

1-0400-5642-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF AGRICULTURE

In the Matter of Claims
Against the Grain Buyer's
Bond No. 877706-08624237,
Thomas D. French, d/b/a
French Grain Co. Principal,
Auto-Owners Insurance, Surety.

FINDINGS_OF_FACT,
CONCLUSIONS_AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck on Tuesday, July 16, 1991 at 9:30 a.m. at the Office of Administrative Hearings, 500 Flour Exchange Building, in the City of Minneapolis, Minnesota.

Paul A. Strandberg, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Department of Agriculture. James A. Reding, Esq., of the firm of Reding and Votel, 814 Degree of Honor Building, 325 Cedar Street, St. Paul, Minnesota 55101, appeared on behalf of Auto-Owners Insurance Company. Michael J. Wallace, Route 3, Box 187, Isanti, Minnesota 55040, appeared on his own behalf, as did James Quigley, Route 3, Box 321, Isanti, Minnesota 55040.

The record in this matter closed on July 31, 1991, the date of filing of the last written memorandum filed by a party.

This Report is a recommendation, not a final decision. The Commissioner of Agriculture will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. P 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Elton Redalen, Commissioner, Minnesota Department of Agriculture, 90 West Plato Boulevard, St. Paul, Minnesota 55107, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this contested case proceeding is whether or not the Claimants, James Quigley and Michael Wallace, are entitled to recover against the grain buyer's bond written by Auto-Owners Insurance Company for Thomas D. French, d/b/a French Grain Company.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Thomas D. French, d/b/a French Grain Company, Box 57, Isanti, Minnesota 55040, was licensed by the Department of Agriculture as an independent grain buyer for the period July 1, 1989 through June 30, 1990. (Ex. 1). Mr. French submitted with his application for a license a grain buyer's bond written by Auto-Owners Insurance Company in the amount of \$30,000 for the benefit of all producers selling grain to Mr. French. (Ex. 1).

2. James Quigley, an Isanti area grain producer, made the following sales of corn to Thomas French:

980.89 bushels of corn at \$2,265.86 on March 7, 1990.

908.21 bushels of corn at \$2,120.67 on March 9, 1990.

942.50 bushels of corn at \$2,309.13 on March 19, 1990.

975.89 bushels of corn at \$2,490.96 on April 16, 1990.

These four sales totalled \$9,186.62. The grain was sold to Mr. French on a cash basis. (Ex. 3). He usually paid Mr. Quigley approximately one week after delivery of the grain.

3. Mr. Quigley did not enter into a written contract with Mr. French for an extension of credit.

4. When Mr. French had not paid Mr. Quigley within the normal time period, Mr. Quigley called him and told him that he needed the money and expected to be paid. Mr. Quigley called M

5. Mr. Quigley did not realize that he was not going to be paid by Mr. French until Mr. French filed for bankruptcy in December of 1990. In December of 1990, Mike Wallace, another Isanti area grain producer, advised Mr. Quigley of the procedure for filing a claim with the Department against the grain buyer's bond. On December 24, 1990 Mr. Quigley filed a claim against the bond of French Grain Company with the Department of Agriculture. (Ex. 3).

6. Michael Wallace sold 10,896.42 bushels of corn to French Grain Company in February and March of 1990 for \$25,212.89. Taking into consideration a prior debit balance as well as partial payments made by Mr. French to Mr. Wallace from February through August of 1990, the net amount due

and unpaid amounts to \$11,696.82. (Ex. 4; Ex. 6).

7. The sale of the grain by Mr. Wallace to Mr. French was done on a cash basis. In the past Mr. French had usually paid Mr. Wallace within approximately two weeks of delivery of the grain. Mr. Wallace did not enter into a written contract with Mr. French for an extension of credit.

8. Mr. Wallace called Mr. French approximately two times a week through the summer and fall of 1990. Mr. French would make excuses about why he could not pay the money. He said that he was too busy when Mr. Wallace called. On another occasion he stated he would pay Mr. Wallace when it was raining but he would not be at his office if Mr. Wallace showed up on a rainy day. At the end of November 1990, Mr. French acknowledged to Mr. Wallace the need to get squared away on the money he owed Mr. Wallace.

9. Mr. Wallace realized that he was not going to get paid when Mr. French filed bankruptcy in December of 1990. Mr. Wallace first learned in December that Mr. French had lost his grain buyer's bond in June of 1990. He filed a claim with the Department on December 26, 1990. (Ex. 4).

10. By a letter dated July 20, 1990 the Minnesota Department of Agriculture advised Mr. French that he could not be issued a grain buyer's license for the year beginning July 1, 1990 because it had not received a completed application, the license fee, or the grain buyer's bond. Nor had it received a financial statement from Mr. French for the year ending December 31, 1989. The letter advised Mr. French that he was therefore prohibited from buying grain from producers. (Ex. 2).

11. On February 13, 1991, the Department notified Auto-Owners Insurance Company that it had received the two claims discussed above. (Ex. 5).

12. By letter dated April 23, 1991 the Department advised Auto-Owners Insurance Company that the Department had determined that the two claims discussed above were valid and directed the Surety to pay the Claimants the amounts set out above. (Ex. 6).

13. By letter dated May 6, 1991 Auto-Owners Insurance Company requested a contested case hearing to appeal the determination of the Department of Agriculture.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Commissioner of Agriculture and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 223.17, subd. 7.

2. That the Department of Agriculture has fulfilled all relevant substantive and procedural requirements of law or rule.

3. That the Department of Agriculture has given proper notice of the hearing in this matter.

4. That the Claimants or the Department has the burden of proof in this contested case proceeding.

5. Minn. Stat. § 223.17, subd. 7 provides, in part, as follows:

A producer claiming to be damaged by a breach of a

contract for the purchase of grain by a licensed grain buyer may file a written claim with the commissioner. The claim must state the facts

6. Minn. Stat. § 223.17, subd. 8(a) provides, in part, that:

The bond required under subdivision 4 shall provide for payment of loss caused by the grain buyer's failure to pay, upon the owner's demand, the purchase price of grain sold to the grain buyer in the manner provided by subdivision 5, including loss caused by failure to pay within the time required.

7. Minn. Stat. § 223.17, subd. 8(b) provides, in part, that:

The commissioner shall promptly determine the validity of all claims filed and notify the claimants of the determination. An aggrieved party may appeal the commissioner's determination by requesting, within 15 days, that the commissioner initiate a contested case proceeding. In the absence of such a request, or following the issuance of a final order in a contested case, the surety company shall issue payment promptly to those claimants entitled to payment.

8. Minn. Stat. § 223.17, subd. 5 provides, as follows:

For a cash sale of a shipment of grain which is part of a multiple shipment sale, the grain buyer shall tender payment to the seller in cash or by check not later than 10 days after the sale of that shipment, except that when the entire sale is completed, payment shall be tendered not later than the close of business on the next day, or within 48 hours, whichever is later. For other cash sales the grain buyer, before the close of business on the next business day after the sale, shall tender payment to the seller in cash or by check, or shall wire or mail funds to the seller's account in the amount of at least 80 percent of the value of the grain at the time of delivery. The grain buyer shall complete final settlement as rapidly as

possible through ordinary diligence. Any transaction which is not a cash sale in compliance with the provisions of this subdivision constitutes a voluntary extension of credit which is not afforded protection under the grain buyer's bond, and which must comply with sections 223.175 and 223.177.

9. Minn. Stat. § 223.16, subd. 16 defines "voluntary extension of credit contract" as:

A contract for the purchase of a specific amount of grain from a producer in which the title to the grain passes to the grain buyer upon delivery, but the price is to be

determined or payment for the grain is to be made at a date later than the date of delivery of the grain to the grain buyer. Voluntary extension of credit contracts include deferred or delayed payment contracts, unpriced sales, no price established contracts, average pricing contracts, and all other contractual arrangements with the exception of cash sales and grain storage agreements evidenced by a grain warehouse receipt.

10. Minn. Stat. § 223.177, subd. 2 provides as follows:

Any grain buyer entering into a voluntary extension of credit contract orally or by phone shall give or mail to the seller a written confirmation conforming to the requirements of section 223.175 before the close of the next business day.

11. Mr. French never provided either Claimant with a written confirmation of any voluntary extension of credit contract.

12. Each of the Claimants in this proceeding engaged in a cash sale with French Grain Company and did not grant Mr. French a voluntary extension of credit or enter into a contract for a voluntary extension of credit.

13. That by statements made to each Claimant

14. That the breach of the contract between the Claimants and French Grain Company for the purchase of grain occurred in December of 1990 within the meaning of Minn. Stat. § 223.17, subd. 7 and *In Re Kern Grain Company*, 369 N.W.2d 565 (Minn. Ct. App. 1985) rev. den. (Minn. August 29, 1985).

15. That the Claimants did not know of the breach until French Grain Company filed for bankruptcy in December of 1990.

16. That both claims were timely filed under Minn. Stat. § 223.17, subd. 7.

17. That the above Conclusions are arrived at for the reasons set in the Memorandum which follows and which is incorporated into these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED: That the Commissioner of Agriculture issue an Order directing Auto-Owners Insurance Company to pay to the Department of Agriculture for the benefit of Claimant James Quigley, the sum of \$9,186.62 and for the benefit of Claimant Michael Wallace, the sum of \$11,696.82.

Dated this __8th__ day of August, 1991.

____s/George A. Beck_____

GEORGE A. BECK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. P 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. Tapes Nos. 10,560 and 10,584.
No Transcript Prepared.

MEMORANDUM

The question to be resolved in this contested case proceeding is whether or not the claims filed by Mr. Wallace and Mr. Quigley were filed in a timely manner. The statute provides that a claim must be filed with the Commissioner within 180 days of the breach of the contract between the grain buyer and the producer. The statute also provides that in the case of a cash sale, when the entire sale is completed, payment must be tendered not later than the close of business on the next day, or within 48 hours, whichever is later. The Surety

argues that if payment was not made within the 48-hour time period specified in the statute then a breach of the contract has occurred and the Claimants have the following 180 days to file their claims. The last sale made by Mr. Quigley was April 16, 1990 and his claim was not filed until December 24, 1990. The last sale by Mr. Wallace was made in March of 1990 and his claim was dated December 26, 1990. If the Surety's interpretation of the statute is correct, the breach for each Claimant occurred in April 1990 or earlier and neither claim would be filed within 180 days.

Neither the statute nor the rules adopted by the Department state when the breach of a contract occurs. The Department's initial determination in favor of the Claimants in this matter stated that the contract was breached on July 1, 1990, because on that date French Grain Company was no longer licensed to buy grain, and no longer bonded. The Department reasoned that the assurances of eventual payment in full being made by French Grain Company lost significant credibility at that point, so that the Claimants could then be expected to begin looking to the bond for reimbursement. The Surety urges that under the terms of a cash sale the breach occurs when the principal fails to make payment for the grain. Although the Surety argues that a failure to make payment happens when the principal fails to abide by the statute, the Claimants in this matter had good reason to believe that payment would be made, based upon the assurances of Mr. French, up until December of 1990. At least one Claimant was unaware until December of 1990 that Mr. French had lost his license and bonding in June. In the case of In Re Kern Grain Company, 369 N.W.2d months of the time that the claimants had demanded payment or return of their grain. The Court of Appeals, stated as follows:

The argument has merit. The Administrative Law Judge found, however, as a matter of fact, that all claimants did not know of the breach until the Kerns actually filed for bankruptcy on July 14. The evidence in the record shows that the Kerns deliberately tried to soothe the fears of their customers, and many of the customers still hoped, after April, that the Kerns would be able to work their financial troubles out and be able to pay them. Finding of fact cannot be set aside unless it is without substantial evidence in the record as a whole. While the record shows evidence of rumors about Kern's imminent collapse, the record also shows that Kerns gave their customers false reassurances that things would pick up and their trust in the Kerns would be rewarded. Reliance upon written assertions by the Kerns rather than on rumor should not now be punished. The finding that many of the claimants did not know of the breach for certain until July 14 was supported by substantial evidence.

369 N.W.2d at 570. 1/

In this case there is no indication that either Claimant had reason to

suspect that French would be unable to pay what he owed them until December of 1990. Chapter 223 of the statutes must be interpreted in light of its purpose which is to protect farmers who must entrust their grain to buyers and thereby risk not receiving payment. Minn. Stat. § 223.17, subd. 5 does direct the grain buyer to pay within a certain time period which is consistent with the statutory purpose of protection of producers. As the Kern case points out, however, the limit on payment in the statute does not necessarily mean that that limit is synonymous with the breach of a contract in a situation where the grain buyer continues to assure a producer that payment will be forthcoming. It is therefore concluded that the breach of the contract to purchase grain by French Grain Company did not occur until it became clear that he would not pay the claims. This did not happen until French declared bankruptcy in December of 1990. Since the Claimants filed their claims with the Department in that month, they are timely and the Surety is obligated to pay their loss.

G.A.B.

1/ The Surety seeks to distinguish Kern by pointing out that it involved the open storage of grain for producers while this case involves sales complete upon delivery. While this is true, the main issue in the case at bar is the timeliness of filing and on that issue the case is indistinguishable from Kern.