

OFFICIAL OPINION NO. 84-28, Warehouseman's bonds

July 5, 1984

Mr. Ken Stofferahn
Chairman
Public Utilities Commission
500 East Capitol
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 84-28

Warehouseman's bonds

Dear Chairman Stofferahn:

You have requested an official opinion from this office with regard to the following factual situation:

FACTS:

A grain elevator was granted a public grain warehouse license by the Public Utilities Commission pursuant to SDCL 49-42-5. The licensee, as principal, and a surety company, as surety, provided a bond running to the State of South Dakota pursuant to SDCL 49-42-10 and 49-42-12. As a result of complaints regarding failure of the licensee to deliver grain to the holder of storage receipts, as required by SDCL 49-43-22, the Commission initiated proceedings to determine whether to revoke, decline to renew, or take other action authorized by law against this license.

You have asked the following questions:

QUESTIONS:

1. What is the procedure for gathering claims and proceeding against the warehouseman's bond and who is responsible for taking such action?
2. When is the surety liable for payment of the bond--upon a showing that the warehouseman failed to comply with his legal duties as a public warehouseman and/or upon a showing that the warehouseman is insolvent and unable to deliver grain to or reimburse the claim holders?

3. If the bond is payable to the state of South Dakota, who is responsible for collecting the bond and for disbursing the proceeds of the bond?

SDCL 49-42-10 provides:

Before any license is granted pursuant to § 49-42-5 and before any public warehouseman may accept anything for storage or handling, he shall file with the public utilities commission a sufficient bond running to the state with sufficient surety, conditioned for the faithful performance of his duties as a public warehouseman and full and unreserved compliance with all the laws of this state in relation thereto, and in the amount specified by §§ 49-42-11 to 49-42-14, inclusive. A violation of this section by a warehouseman is a Class 2 misdemeanor.

SDCL 49-42-5 authorizes issuance of a license, upon written application containing certain enumerated information, to conduct either a public storage warehouse or a public grain warehouse, in accordance with the laws of this state.

SDCL 49-42-10 provides that the 'amount' of the bond required to be filed shall be as specified in 49-42-11 through 49-42-14. Those sections provide several methods for computing such amount, dependent on the type of operation, the amount of storage space, and other circumstances. Your factual situation demonstrates that the amount of the bond in this case was determined under the provisions of SDCL 49-42-12.

SDCL 49-43-22 provides as follows:

Upon the return of any storage receipt by the holder thereof, to the public grain warehouse issuing same, and the tender of all proper charges on the grain represented thereby, such grain or an equal quantity of the same grade, kind, and quality shall immediately be delivered to the holder of such receipt as rapidly as due diligence, care, and prudence will justify.

Chapter 49-42 of SDCL contains provisions for licensing and regulation of both 'public storage' and 'public grain' warehouses and Chapter 49-43 contains provisions applicable exclusively to 'public grain' warehouses. The authority, generally, of the Public Utilities Commission to license, investigate, administer the law applicable to, and supervise public grain warehouses is contained in SDCL 49-42-1. The specific authority to require a bond prior to licensing is contained in 49-42-10. The bond is to 'run to the state' and is to be 'conditioned for the faithful performance of his duties as a public warehouseman.'

SDCL 15-6-17(a) provides as follows:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The provisions of the statute pursuant to which a bond is given are to be read into the bond and considered a part of it. 12 Am.Jur.2d 479 Bonds § 2, Bonds § 26.

Some discussion of the nature and purpose of the bond required to be filed by a warehouseman is necessary to the proper answering of your questions. The nature of bonds is summarized in 12 Am.Jur.2d 478, Bonds, § 1, as follows:

The term 'bond' as used in today's legal terminology includes both investment bonds, which are obligations of public bodies, private and quasi- public corporations, and other legal entities, to pay stated sums of money-- discussed in another part of this article; penal bonds conditioned upon the performance of duties of office, or other obligations undertaken by the principal obligor in the bond or collateral things to be done by the principal obligor; and indemnify and fidelity bonds or undertakings to indemnify the obligee against loss from conduct of the principal, . . .

In determination of the purpose of requiring a bond of licensees of the state the following language used by the Minnesota Court, in Anchor Casualty Company v. Commissioner of Securities, 107 N.W.2d 234 (1961) appears appropriate:

[F]rom views previously expressed by this court, logic, and practical considerations, it appears that when the Legislature licenses a particular occupational group, and requires a bond for such license as part of a general scheme to protect the public, the bond is an indemnity bond rather than a penal bond. The state's interest in occupational licensure is the well-being of its citizens and their freedom from injury by those licensed. The public is the actual beneficiary of such legislation. Any loss by misconduct of a licensee is personal

to the injured citizen. The responsibility of government is to provide redress for such loss through legal process.

For an in-depth discussion of the distinction between a 'penalty' and an 'indemnity' bond, see Milwaukee Enforcers, Inc. v. Ball, 237 N.W.2d 715 (Wis. 1976). The court, in that case, demonstrates that the specific language of the bond, and the designation of the obligee is not necessarily determinative of the nature and purpose of the bond.

Warehouseman's bonds are generally conceded to be 'indemnity bonds,' for the benefit of those doing business with the licensee. The United States Warehouse Act requires filing a bond for the benefit of those who store grain, and for designation as a 'bonded warehouse.' The South Dakota Court has recognized the bonds required to be filed by warehousemen as indemnity bonds in State, on Behalf of Bickel, et al. v. Interstate Surety Company, 204 N.W. 650 (1925) and State ex rel. Vojta, et al. v. Deibert, et al., 240 N.W. 332 (1932).

Your questions are each a variation of this question: Who has the right to bring an action against the surety on the warehouseman's bond, and when does a default occur for which the surety is liable?

The general statement as to who is entitled to maintain action on the bond is contained in 78 Am.Jur.2d 265, Warehouses, § 131, and is as follows:

An action for a warehouseman's default in violation of the conditions of a bond executed to the state should, under the rule supported in some cases, be brought in the name of the state. This result has been reached, sometimes because of the absence of a statute requiring the action to be brought in the name of the real party in interest, and sometimes because of a policy to avoid a multiplicity of suits, since there may be other parties in interest in addition to the particular receipt holder bringing the action. There is, however, also authority for the rule that although a warehouseman's bond is executed to the state, an action thereon may be maintained in the name of an individual injured by the warehouseman's default in violation of the condition of the bond. This result has been based upon the statutory provision that an action should be brought in the name of the real party in interest.

SDCL 15-6-17(a) is a 'real party in interest' statute. The South Dakota Court appears to have not been confronted with the specific issue of whether or not an injured individual could maintain an action, other than in the name of the state, on a warehouseman's bond. The reported cases of State ex rel. Bickel v. Interstate Surety Company, and State

ex rel. Vjota v. Deibert, were both brought by individuals, in the name of the state in behalf of the injured individual. The South Dakota Court has broad authority under the Rules of Civil Procedure, to order joinder of parties, consolidation of actions, and permit class action suits. In the absence of a specific directive from the Court, any attempt to state specifically in whose name a suit must be brought on a warehouseman's bond would be mere speculation.

The Public Utilities Commission has jurisdiction over the warehousemen, and to determine the sufficiency of sureties, and to require different, or further sureties to be given as a condition of further licensing. The Commission does not have a right to dictate the terms of settlement between a surety and an injured holder of a warehouse receipt. 78 Am.Jur.2d 265, Warehouses, § 130.

The Public Utilities Commission is not appointed by statute as trustee for injured customers of a warehouseman.

It is, therefore, my opinion that:

As to Question 1, the injured party, that is the holder of the storage receipt, is responsible for taking action against the warehouseman's bond and that the procedure for gathering of possible claims is either through a class action suit or through the court requiring joinder of other interested parties.

As to Question 2, the surety becomes liable for payment under the bond, as to each respective receipt holder, at such time as the warehouseman refuses to honor the receipt.

As to Question 3, the bond is required to 'run to the State of South Dakota,' and no claim made against the bond is 'payable' to the State of South Dakota, unless and until a Court having jurisdiction of the action might order payment to be made to the State for the benefit of the injured party or parties. In that event the funds would be dispersed pursuant to the Court's order.

Respectfully submitted,

Mark V. Meierhenry
Attorney General