

## **CHAPTER 60-04 INSOLVENT GRAIN WAREHOUSEMEN**

### **60-04-01. Definitions.**

In this chapter, unless the context or subject matter otherwise requires:

1. "Commissioner" means the agriculture commissioner.
2. "Credit-sale contract" means a written contract for the sale of grain pursuant to which the sale price is to be paid or may be paid more than thirty days after the delivery or release of the grain for sale and which contains the notice provided in subsection 7 of section 60-02-19.1. When a part of the sale price of a contract for the sale of grain is to be paid or may be paid more than thirty days after the delivery or release of the grain for sale, only such part of the contract is a credit-sale contract.
3. "Grain" means wheat, durum, oats, rye, barley, buckwheat, flaxseed, speltz, safflower, sunflower seeds, tame mustard, peas, beans, soybeans, corn, clover, millet, alfalfa, and any other commercially grown domestic grain or grass seed. "Grain" as defined in this chapter does not include grain or grass seeds owned by or in the possession of the warehouseman that have been cleaned, processed, and specifically identified for an intended use of planting for reproduction and for which a warehouse receipt has not been issued.
4. "Public warehouse" means any elevator, mill, warehouse, subterminal, grain warehouse, terminal warehouse, or other structure or facility in which grain is received for storing, buying, selling, or shipping for compensation. Provided, however, that nothing in this chapter requires any warehouseman doing manufacturing business only, to receive, store, or purchase any kind of grain at said mill.
5. "Public warehouseman" means the person owning or operating a public warehouse which is located or doing business within this state, whether such owner or operator resides within this state or not.
6. "Receipts" means grain warehouse receipts, scale tickets, checks, or other memoranda given by a public warehouseman for, or as evidence of, the receipt, storage, or sale of grain except when such memoranda was received as a result of a credit-sale contract.

### **60-04-02. Insolvency of warehouseman.**

A licensee is insolvent when the licensee refuses, neglects, or is unable upon proper written demand, including electronic communication, to make payment for grain purchased or marketed by the licensee or to make redelivery or payment for grain stored.

### **60-04-03. Appointment of commissioner.**

Upon the insolvency of any warehouseman, the commissioner shall apply to the district court of a county in which the warehouseman operates a licensed warehouse for authority to take all action necessary and appropriate to secure and act as trustee of the trust fund described in section 60-04-03.1. Upon such notice to the warehouseman as the court shall prescribe, but not exceeding twenty days, or upon waiver of such notice in writing by the warehouseman, the court shall proceed to hear and determine such application in a summary manner. If it shall appear to the court the warehouseman is insolvent within the meaning of this chapter and it would be for the best interests of the receipt holders that the commissioner secure and execute such trust, the court shall issue an order granting the application, without bond, at which time the commissioner shall proceed to exercise the commissioner's authority without further direction from the court.

Upon the filing of the commissioner's application, the court may issue ex parte such temporary order as may be necessary to preserve or protect the assets of the trust fund, or the value of the trust fund, until the court issues an order granting or denying the application.

### **60-04-03.1. Trust fund established.**

1. Upon the insolvency of any warehouseman, a trust fund must be established:

- a. For the benefit of noncredit-sale receiptholders of the insolvent warehouseman, other than those who have waived their rights as beneficiaries of the trust fund in accordance with section 60-02-11; and
  - b. To pay the costs incurred by the commissioner in the administration of this chapter.
2. The trust fund consists of the following:
- a. The grain in the warehouse of the insolvent warehouseman or the proceeds as obtained through the sale of such grain;
  - b. The proceeds, including accounts receivable, from any grain sold from the time of the filing of the claim that precipitated an insolvency until the commissioner is appointed trustee;
  - c. The proceeds of insurance policies upon grain destroyed in the elevator;
  - d. The claims for relief, and proceeds from the claims for relief, for damages upon any bond given by the warehouseman to ensure faithful performance of the duties of a warehouseman;
  - e. The claims for relief, and proceeds from the claims for relief, for the conversion of any grain stored in the warehouse;
  - f. Unencumbered accounts receivable for grain sold before the filing of the claim that precipitated an insolvency;
  - g. Unencumbered equity in grain hedging accounts; and
  - h. Unencumbered grain product assets.

#### **60-04-03.2. Possession of grain.**

Upon the commissioner's appointment by the district court, the commissioner shall seek possession of the grain to be included in the trust fund. Upon the commissioner's possession of any grain in the warehouse, the commissioner shall sell such grain and apply the proceeds to the trust fund.

#### **60-04-03.3. Joinder of surety - Deposit of proceeds.**

The surety on the warehouseman's bond must be joined as a party to the insolvency proceeding upon a motion by the commissioner if the commissioner believes proceeds from the warehouseman's bond may be needed to redeem outstanding receipts issued by the warehouseman. If it appears in the best interests of the receiptholders, the court may order the surety to deposit the penal sum of the bond, or so much of the sum as may be deemed necessary, into the trustee's trust account pending a final determination of the surety's liability under the bond.

#### **60-04-04. Notice to receiptholders and credit-sale contract claimants.**

Upon the commissioner's appointment by the district court, the commissioner may take possession of relevant books and records of the warehouseman. The commissioner shall cause a notice of the commissioner's appointment to be published once each week for two consecutive weeks in a newspaper in the county in which the warehouse is located and may notify by ordinary mail the holders of record of outstanding receipts and those who are potential credit-sale contract claimants, as shown by the warehouseman's records. The notices must require outstanding receiptholders and credit-sale contract claimants to file their claims against the warehouseman with the commissioner along with the receipts, contracts, or any other evidence of the claims as required by the commissioner. If an outstanding receiptholder or credit-sale contract claimant fails to submit a claim within forty-five days after the last publication of the notice or a longer time as prescribed by the commissioner, the commissioner is relieved of further duty or action under this chapter on behalf of the receiptholder or credit-sale contract claimant and the receiptholder or credit-sale contract claimant may be barred from payment for any amount due. Outstanding receiptholders and credit-sale contract claimants are not parties to the insolvency action unless admitted by the court upon a motion for intervention.

#### **60-04-05. Remedy of receiptholders.**

A receiptholder does not have a separate claim for relief upon the warehouseman's bond, nor for insurance, nor against any person converting grain, nor against any other receiptholder, except through the trustee, unless, upon demand of five or more receiptholders, the commissioner fails or refuses to apply for the commissioner's own appointment from the district court or unless the district court denies the application for appointment. This chapter does not prohibit or prevent any receiptholder, either individually or in conjunction with other receiptholders, from pursuing concurrently such other remedy against the person or property of the warehouseman, for the whole, or any deficiency occurring in the redemption, of the receipts.

#### **60-04-06. Commissioner to marshal trust assets.**

Upon the commissioner's appointment by the district court, the commissioner may maintain suits at law or in equity, or any special proceeding, in the name of the state of North Dakota, upon the commissioner's own relation, but for the benefit of all such receiptholders against:

1. The insurers of grain;
2. The warehouseman's bond;
3. Any person who may have converted any grain; or
4. Any receiptholder who received more than the receiptholder's just and pro rata share of grain,

for the purpose of marshalling all of the trust fund assets and distributing the same among the receiptholders. The commissioner shall seek possession of any grain in the warehouse before recourse is had against the insurers of grain, and the remedy against the insurers of grain must be exhausted before recourse is had against the bond, and against the bond before recourse is had against the person honestly converting grain, unless the commissioner deems it necessary to the redemption of the receipts that all the above remedies be pursued at the same time.

#### **60-04-07. Power of commissioner to prosecute or compromise claims.**

The commissioner may:

1. Prosecute any action provided in this chapter in any court in this state or in any other state.
2. Appeal from any adverse judgment to the courts of last resort.
3. Settle and compromise any action if it is in the best interests of the receiptholders.
4. Settle and compromise any action if it is in the best interests of the credit-sale contract claimants.
5. Upon payment of the amount of the compromise or of the full amount of any insurance policy, bond, or conversion claim, exonerate the person so compromising or paying in full from further liability growing out of the action.

#### **60-04-08. Money received by trustee - Deposited in Bank of North Dakota.**

All moneys collected and received by the commissioner as trustee under this chapter, pending the marshalling of the fund, must be deposited in the Bank of North Dakota.

#### **60-04-09. Report of trustee to court - Approval - Distribution.**

Upon the receipt and evaluation of claims filed with the commissioner, the commissioner shall file with the court a report showing the amount and validity of each claim after recognizing:

1. Any proper liens or pledges on the claims.
2. Assignments of the claims.
3. Deductions from the claims by reason of advances or offsets accrued in favor of the warehouseman.
4. In case of cash claims or checks, the amount of the claims or checks.
5. In the case of scale tickets or warehouse receipts, the amount based upon the market price prevailing on the date the commissioner first received a copy of the written demand required by section 60-04-02.
6. In the case of a credit-sale or noncredit-sale contract, the amount remaining to be paid based on the terms of the contract.

The report must also contain the proposed reimbursement to the commissioner for the expenses of administering the insolvency, a proposed distribution of the trust fund assets, less expenses incurred by the commissioner in the administration of this chapter, and the proposed credit-sale contract indemnity fund payments to credit-sale contract claimants as the interests of the claimants are determined. If the trust fund is insufficient to redeem all receiptholder claims in full, the fund must be shown prorated in the report in the manner the commissioner deems fair and equitable.

The court shall set a hearing and the appropriate notice for interested persons to show cause why the commissioner's report should not be approved and credit-sale contract indemnity fund payments and distribution of the trust fund be made as proposed, and payments from the credit-sale contracts be made as proposed. Copies of the report and notice of hearing must be served by the commissioner by certified mail upon the warehouseman and the surety and by ordinary mail upon all persons having claims filed with the commissioner.

Any aggrieved person having an objection to the commissioner's report shall file the objection with the court and serve copies on the commissioner, the warehouseman, and the surety at least twenty days before the hearing. Failure to file and serve objections in the time set is a waiver of the objection.

Following hearing, the court shall approve or modify the report and issue an order directing payment of the necessary bond proceeds, distribution of the trust fund, payments from the credit-sale contract indemnity fund, and discharge of the commissioner from the commissioner's trust.

#### **60-04-10. Filing fees and court costs - Expenses.**

In any action in a state court in this state, the commissioner may not be required to pay any filing fee or other court costs or disbursements if the fees accrue to the county or to the state. The attorney general may employ outside legal services to assist the commissioner in the prosecution of such action as in the attorney general's judgment may be necessary and the commissioner shall deduct the expenses of the same from the trust fund and the credit-sale contract indemnity fund as appropriate. All other necessary expenses incurred by the commissioner in carrying out the provisions of this chapter, including adequate insurance to protect the commissioner, the commissioner's employees, and others engaged in carrying out the provisions of this chapter, must be reimbursed to the commissioner from the trust fund and credit-sale indemnity funds as appropriate.