevators, in contrast to state regulated elevators, demonstrate that state regulation of elevators is much more common. It is the choice of the elevator as to whether they will be federally or state licensed and thereby subject to either the state or federal regulations. Depending on the individual state, most states regulations mirror the U.S. Warehouse Act.

States, due to the absence of federal law, are also responsible for the regulation of grain elevators when elevators engage in business as grain dealers. Usually, states require grain dealers to be licensed. Licensing generally demands, among other things, that a dealer submit financial records at required intervals. The state agency will oversee grain dealers with period audits and require that they post a dealer bond.

Generally, bonds range between $5,000 and $1,000,000 and are made available to those warehouse receipt holders whose grain deposits are not fully returned. To the extent that the grain on hand and the bond is not sufficient to compensate all warehouse receipt holders in full, they will typically receive a pro rata share of the bond and available grain.

Because of some grain dealers substandard financial management regarding their handling of commodity future trading, some states such as Illinois and Iowa have enacted statutes to regulate grain dealers more closely. They have also added protections for farmers through the use of ***indemnity funds***.

Regulation of grain elevators is usually intended to regulate management in order to keep the elevators solvent. When the elevators fail or become insolvent, the state agency will frequently take over the elevator and take whatever action is necessary to correct the problem. This only happens if a federal bankruptcy petition is not filed first.

A closer look into our state as compared to other surround states activities in this area may be helpful in generating new ways to protect farmers from these situations.

Risk Management by State

Grain elevators, warehouses, and dealers are required to be licensed and almost all states have some form of bonding requirement. Despite these regulatory efforts, the prior measures have sometimes been inadequate to provide stability in the grain industry. Because of the increased complexity in the grain industry and the potential for losses surrounding the futures market, we feel compelled to once again review our regulatory scheme in the State of Kansas.

Kansas

The bonding requirements in most states, including Kansas, have not increased in proportion to the increase in the storage capacity of grain elevators. The general long-run trend in the Kansas grain handling industry has been, and can be expected to continue to be, one of gradual concentration (merged facilities) in fewer, larger elevators.

Kansas gives authority to regulate security requirements for licensed warehouses. This power includes the ability to require a bond to cover any shortage in commodities for outstanding receipts and scale tickets. Once notice is given, it requires the warehouse to do any of the following:

- Cover any existing shortage;
- Give additional bond or letter of credit; or
- Submit to any further examination the Secretary may require.

The Secretary may impose any or all of the requirements state above. Failure to comply may result in the issuance of a court order authorizing the Department of Agriculture to take "immediate possession of and maintain the commodities, records, and property" of the warehouse.

From a procedural perspective, the Department of Agriculture's petition must be verified. The defendant/warehouse may answer within ten days, and a hearing is to be set within fifteen days. If the warehouse is insolvent or cannot pay all claims, then the department may liquidate the business or request appointment of a receiver.

In Kansas, a grain warehouse is required to purchase a bond or letter of credit equivalent to 10-20 cents times the total bushel capacity of the facility. More specifically, the bond requirements are as follows:

- $.20/ bushel for the first 1,000,000 bushels of licensed capacity;
- $.15/ bushel for the next 1,000,000 of licensed capacity; and
- $.10/ bushel for all licensed capacity over 2,000,000 bushels.
- Except in no event shall the bond or letter of credit be for an amount less than $10,000 nor more than $500,000.

In addition, a public warehouse has an obligation to insure stored grain with a "reliable insurance company" at the grains full market value. Failure to do so triggers liability on the bond.

Are the bond requirements stated above sufficient to cover a grain elevator failure? The fact that some grain sells for well over four dollars per bushel indicates there maybe inadequacy of the bonding requirement. The lack of protection provided by these requirements illustrates the potential for disaster if a grain elevator fails in our state.

We turn to Illinois for what appears to be the Cadillac for protection offered to farmers from all of the states that were reviewed.

Illinois

The Illinois Department of Agriculture trust account (Indemnity fund) is what drives the system. It is from the trust account that the Department takes funds to disburse to claimants. The Department has broad control of "surety" and trust funds. This allows an increased protection through a larger grain insurance fund and more generous rules regarding which producer claims are eligible for payment. The size of the Illinois Grain Insurance Fund (IGIF) fund went from $3 million to $6 million, and now is approaching $8 million.

Surety bonds are no longer a critical part of the Illinois process. Instead, Illinois places an assessment on licensees, applicants, first sellers of grain to grain dealers, and lenders. The whole process is very enlightening.

Illinois has created a ***Grain Indemnity Trust Account*** under the auspices of the Director of the Illinois Department of Agriculture. It is important to note that "a person may not engage in the business of buying of grain from producers, or storing of grain for compensation, in the State of Illinois without a license issued by the Department" or federal government. (Note: this would eliminate ethanol plants and feed yards from purchasing directly from farmers in our state.)

Illinois has two classes of warehousemen with regard to the storage of commodities. A "Class I warehouseman" means it is authorized to issue negotiable and non-negotiable warehouse receipts. A "Class II warehouseman" is authorized to issue only non-negotiable warehouse receipts. On the other hand, grain dealers buy only grain from producers.

For purpose of the Illinois statute, a "claimant" includes parties that have written evidence of a storage obligation. Lenders that have loaned money to a warehouse fall within the definition of a claimant. Upon a failure by a licensed warehouse, the Department will process the claims. Much of their statutes require notice to potential claimants as part of the procedural process.

In the event of a failure of a warehouse, in theory, claimants should be entitled to 100% reimbursement unless insufficient assets exist, in which case the claim is paid on a prorated basis "out of the net proceeds of the liquidation of grain assets …" subject to statutory caps.

Claims submitted by unpaid farmers who delivered grain for sale are known as grain dealer claims. Payments from the IGIF are capped at either $1 million per claimant. A producer may recover separately up to $1 million for his warehouse claims and up to $1 million for his grain dealer claims. However, if a contract is involved it may lower the claim to ($250,000). Subject to this caps, valid claims for some losses are covered at 100% of the loss while others are covered at 85%.

A brief overview is as follows before farmers can recovery under the IGIF:

1. **21-Day Rule: 100% Guaranteed Payment Up To $1,000,000**

   The IGIF guarantees 100% payment of the claim, up to $1 million, so long as the farmer completed delivery of the grain *and* agreed on a price within 21 days of the elevator's failure. Therefore, to ensure 100% coverage for up to $1 million in sales to a grain dealer, farmers must require payment within 21 days of delivering *and* pricing the grain for sale.

2. **22-160 Day Rule for Deferred Payment Sales: 85% Guaranteed Up To $250,000**

   If payment is not made in the first 21 days after delivering *and* pricing the grain, but the grain was delivered and priced within 160 days of the elevator failure, the farmer is entitled to 85% of the amount of the claim, up to a maximum payment from the IGIF of $250,000. Therefore, to assure at least 85% coverage for up to $250,000 in sales to a grain dealer, payment must be required within 160 days of delivering and pricing the grain.

3. **160-Day Rule & 365 Day Rule for "Price Later" sales: 85% Guaranteed Payment Up To $250,000**

   160-Day Rule for "Price Later" Sales: Where *either* completion of delivery *or* the date of pricing is within 160 days of the elevator's failure, farmers who file valid claims are also guaranteed 85% of the amount of the claim, up to a cap of $250,000 per claimant (so long as the 365-day rule is not violated – see below). The date of completion of delivery means the date of the last delivery of grain that was to be applied to the contract's quantity requirement.

   365-Day Rule for "Price Later" Sales: Either the date of the actual execution of the contract *or* delivery of the grain must be no more than 365 days before the date of failure.

4. **$250,000 Cap is on Combined Claims for Deferred Payment and Price Later Sales**

   Where a farmer has claims for deferred payment and price later sales, the maximum payment from the IGIF for the combined claims is $250,000.

In the event the fund is exhausted, the statute indicates the state assembly will fund any additional claims. The IGIF would be required to reimburse the state for any shortages from the fund. See Exhibit 1 for more details.

Iowa

Iowa regulates "grain dealers" which as part of the definition must meet the threshold of purchase of more than 1,000 bushels or more of grain from a producer in a calendar month. There are a number of exceptions to the definition.

Under Iowa law, grain dealers must have a license. In order to obtain a license, you must post a surety bond, which varies based upon the type of license. Under certain circumstances, the condition can be met by maintaining current assets equal to 100% of current liabilities. An irrevocable letter of credit may be used in lieu of a bond.

If the elevator's license is revoked, producers must file a written claim against the grain dealer. In addition, the claim must be filed with the issuer of the bond and the Department of Agriculture and Land Stewardship within 120 days after the termination, revocation, or cancellation.

The Iowa statute provides for the creation and perfection of liens on grain dealer assets when the seller has not received full payment for the grain. The lien occurs when the "warehouse receipts" are surrendered and terminates "when the liability of the grain dealer to the seller has been discharged."

Upon application of the Department, the court may appoint it as the receiver if the grain dealer's license has been revoked or suspended. The procedural process is similar to Kansas.

The grain dealers or warehouses are participants in the ***Iowa Grain Depositors and Sellers Indemnity Fund*** (IGDSIF). IGDSIF was established to partially reimburse farmers for losses arising from the selling or storing of grain. The Board of IGDSIF determines the amount and validity of claims made against the fund, reviews and adjusts the per-bushel fee and approves costs of administering the fund.

The board of the fund reviews and makes determinations as to the validity of the claims filed. The statute defines how claims are made, determined and paid. However, the statute does ***not*** guarantee or obligate the State of Iowa to do anything.

The fund arises from a per-bushel fee on purchased grain from licensed warehouse and grain dealers. The current per-bushel fee is one and one-half cent per bushel on all purchased grain. At the end of any three month period, if the assets of the fund exceed $8 million, then the fee will be waived and no longer collected. The board is required to reinstate the fees if the assets of the fund are $3 million or less. The balance in the Investment in State of Iowa Pooled Accounts as of February 28, 2009 was $8,127,797.

With more than $8 million available, the Indemnity Fund covers losses at 90 percent of the value of the loss, with a cap on coverage of $300,000 per claimant. While the Indemnity Fund is very liquid, claims will be paid on a first-in, first-out basis if the fund drops to zero due to numerous claims.

Nebraska

Nebraska has also adopted a Grain Warehouse Act. Under Nebraska law, all grain dealers in the state must be licensed by the ***Public Service Commission*** (PSC). The bonds must be payable to the 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."

Grain warehouses are subject to the jurisdiction of the PSC. To become a licensed grain dealer you must file an application. The applicants must also submit "a bond, a certificate of deposit, an irrevocable letter of credit, treasury notes, or other public debt obligations of the United States …" The security is to be in an amount required by the Commission, but should not be less than $25,000.

Like Kansas, the statute specifically addresses the cumulative nature of the security. The Commission also has the authority to suspend or revoke the license of a grain dealer.

Last year, it was announced that Nebraska officials were moving forward with a plan to establish a multimillion-dollar insurance fund to protect farmers when grain warehouses go broke, following the financial collapse of Alvo Grain and Feed an elevator in Nebraska.

The plan establishes a $25 million fund that would be paid for by farmers. Although the plan received a cool reception from farm groups, bankers and grain dealers when presented by the PSC. The PSC officials have stated they would not move forward without their support.

Members of both the Nebraska Farm Bureau and Nebraska Corn Growers Association haven't jumped on board with the plan, and the groups have indicated this to the PSC commission.

Missouri

The Missouri has also established the Director's authority to act under the Missouri Grain Warehouse Law. Missouri Revised Statutes provide that the Director of the Missouri Department of Agriculture is responsible for the approval of surety bonds required by the statute for grain dealers and warehouseman.

Before a person may be issued a warehouse license, they must file a bond with the Director. "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." Stored grain that has been priced is not covered by the warehouseman's bond; whereas grain in storage is covered.

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. Like Kansas, the Director has similar authority, under their Grain Warehouse Law, upon learning of the insolvency. The Director must give written notice of the action to the surety and "holders of record." Similarly, the Director is authorized to retain possession until such time as the surety satisfies all the claims of the depositors.

As a side note, the writer of this paper has spoken to the representatives of Missouri Farm Bureau regarding this matter. They are clearly looking for answers surrounding this subject and face the same obstacles presented in Kansas.

The remaining discussion briefly summarizes other state activities regarding this situation.

Minnesota

Their statutes require the application for a grain buyer's license be filed with the Commissioner of Agriculture and licenses issued before any grain is purchased. Minnesota provides for three categories of licenses: private grain warehouse operator's license, public grain warehouse operator's license, and independent grain buyer's license.

Prior to a grain buyer's license being issued, the applicant must file with the commissioner a bond in a penal sum to be prescribed by the Commissioner. The amount of the bond is based on the gross annual purchases and ranges in penal sums from $10,000 to $150,000.

Minnesota divides the bonds into "condition bonds." The first bond is defined as a "condition one bond." The bond is conditioned upon the liability of the operator who issued a grain warehouse receipt to the "depositor for the delivery of the kind, grade and net quantity of grain called for by the receipt."

The "condition two bond" is to provide for payment of losses caused by the grain buyer's failure to pay the purchase price of grain sold to the grain buyer once demanded by the farmer. The bond is "conditioned upon the buyer being duly licensed." At the same time, the bond does not cover "any transaction which constitutes a voluntary extension of credit."

Upon default, the Commissioner is to determine the validity of the claims and notify those parties that have filed claims. An aggrieved party may appeal the Commissioner's determination by commencing a contested case proceeding. In the absence of a contested case proceeding being initiated, or following the issuance of an order in a contested case proceeding, "the surety company shall issue payment to those claimants entitled to payment."

North Dakota

North Dakota requires a bond in a sum of not less than $5,000, be continuous, and given to the State of North Dakota. The state also tightly regulates credit-sales contracts. The contracts may only be entered into as allowed and as defined by the statute.

Upon the insolvency of a warehouse, the Public Service Commission is appointed trustee of the warehouse. The trustee, like some other jurisdictions, has a procedural protocol the Commission is to follow.

Once a licensee becomes insolvent, upon application or an order of the district court, a trust fund is established by the Commission for the benefit of all claimants. The trust fund shall consist of grain held in storage. Also, "the proceeds including accounts receivable, from grain sold from the time of the filing of the claim that precipitated an insolvency …" The proceeds of any insurance policies on destroyed grain are included within the fund. Finally, the claims for relief of damages on any bond are included within the fund.

Holders of claims are all notified by publication and the proceeds from the trust fund are then divided. The Commission has the authority to prosecute and compromise claims.

South Dakota

South Dakota has defined by statute that delivery of grain to a warehouse is a bailment and not a sale. 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 by the owner or holder of such warehouse receipt to enforce the terms of the same."

Warehouses are subject to licensing and an application process. A bond is required for the purpose of protecting those producers storing the grain with the warehouse. The bond must have a minimum value of $25,000 per location. In the event a failure occurs, the Public Utilities Commission will take over a facility.

South Dakota's legislation only allows for a one-year storage contract. 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."

Wisconsin

Wisconsin regulates a number of agriculturally related storage facilities under a broad notion of "agricultural producer security." Also, their 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.

The statute requires that the Department procure surety bonds or "contract to provide a cash loan" to a subject fund. The legislature appropriated a start-up loan of $2,000,000 to the ***Agricultural Producer Security Fund*** (APSF), which has to be paid back in installments. The APSF is a public trust that secures payments to producers.

Once established as a dealer, the dealer must pay annual fund assessments. These annual assessments now drive the funding system.

Bond and insurance are required for grain dealers and warehouses. Any claims are dealt with by means of a recovery proceeding. A claim must be submitted to the Department for review. Claims are paid first from the security, if applicable. If the contractor is not a contributor to the fund, then the claims are paid from the security on a prorated basis. If the contractor is both a contributor and has security, the security is used to reimburse the fund when the security exceeds the claims. If the security is insufficient to pay all of the claims on a contributing contractor, the Department is to pay the claimants on a prorated basis.

Attached are Exhibits 1 and 2 to further delineate states and their procedures for handling storage of grain.

Suggestions

Farmers in our state who could be adversely affected by an elevator failure and whose claims may not be made whole may want to consider indemnity funds as used by other states.

In the alternative, private insurance companies offer policies to farmers which allow them to insure against losses they incur as a result of elevator bankruptcies. It seems this potentially fills a void created by a lack of legislation.

Another possibility is to look at legislation similar to the Packers and Stockyards Act (PSA), whereby there are provisions that allow for the prompt and full payment for livestock in the event the stockyard fails. Under these provisions, before the close of the next business day following the purchase of the livestock, the packer, market agency or dealer must deliver a check or wire funds to the seller. This provision was added in 1976 to the PSA.

Also, the Bankruptcy Act was amended in 1987 so even if a packer goes into bankruptcy, the proceeds of livestock sales are held in trust out of bankruptcy and away from creditors to assure payment to the sellers of the livestock. Again, with a written agreement to defer the payment or pricing of livestock, there is a danger of waiving the right to the payment. The seller may become an unsecured creditor.