



News & Views

A Monthly Publication Dedicated to the Feed, Seed, Grain and Farm Supply Industries of Wisconsin

Somebody Asked ■

Q.: I heard that following ethanol producer VeraSun's bankruptcy filing last month that a judge voided all their delivery contracts. Is this true and could it happen in Wisconsin; that is, a grain buyer declaring bankruptcy and undelivered grain contracts being voided.

A.: First off, there is an important point that needs to be made here. This was a federal bankruptcy filing and different filings in different states may lead to different outcomes. Also, different judges might provide different rulings. So simply consider this case as an example of what might happen and not as a precedent or guarantee of what would happen in a Wisconsin bankruptcy. That said; we are reprinting an informational letter written earlier this month by Roger McEowen, the Leonard Dolezal Professor in Agricultural Law and Director of the Iowa State University Center for Agricultural Law and Taxation. While some of the following may be a little "Inside Baseball" and specific to the VeraSun case, there are points made of which you should be **very** aware. We also wish to make clear none of the following discussion involves the state grain indemnity fund. That program does not cover dealer to dealer trades nor equity in undelivered contracts.

VeraSun Energy and its 24 subsidiaries filed Chapter 11 bankruptcy on October 31, 2008 in the United States Bankruptcy Court in Delaware. The bankruptcy filing raises numerous questions for farmers and grain elevators who have contracted to deliver grain to VeraSun

Here's a rundown of the most important questions:

Q: Will farmers and elevators be paid for corn delivered before filing?

A: VeraSun will treat claims of corn suppliers that supplied corn to it at different times differently as is required by the bankruptcy code. VeraSun will treat all corn suppliers that supplied corn to its plants before October 11, 2008 as unsecured creditors that may share in a dividend at some time, many months in the future. However, VeraSun has received confirmation from the Delaware Bankruptcy Court that corn suppliers who supplied corn from October 11 through October 31 will be treated as priority creditors that can be paid in full from VeraSun's cash provided they agree to continue supplying corn at prevailing market prices, not contracted prices. VeraSun's attorneys drafted the following language that is found in the Bankruptcy Court's Order Affirming the Administrative Expense Status of the Claims of Creditor that provided goods (corn) within 20 days of the bankruptcy filing:

In return for receiving prompt payment on account of obligations arising with respect to any 20-Day Goods, the Vendors, through the endorsement of any check for payment or other written acknowledgment in respect of such 20-Day Goods, shall be deemed to have agreed to continue supplying Goods to the Debtors at prevailing market prices in accordance with the most favorable terms and conditions (including payment terms) pursuant to historical practices in effect between such Vendor and the Debtors in the twelve months prior to the Petition Date, or such other terms and conditions as are agreed to by the Debtors and the applicable Vendor. This language appears to trump any obligations that the VeraSun Debtors have to pay the contract prices they agreed to pay farmers and elevators while requiring the farmers and elevators to continue selling corn at current market prices. This interpretation is further supported by the language in

the Corn Suppliers Letter from VeraSun dated November 4th that provides the following:

We have also requested specific authority from the Court to pay those trade partners from whom we have received corn on or after October 11, 2008 in the ordinary course. We have been granted authority by the Court to make these payments. *However, if you already received a check but have not yet cashed it, we need to re-issue you a check. Also, to get authority from the Court to pay for corn delivered before the filing date, we will need an acknowledgment from you that you will continue to do business with us on normal terms. This acknowledgment will be on the back of the check to pay for the corn and will be accepted by your endorsement.*

Farmers and elevators that sign the checks in order to get prompt payment for the corn that VeraSun purchased within 20 days of filing appear to have agreed to continue supplying corn at prevailing market prices.

Warning: Farmers and elevators that receive checks from VeraSun for grain delivered between October 11 to October 31st should show the checks to their attorneys to determine what signing the check will contractually obligate to perform in the future. They could be agreeing to deliver corn at the prevailing market price with payment on the most favorable terms provided within the past 12 months.

Q: Will VeraSun honor its contracts?

A: The bankruptcy code allows a debtor to decide whether to accept or reject contracts like grain supply contracts through the date of confirmation of the plan. Thus, if a farmer or elevator has a contract to sell grain to VeraSun for \$5.25 per bushel and the prevailing market price increases to \$6.00 per bushel VeraSun has the option to enforce the contract by accepting the contract. At this time, VeraSun appears to have the upper hand as it can wait until plan confirmation to decide whether to accept or reject corn contracts while the farmers and elevators that have agreed to sell to VeraSun are required to

honor those contracts until VeraSun decides whether to accept them.

Q: Do farmers and elevators need to honor their contractual commitments to VeraSun?

A: VeraSun can enforce the terms of delivery contracts it has with farmers and elevators. Until VeraSun rejects a contract, the farmer or elevator is still bound by the terms of the contract. If the farmer or elevator sells the corn elsewhere, and the price increases VeraSun could require the farmer or elevator to fulfill the contract even if the cost of corn is considerably higher than the farmer or elevator will receive from VeraSun.

Note: Contract Holders can Seek Limit on Time for VeraSun to Accept or Reject Contracts.

The bankruptcy code makes provision for those burdened by contracts to request that the Bankruptcy Court enter an order requiring that the Debtors accept or reject the contracts by a date certain. If such a motion were filed and a date was set for VeraSun to accept or reject contracts, VeraSun would be required to determine which contracts to accept or reject. If the contract was rejected, the farmer or elevator would be free to sell the corn to whomever it chose. Farmers and elevators should consider hiring a bankruptcy lawyer to collectively represent them in the VeraSun bankruptcy as their interests appear to be identical. By hiring one attorney, the farmers and elevators can have their interests properly represented when none of them could afford proper representation alone.

Q: What happens if VeraSun rejects a corn delivery contract?

A: If a corn supply contract is rejected the rejection is treated as if VeraSun rejected the contract on the day before it filed bankruptcy. The farmer or elevator whose contract is rejected will need to market its corn previously covered by the contract, then it can file a claim in the VeraSun bankruptcy that will be treated as an unsecured claim that can share in the dividend paid to unsecured creditors many months later. There is no guarantee that any payment will be made to unsecured creditors.

A very important point for you as a manager to “take home” from this situation is the need to immediately review your credit policies.

- Look at what your exposure is with any single buyer and set limits, both in terms of total sales and shipments.
- Set policies with buyers as to payment terms. You may wish to be paid once or twice a week on shipments instead of waiting until contract completion.
- Review your policy of allowing farmer direct ship arrangements to buyers. Keep in mind if that buyer defaults, it's you owing the producer. Is your margin big enough?
- You may wish to revise contract terms regarding pricing of basis trades. Instead of the usual practice of “buyer's option” as to the exchange of futures/pricing of the contract, make pricing available only when delivery is imminent. This would largely remove the “price differential” issue in the case discussed above.

If you have further questions or concerns, please contact the WASA office.

Crop Insurance Adjustors■

We've taken a few phone calls from members regarding how to deal with the increasing flood (no pun intended) of crop insurance adjustors requesting documents for customer claims. Two problems of which we are aware are: 1) the adjustor demanding that financial documents of a producer be given directly to the adjustor, and 2) the near complete lack of any type of identification or assurance the adjustor is who they say they are. In this era of heightened privacy and identity theft protection required of businesses, you can't be lackadaisical in regards to this issue. (See the August '08 *News & Views*.)

To address these issues, we have developed a simple form, which you are free to duplicate and use, which brings some order to the process. The enclosed form should lend some order to the process and help your staff keep track of what we expect is going be fairly

busy with these requests especially in the southern portion of the state.

WASA Directory Update■

The following updates should be made to your WASA Directory.

Changes:

Helena Chemical Company
formerly Gundrum Brothers Farm
Supply
6525 Town Line Rd.
West Bend, WI 53090
Phone: (262) 629-5564
Fax: (262) 629-1913

Helena Chemical Company
formerly Gundrum Fertilizer & Feed
102 W. Main St.
Eden, WI 53019
Phone: (920) 477-6801
Fax: (920) 477-2524

New:

Mortensen, Matzelle & Meldrum
3113 W Beltline Hwy.
Madison, WI 53
Phone: (608) 288-2835
Fax: (608) 273-1725

Changes are indicated in **bold**. As additions or changes are made throughout the year, we will notify you here in *WASA N & V*.

Looking Down the Road■

Jan. 28 **WASA Safety Day**
Kalahari Resort, Wisconsin Dells

Jan. 29 - 30 **WASA Annual Convention &**
Trade Show, held in conjunction
with the Wisconsin Corn/Soy Expo
and the Wisconsin Pork Producers
Kalahari Resort, Wisconsin Dells

Sep. 10 **WASA Golf Outing**
Northern Bay Golf Resort, Arkdale

Get this one on your calendars now! It's hard to find, but it's going to be very special!

Route:

- General Manager
- Feed Department
- Grain Department
- Agronomy
- Safety Director
- Personnel
- _____

WASA Board of Directors

Tom Lefeber, President
(920) 773-2505

John Van De Wiel, Vice-President
(608) 744-2287

Kim Lamp, Secretary/Treasurer
(920) 674-8513

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Bob O'Donnell (608) 838-4354

Dennis Schultz (715) 654-5134

David Wiederholt (608) 739-3103

WASA Staff (608) 223-1111

John Petty, Executive Director

RB "Bob" Willder, Loss Control Dir.

Denise Poindexter, Office Manager



**WASA office will be closed
November 27 & 28 for the
Holiday weekend.**

Happy Thanksgiving