

**OPINION
70-12**

March 4, 1970 (OPINION)

Mr. Leland R. Miller
Dairy Commissioner
Department of Agriculture

RE: Agriculture - Livestock Dealers' Bonds - Trusteeship

This is in response to your request for an opinion relative to trusteeship on bonds provided by livestock dealers licensed by the Department of Agriculture of the State of North Dakota pursuant to chapter 36-04 of the North Dakota Century Code, as amended to date.

You refer us to the general requirements of section 36-04-05 of the 1969 Supplement to the North Dakota Century Code with regard to bonding of license applicants and the provisions thereof to the effect that license applicants either furnish a bond to the dairy department or in lieu thereof file with the dairy department the dealer's bond filed by him with the United States Department of Agriculture and in effect pursuant to the provisions of the Packers and Stockyards Act 1921 (7 U.S.C. 181) naming the dairy commissioner as the trustee of such bonds.

Your letter further informs us that the Union Stockyard Company of West Fargo is requesting that they be included as trustee with the North Dakota Dairy Commissioner on those bonds furnished by individuals doing business with their firm. Your letter informs us that this company feels the need of something tangible to insure credit rating at the stockyard in the case of an individual whose bond may expire or be cancelled. As trustee in such bond they would receive notification from the bonding company in time to forestall cattle pickup prior to releasing the cattle for shipment.

Your letter indicates that the trustee under such arrangement would thus be listed as:

"The Dairy Commissioner of the State of North Dakota and the General Manager of the Union Stockyard Company of West Fargo, North Dakota."

Your question is stated as: "Is this permissible or legal?"

Your letter further indicates that you are wondering if this type of dual trusteeship would cause a problem should it become necessary for the state to use a bond for settlement of a claim when a dealer defaults in payment. Your letter further asks the questions as to whether it would be necessary for the state dairy department to secure a release from the Union Stockyard Company prior to using the bond in question.

Language was added to the preexisting section 36-04-05 of the North Dakota Century Code by the 1969 Legislative Assembly apparently to accommodate individuals who were engaged in business requiring a federal Packers and Stockyards Act bond to enable them to use such bond in lieu of the bond heretofore required to individuals applying for a state license. Under the state bond heretofore and hereafter required of persons not having federal Packers and Stockyards Act bond the dairy department is required to be named as "obligee" but the bond is to be held for the purpose of protecting and for the benefit of any person selling livestock, wool, or poultry, as the case may be, to the licensed dealer or his agent. Thus under the state bond the dairy commissioner is in effect trustee for the limited class of individuals thus described in the statute who can bring the necessary action in his own name for the benefit of the named class of persons in the events described in said section 36-04-05 of the 1969 Supplement to the North Dakota Century Code. Section 204 of Title 7 U.S.C.A. prescribes in effect to the federal bond:

On and after July 12, 1943 the Secretary may require reasonable bonds from every market agency and dealer, under such rules and regulations as he may prescribe, to secure the

performance of their obligations, and whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction."

Thus the class of obligees and the events that can justify action under the federal bond may, dependent upon the regulations promulgated by the secretary, be considerably broader than those described in the state statute with regard to the state bond, though we might well assume that the legislative purpose in providing this "in lieu" provision was basically to protect the same groups and against the same events as prescribed in the basic state bond statute. In any event, however, the beneficial owners of the proceeds of these bonds, and the extent of their rights therein, will in the case of the state bond be determined on the basis of the terms of the state statute and in the case of the federal bond be determined on the basis of the federal statute and the regulations promulgated thereunder.

The obvious purpose of requiring that the dairy commissioner be named as "obligee" in the state bond and of requiring that he be named as "trustee" in the federal bond is to have a responsible state officer available to take action on the bond where events necessitate such action. He in no sense is a beneficial owner of the proceeds of the bond under either the federal or state enactments.

The fact that an additional trustee was named in the federal bond in the manner designated in your letter should not change the class or beneficiaries nor their rights thereunder. Quite obviously with an additional trustee named on the federal bond, such additional trustee would necessarily have to be named a party - either plaintiff or defendant - in any action brought on the bond, whether by a beneficiary or a cotrustee and such additional trustee should properly be entitled to be heard on any questions as to the nature and manner of proceedings to be undertaken. Conceivably as your letter suggests, the state dairy department could secure a release from the Union Stockyard Company prior to bringing action on the bond though we would assume that by becoming a trustee on the bond the Union Stockyard Company would be to some extent undertaking some responsibility on behalf of beneficiaries thereunder, as to the mode of proceeding and as to the costs of action brought, and on such basis should remain in the action as an active party plaintiff or defendant. It seems entirely possible that a cooperative cotrustee on such a bond located close to where the transaction or transactions upon which bond liability is predicated took place could be of considerable help in bringing legal action on the bond to a satisfactory conclusion.

On these bases we would conclude that under the type of dual designation heretofore described, the provisions of the last paragraph of section 36-04-05 as to " * * * naming the dairy commissioner as the trustee of such bond. * * *" would be satisfied. Thus in specific answer to your question, "this is permissible and legal." Such procedure would for practical purposes require naming the cotrustee as a party defendant or plaintiff in actions brought, though this would not necessarily create any serious difficulties in administering this act. We would assume that naming such cotrustee as a party to actions brought would be more appropriate than simply securing a release and proceeding without such cotrustee - though obviously stipulations of the counsel for each of the cotrustees could be entered into as to methods and procedures to be used throughout the action.

HELGI JOHANNESON
Attorney General