IN THE IOWA SUPREME COURT
No. 19-1302

MIDWESTONE BANK,

Plaintiff / Appellee / Counterclaim Defendant / Appellee,

vs.

HEARTLAND CO-OP,

Defendant / Appellant / Counterclaim Plaintiff / Appellant.

Appeal from the Iowa District Court for Story County
The Honorable Angela L. Doyle

Brief of Amicus Curiae Iowa Institute for Cooperatives

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Identity and Interest of Amicus Curiae

The Iowa Institute for Cooperatives ("Institute") supports cooperatives in a variety of industries throughout the State of Iowa, including grain cooperatives. Iowa's state-licensed grain cooperatives provide valuable services to grain producers by drying and storing grain until sale. A decision in this appeal will impact grain dealers across the state, including grain cooperatives, because the district court's decision flouted longstanding industry practice recognizing a grain dealer deducts drying and storing charges before proceeds from the grain sale are distributed to a secured lender or producer. The industry custom at the heart of this matter is used and relied on by thousands of farmers, grain dealers, and agricultural lenders across Iowa each year.

The Institute submits this amicus brief because the Court's decision may significantly impact Institute members and the way they provide grain warehousing services. The Institute possesses a unique perspective and information regarding such transactions that

will assist the Court in assessing the ramifications of any decision rendered in this case.

Rule 6.906(4)(d) Statement of Authorship

The Institute is represented by the undersigned counsel from the Nyemaster Goode, P.C., law firm, who authored this brief in whole. No party, party's counsel, or other person contributed money to fund the preparation or submission of this brief.

Introduction

Iowa has long been recognized as a leader in state grain regulation across the country. In Iowa, grain dealers[1] deduct their customary charges for storing and drying grain before sending the balance of the sale proceeds to an agricultural secured lender or the grain producer.[2] A recent district court ruling, which Heartland challenges in this appeal, upended this longstanding practice whereby grain dealers deduct drying and storing charges before releasing the proceeds from sale to a producer or secured lender. If the district court's decision is affirmed, the result would adversely impact all 149 state-licensed grain warehouses in Iowa, twenty-one of which are cooperatives, and the rest of which are private dealers. It

[1] We use the term "grain dealer" to reference grain elevators, cooperatives, warehouses, and dealers. We emphasize that the issues raised in this appeal impact all grain dealers, not only cooperatives.
[2] We use the terms "farmer" and "producer" interchangeably.

would also potentially adversely impact every farmer that delivers grain to those warehouses.

Argument

I. Agricultural lenders should not be unjustly enriched by valuable grain drying and storage services that grain dealers provide prior to sale.

The unambiguous facts in the record reveal a routine scenario in the agricultural industry. Farmers (the Harkers) turned to an agricultural lender (the Bank) to finance their business operating expenses. After harvest, the Harkers delivered their grain to a warehouse (Heartland) for vital and necessary drying and storage services that added value to the grain. Pursuant to longstanding industry custom and usage of trade, the grain dealer recouped the drying and storage expenses from the grain sale proceeds before releasing the proceeds to the secured lender and producer.

What differentiates this particular case is the Bank's decision to initiate a lawsuit against Heartland, pleading a conversion claim to recover the drying and storage charges that Heartland deducted from

the grain sale proceeds. In response, Heartland pleaded unjust enrichment and setoff, which the district court dismissed on the Bank's motion for summary judgment. The district court's decision rejecting Heartland's unjust enrichment and setoff claim as a matter of law is incorrect and should be reversed.

Unjust enrichment "serves as a basis for restitution." *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154 (Iowa 2001). To establish unjust enrichment, Heartland had to show that (1) the Bank "was enriched by the receipt of a benefit;" (2) the Bank was enriched at Heartland's expense; and (3) "it is unjust to allow [Bank] to retain the benefit under the circumstances." *Id.* at 155 (citation omitted). Unjust enrichment "is a broad principle with few limitations." *Id*. The "benefits can be direct or indirect and can involve benefits conferred by third parties." *Id*. "The critical inquiry is that the benefit received be at the expense of the plaintiff." *Id.* (citation omitted). In *Palmer*, the

Iowa Supreme Court recognized that a party pursuing an unjust enrichment claim does not have a heavy burden:

> In *In re Stratman's Estate,* 231 Iowa 480, 488, 1 N.W.2d 636, 642 (1942), we said: "[I]t is essential merely to prove that a defendant has received money which in equity and good conscience belongs to plaintiff." We think the three elements we have identified today capture this statement, as well as the general statements and definitions of unjust enrichment we have utilized since *Stratman*.

637 N.W.2d at 155 n.3.

The grain drying and storage services that cooperatives and other grain dealers provide before sale add significant value, increasing the ultimate proceeds from sale, whether those proceeds are paid to a secured lender or the farmer. If Iowa law disallows this longstanding practice whereby grain dealers deduct their drying and storage charges before releasing the grain sale proceeds to the secured lender or farmer, the end result will upend the industry. One potential result is that grain dealers will decline to accept grain if a secured lender is involved. Additionally, if a cooperative loses money on one member, the others are responsible for bearing that loss. In

other words, the other members have to absorb that loss. The Court may avoid wreaking havoc in this Iowa industry by reversing the district court's judgment and remanding the case for trial.

A. Grain drying and storage services benefit and enrich agricultural lenders.

Proper grain drying, storage, and management is critical.[3] Much of the profit or loss in farming results from decisions made after harvest. Many grains, including corn, do not dry to safe moisture levels naturally in the field, necessitating artificial drying to achieve the target moisture level for safe storage.[4] Improper moisture

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[3] *See* Carol Jones et al., *Drying, Handling, and Storage of Raw Commodities*, *in* STORED PRODUCT PROTECTION 1 (Kan. State Univ. 2012), *available at* https://entomology.k-state.edu/doc/finished-chapters/s156-ch-10-drying-and-handling-mar5.pdf.

[4] *See, e.g.*, Richard Nicolai, *Best Management Practices for Corn Production in South Dakota: Corn Drying and Storage*, 99-105 (S.D. State Univ. 2009), *available at* https://pdfs.semanticscholar.org/f300/6087dd618b3ba5af4dbd1ccbd3302a5821bb.pdf (hereinafter Nicholai, *Corn Drying and Storage*); Charles Hurburgh, Jr., *Soybean Drying and Storage*, IOWA STATE UNIV. (Nov. 2008), *available at* https://store.extension.iastate.edu/product/5141.

levels can stimulate mold growth, fermentation, and rotting.[5] Grain storage adds flexibility to a grain marketing program and enables the producer to maximize profits.[6]

Grain dealers in Iowa, some of which are owned by cooperatives such as Heartland, play a vital role in the industry by assisting farmers in cleaning, drying, exchanging, selling, and storing grain. *See* Iowa Code § 203.1(10). The dealers necessarily incur costs in providing these services, which are customarily charged against the grain before the sale proceeds are released.[7] Granted, farmers have the option to pay these charges outright or to wait and use the

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[5] Nicholai, *Drying and Storage*, at 100.

[6] *See How Does it Work: Grain Elevators*, IOWA AG LITERACY (Feb. 5, 2018), https://iowaagliteracy.wordpress.com/2018/02/05/how-does-it-work-grain-elevators/.

[7] For an explanation of the costs associated with grain drying, *see* William Edwards, *Estimating the Cost for Drying Corn*, IOWA STATE UNIV. AG DECISION MAKER (Sept. 2014), https://www.extension.iastate.edu/agdm/crops/pdf/a2-31.pdf. For an explanation of the costs associated with grain storage, *see* William Edwards, *Cost of Storing Grain*, IOWA STATE UNIV. AG DECISION MAKER (May 2015), https://www.extension.iastate.edu/agdm/crops/pdf/a2-33.pdf.

proceeds from selling the grain to offset the balance due. But for many farmers (such as the Harkers), the latter is the only realistic option; their ability to pay the storage and drying expenses is wholly dependent on realizing proceeds from sale. If the charges are still outstanding when the grain is sold, standard industry practice allows the dealer to deduct its drying and storage expenses before distributing the proceeds to the farmer or secured lender.

Like farmers, agricultural lenders are keenly aware that proper grain handling, drying, and storage are crucial to the marketability and value of the crop.[8] Indeed, most agricultural security agreements specifically obligate the debtor-farmer to take affirmative action to preserve and protect the crops.[9] Put simply, without proper drying

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[8] *See Grain Drying – Why Do They Do That?*, IOWA AG LITERACY (Dec. 15, 2015), https://iowaagliteracy.wordpress.com/2015/12/15/grain-drying-why-do-they-do-that/.

[9] The security agreements entered into by the Harkers and the Bank contain prototypical examples of these clauses. If the Harkers did not dry and store their grain, the Harkers, lacking the financial means to pay the costs up front, would have been in breach of the security agreement by virtue of being unable to afford the costs of drying and storing their grain. *See* Petition, Ex. 1 ("**Care and Preservation of the**

and storage, the grain—collateral securing the loan—would have decreased in value or, if not saleable at all, would be worthless. The "failure to process the grain for storage results in the destruction of the grain's value, making harvesting a vain act." *Mennel Milling Co. v. Tracy*, No. 5-96-26, 1997 WL 346213, at *6 (Ohio Ct. App. June 17, 1997); *see also Harry J. Whelchel Co. v. King*, 610 S.W.2d 710, 713 (Tenn. 1980) (noting a farmer's testimony that "it would be economically impossible for him to raise corn and soy beans" without the ability to dry and store his grains). For this reason, upon the sale of grain, in Iowa, longstanding custom in the industry allows grain dealers to

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Crops. Grantor shall (1) At seasonable and proper times and in accordance with the best practices of good husbandry attend to and care for the crops and the tillage of the land and do, or cause to be done, any and *all acts that may at any time be appropriate or necessary to grow, farm, cultivate, irrigate, fertilize, prune, harvest, pick, clean, preserve, and protect the crops; (2) Not commit or suffer to be committed any damage to, destruction of, or waste of the crops; . . . (4) Harvest and prepare the crops for market* and promptly notify Lender when any of the crops are ready for market. . .") (emphasis added).

recoup drying and storage costs before distributing the grain sale proceeds.

Courts recognize the significant value added by drying and storage processes. *E.g., Comm'r of Internal Revenue v. Schuyler Grain Co.*, 411 F.2d 649, 652 (7th Cir. 1969) ("Without the use of the storage facilities, with their attendant aeration and drying processes, the grain could not have been put to its intended uses."); *F. P. Wood & Son of Elizabeth City, Inc. v. U.S.*, 314 F. Supp. 1205, 1206–07 (E.D.N.C. 1970) (describing the grain drying, cleaning, aerating, and storing processes and the necessity of each step); *Mennel Milling Co.*, 1997 WL 346213, at *4 (concluding that "cleaning, drying, and protecting the grain from insect infestation is part of the harvesting process that must take place before storage can begin"); *Matter of Collingwood Grain, Inc.*, 891 P.2d 422, 427 (Kan. Ct. App. 1995) (explaining that the drying process is necessary before grains can be stored); *Harry J. Whelchel Co.*, 610 S.W.2d at 713 ("Unquestionably, the grain bin structure provides the necessary operating environment for the

drying of the grain to make the crop marketable at an acceptable price and provides safe storage until such time as the farmer is not 'at the mercy' of the grain buyers."). Implicitly, recognizing the substantial loss that would result without grain drying and storage services, the Bankruptcy Code allows a trustee to recover from grain and grain proceeds the reasonable and necessary costs and expenses attributable to the preservation or disposal of such grain. 11 U.S.C. § 557(h)(1).

The benefits conferred in secured lenders by post-harvest care are reflected in the industry custom and usage of trade allowing a grain dealer to provide the crucial grain drying and storage services without fear that such services will go unpaid.

B. Grain dealers incur significant cost and expense providing grain drying and storing services.

Grain cooperatives expend significant costs in providing grain drying and storage services. The sum of $79,895.68 incurred by Heartland, at issue in this particular case, illustrates the steep costs associated with the utilities, machinery, tools, labor, fuel, repairs, and

maintenance required for the grain drying and storage processes. Warehouse costs include utility costs. Electricity is the largest expense that a grain dealer bears in storing and drying grain.[10] These costs are not a profit center for the dealer; they are hard expenses—not overhead—that are essential to dry and store.[11] Grain dealers do not provide these services gratuitously; they expect fair compensation for the expenses associated with providing services that enrich and preserve the crops.

Grain dealers would not, and could not, provide these drying and storage services if they were unable to recoup their expenses from sale proceeds. An alternative approach would require all

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[10] For a detailed explanation of the types of costs incurred in grain storage, *see* Phil Kenkel & Bill Fitzwater, *Grain Handling and Storage Costs in Country Elevators* (Okla. State Univ. 2008), http://www.agecon.okstate.edu/coops/files/Grain%20Handling%20and%20Storage%20Costs%20in%20Country%20Elevators.pdf. For energy cost calculations for various methods of grain drying, *see* William Wilckle, *Energy Costs for Corn Drying and Cooling*, (Univ. of Minn. 2018), https://extension.umn.edu/corn-harvest/energy-costs-corn-drying-and-cooling#how-to-calculate-energy-use-1206261.

[11] Of course, there are no utility costs associated with a grain bin that sits empty.

farmers to pay these costs up front and in advance of sale. But the time of storage is unpredictable, so it would be nearly impossible for any dealer to predict the length of time a particular producer's grain will be in storage before sale. And this approach is impractical. If a grain dealer required a producer to pay drying and storage costs on a monthly basis, what would the dealer do if the producer missed a payment? Should the dealer to haul the grain and dump it in the producer's driveway? Transport it to the lender's parking lot? Auction the grain? The grain dealer is not in the business of making these decisions about the disposition of grain; those decisions should be made by the producer and secured lender. Moreover, farmers who are unable to make prepayments would be in a precarious position. Flexibility in the grain market would essentially vanish. Raw crops would need to be sold immediately, regardless of market price.

Lower profits would, in turn, inhibit the ability to repay agricultural secured lenders.

Longstanding industry custom and usage of trade allows grain dealers like Heartland to rest assured they will recoup the costs for these services upon the sale of grain. The district court's decision dismisses such longstanding practices. Aside from the serious concern over upending deep-rooted custom and injecting unnecessary chaos into the agricultural industry, the district court's decision is inherently inequitable. Grain dealers should not bear the expense associated with providing services for drying and storing grain that ultimately enriches and benefites agricultural lenders and producers.

C. Based on industry custom and usage of trade, it would be inequitable and unjust for agricultural lenders to benefit from the grain drying and storing services at the grain dealer's expense.

In its ruling, the district court failed to comprehend the import of this practice and its widespread acceptance throughout the industry. The Bank acquiesced in the Harkers delivering the crops to

Heartland for drying and storage services, knowing full well that the costs would be deducted from the grain sale proceeds. Heartland's services increased the value and marketability of the grain, as well as preserved and protected the crops against rot, mold, and insect infestation. It would be inequitable for the Bank to retain the undeniable benefits conferred by Heartland while Heartland goes unpaid.

The district court's decision dismissing Heartland's unjust-enrichment and setoff claim on summary judgment was based in part on the Bank's assertion that equity should not be used to displace U.C.C. priorities. Iowa law squarely rejects the Bank's argument and the district court's flawed interpretation. *See* Iowa Code § 554.1103 ("Unless displaced by the particular provisions of this chapter, the principles of law and equity . . . shall supplement its provisions."); *see also Warder & Lee Elevator, Inc. v. Britten*, 274 N.W.2d 339, 341 (Iowa 1979) (Iowa Uniform Commercial Code did not displace the equitable doctrine of estoppel).

A party dealing in a particular industry is presumed to know the customs and practices bearing on the transaction. *William R. Smith & Son v. Bloom*, 141 N.W. 32, 35 (Iowa 1913); *see also Schneider Leasing, Inc. v. U.S. Aviation Underwriters, Inc.*, 555 N.W.2d 838, 841 (Iowa 1996). As an agricultural lender, the Bank is presumed to know the customs and practices in the industry. *See Schneider*, 555 N.W.2d at 841; *Bloom*, 141 N.W. at 35.

Moreover, the record belies the Bank's argument before the district court that it was not aware of the custom allowing grain dealers to recoup costs from grain proceeds. It is undisputed that the Bank sent Heartland notices of its security interest dated February 20, 2014; December 15, 2015; and February 1, 2016. The notices stated, in part, that Heartland should pay all sale proceeds "jointly" to the Bank and the Harkers, and Heartland should deliver or mail the proceeds to the Harkers. In other words, the Bank knew it needed to provide notice to the cooperative, and the Bank provided such notice. At that time, Heartland had already accepted grain for drying and

storage months before sale, during harvest season. The Bank in this case had actual or constructive knowledge of the industry custom and usage of trade.

Grain dealers provide crucial services that ensure the success of farmers, enabling those farmers to satisfy the debts owed to agricultural lenders. Based on longstanding and well-recognized industry practice in Iowa, the grain dealer properly deducted its drying and storage costs from sale proceeds before releasing them to the secured lender. The payment for those drying and storage services should be prioritized accordingly in accordance with longstanding custom and practice within the State.[12]

The district court's ruling finding that Heartland failed to establish a genuine issue of material fact for trial regarding its unjust-

[12] Even assuming arguendo that there was some question as to the existence of this well-established industry custom, Heartland presented sufficient evidence to generate a genuine issue of material fact for trial on its unjust enrichment claim. *Hirschhorn v. Bradley*, 90 N.W. 592, 592 (Iowa 1902) (stating where there is conflicting evidence of the alleged usage, the question as to whether it exists is one for the jury); *accord Voest-Alpine Trading USA Corp. v. Bank of China*, 288 F.3d

enrichment claim unfairly allows the Bank to retain the benefits conferred by the cooperative's grain drying and storage services, at Heartland's expense. The end result distorts equitable principles and flies in the face of the industry custom allowing grain dealers to recoup drying and storage costs from grain sale proceeds. The district court's erroneous decision should be reversed.

Conclusion

Grain dealers provide crucial services that ensure the success of a farming operation, enabling farmers to satisfy the debts owed to agricultural lenders, and the payment for those services is prioritized accordingly. The district court's decision allowing MidWestOne Bank to claw back the grain drying and storage costs incurred by Heartland Co-op is unjust and contrary to longstanding industry custom and usage of trade. To turn this practice on its head would be extremely disruptive to the industry as a whole. The Iowa Institute

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262, 265 (5th Cir. 2002) (noting courts have long held that usage of trade is a question of fact).

for Cooperatives respectfully requests that the Court consider the longstanding industry custom allowing grain dealers to recoup costs incurred in enriching the grain and reverse the district court's inequitable order.

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/s/ Debra Hulett

Certificate of Filing and Service

I hereby certify that on November 8, 2019, I presented the foregoing document to the Clerk of Court for the Iowa Supreme Court for filing and uploading into the Iowa Electronic Document Management system, which will send notification of such filing to the appropriate parties electronically.

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