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Insurance, Claims, Liability, and Regulatory Law

Brownson PLLC's annual summary of North Dakota law is useful to insurance and corporate risk managers and claims handlers
–Updated for 2022

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Statutes of Limitations

Statutes of Limitations establish the time period during which a plaintiff, insured, or claimant must file a cause of action so as to preserve a claim.

The limitations period typically runs from the date of an accident or injury, or from the day an individual discovers the existence of a potential claim.

The North Dakota Century Code establishes the following statute of limitations time periods:

2 YEARS
Libel (N.D.C.C. § 28-01-18)
Slander (N.D.C.C. § 28-01-18)
Assault (N.D.C.C. § 28-01-18)
Battery (N.D.C.C. § 28-01-18)
False Imprisonment (N.D.C.C. § 28-01-18)
Malpractice (N.D.C.C. § 28-01-18)
Personal Injury when Death Ensues (N.D.C.C. § 28-01-18)

6 YEARS
Action upon contract, obligation, or liability, express or implied (N.D.C.C. § 28-01-16)
Action upon a Liability Created by Statute (N.D.C.C. § 28-01-16)
Action for Trespass on Real Property (N.D.C.C. § 28-01-16)
Actions for taking, detaining, injuring, or recovery of personal property (N.D.C.C. § 28-01-16)
Action for fraud (N.D.C.C. § 28-01-16)
Other Injury to the Person, including Products Liability and Negligence (N.D.C.C. § 28-01-16)

3 YEARS
Actions against a sheriff or coroner for an act within their official capacity (N.D.C.C. § 28-01-17)
Action upon statute for penalty or forfeiture (N.D.C.C. § 28-01-17)
Foreclosure of construction lien (N.D.C.C. § 28-01-17)

10 YEARS
Action upon a judgment or decree of any U.S. court (N.D.C.C. § 28-01-15)
Action upon contract in any conveyance or mortgage affecting the title to real property (N.D.C.C. § 28-01-15)
Action for foreclosure of mortgage (N.D.C.C. § 28-01-15)

N.D.C.C. § 26.1-26-51
A Breach of Contract or Negligence Claim against a Licensed Insurance Provider must be commenced before the earlier of two years from the date of the alleged act, **OR** six years after performance of the service for which the claim arose

An objection that an action was not commenced within the time limited by law can only be made in an Answer. N.D.C.C. 28-01-39

Key North Dakota Rules of Civil Procedure

Commencement of an action:
In North Dakota, an action is deemed commenced upon service of the of the summons on the defendant. N.D.R.Civ.P.3.

Perfecting Service:
When service cannot be perfected on the defendant, the equivalent attempt thereof can be made by deliverance of the summons to the sheriff or other officer of the county in which the defendant resides, or last resided, or if the defendant is a corporation, the county in which situated the defendant's last principal place of business. N.D.C.C. § 28-01-38.

Personal Jurisdiction
In addition to the requirements of service of process, N.D.R.Civ.P.4 also sets out the requirements of personal jurisdiction over a defendant for suit in the state. A North Dakota state court may exercise personal jurisdiction based on a defendant's "presence or enduring relationship" with the state. N.D.R.Civ.P.4(b)(1). Such presence or enduring relationship exists when a person is "found within, domiciled in, organized under the laws of, or maintain[s] a principal place of business in, [North Dakota]." *Id.*

Depositions may be taken without leave of the court after a case is commenced under N.D.R.Civ.P. 30. A subpoena may be used to compel the attendance of a non-party deponent pursuant to N.D.R.Civ.P 45.

Depositions may also be taken with leave of the court if a plaintiff wants to depose a party or nonparty ***less than 30 days*** after an action is commenced unless a defendant has already served a notice of deposition or commenced discovery, or special notice is afforded under N.D.R.Civ.P. 30(b)(7).

North Dakota Courts have discretion to lengthen or shorten a deposition if good cause is shown and based upon the convenience of the parties and witness and the interests of justice. N.D.R.Civ.P. 30(a)(3).

Under **N.D.R.Civ.P. 11(a)**, all pleadings, motions and other papers filed with the court are required to be signed by an attorney of record, or a *pro se* party. In addition, the signature must be accompanied by: "the signer's address, electronic mail address for electronic service, and telephone number." If the signer is an attorney, the paper must contain the attorney's State Board of Law Examiners identification number.

Pleadings do not need to be verified in North Dakota, unless otherwise specified by rule or statute.

If it is called to a party's attention that its pleading or motion is unsigned, and the party fails to promptly correct the error, the court may strike the paper.

Interrogatories: In this state, a party can serve written interrogatories on a plaintiff after a lawsuit is commenced and on any other party after that party has been served with the summons and complaint. N.D.R.Civ.P. 33(a)(1).

The responding party must serve its answer and objections within 30 days after being served with the propounding interrogatories. N.D.R.Civ.P. 33(b)(2).

***However,* a defendant is not required to respond to interrogatories until 45 days after service of the summons and complaint.**

When responding to interrogatories, a party must object, or otherwise answer each interrogatory fully and under oath. The individual providing the answers must sign them, with their attorney signing any objections. N.D.R.Civ.P. 33(b).

A party is not required to answer an interrogatory that is repetitive of any interrogatory it has already answered. N.D.R.Civ.P. 33(b)(6)

North Dakota Practice Points – State and Federal Court

Depositions of Organizations

In Federal Court, via notice or subpoena, "a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination." Fed. R. Civ. P. 30(b)(6). The entity is required to select a director, officer, managing agent or other representative to testify on its behalf and can determine the topics on which any such designated person will testify. *Id.* A subpoena must notify any nonparty organization as to its duty to select a representative. *Id.* Under the rule, the corporate deponent "must testify about information known or reasonably available to the organization." *Id.*

The North Dakota State Court rule mimics Fed. R. Civ. P. 30(b)(6), and, similarly, includes the requirement that a corporate representative "shall testify as to matters known or reasonably available to the organization." N.D.R.Civ.P 30(b)(6); *See also SRT Communications, Inc. v. Phoenix Civil Contractors, LLC*, 4:14-CV-42, 2015 WL 12803621 (D.N.D. Jun. 19, 2015).

Stipulations in Federal Court

No agreement or consent between the parties or attorneys in respect to court proceedings is binding, unless it is: (1) signed by all parties or their attorneys, filed with the clerk, and approved by the court; or (2) made in open court, on the record, and approved by the court. D.N.D. Gen. L.R. 1.7.

Federal District Court of North Dakota: East and West

The federal court in North Dakota is one judicial district divided up into two divisions, East and West, by counties.

The Western Division comprises:
Adams, Billings, Bottineau, Bowman, Burleigh, Burke, Divide, Dunn, Emmons, Golden Valley, Grant, Hettinger, Kidder, Logan, McHenry, McIntosh, McKenzie, McLean, Mercer, Morton, Mountrail, Oliver, Pierce, Renville, Sheridan, Sioux, Slope, Stark, Ward, Wells, and Williams.

The Eastern Division comprises:
Barnes, Benson, Cass, Cavalier, Dickey, Eddy, Foster, Grand Forks, Griggs, LaMoure, Nelson, Pembina, Ramsey, Ransom, Richland, Rolette, Sargent, Steele, Stutsman, Traill, Towner, and Walsh.

D.N.D. Gen. L.R. 1.1.

Ensuring Filing of an Action in North Dakota

In North Dakota State Court, the commencement of an action is made by service of the summons and complaint, not filing. Unlike other states where an action is commenced at service, North Dakota does not require when an action must be filed following service. ***Nevertheless, the North Dakota Rules of Civil Procedure do require that an action must be filed before any subpoena is issued with proof of service.*** N.D.R.Civ. P. 5(d)(2)(A)(i).

A defendant may further demand that a plaintiff file the complaint following service. N.D.R.Civ. P. 5(d)(2)(A)(iii). In doing so, the demand must be properly served under N.D.R.Civ.P.5(b); where there are multiple defendants, service of the demand by one is effective for all defendants; and if the plaintiff does not file the complaint within 20 days of the defendant's demand for filing, service of the summons is deemed void. Such a demand must contain notice that if the complaint is not filed within 20 days, service of the summons will be void, unless, after motion made within 60 days after service of the demand for filing, the court finds excusable neglect. *Id.*

A defendant may also file the summons and complaint themselves and any costs incurred on behalf of the plaintiff may be taxed under recoverable costs and attorneys' fees. N.D.R.Civ. P. 5(d)(2)(A)(iv).

North Dakota Practice Points – *Continued*

Paragraph Numbering in North Dakota State Court

North Dakota state courts require each paragraph of every document, pleading, or correspondence to be numbered in the following manner:

Paragraph numbering begins with number 1 at the first paragraph in the **body of the document and continues sequentially until the last paragraph of the body.**

For legal documents, pleadings, orders and judgments:

DO NUMBER: All paragraphs within the body of the document;

DO NOT NUMBER:

- Jurisdiction or venue headings;
- Case title and file number;
- Title of the document;
- Section headings and subheadings within the body of the document;
- Individual items contained in lists or bullet points;
- Signature, notary, certification or witness blocks;
- Word processor file location information;
- Headers, footers, footnotes and endnotes;
- Table of Contents, Table of Authorities, or other reference lists.

For correspondence

DO NUMBER: All paragraphs within the body of the document;

DO NOT NUMBER:

- Date;
- Address Block;
- Opening Salutation;
- Closing Salutation and signature block;
- copies to and attachment information;
- Word processor file location information.

The preferred format for numbering is the use Arabic numerals within square brackets, with or without the paragraph symbol of ¶, in the same font as the rest of the document to number the paragraph, (Example: [1], [2], [3] or [¶1], [¶2], [¶3]). Do not use Roman numbers, (Example: [I], [V], [X]). Bolding or italicizing paragraph numbers is not necessary.

Paragraph numbers should be placed in line with the left margin of the document.

See North Dakota Rule of Court 3.5.

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Insurance Law in North Dakota

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Questions? Contact Brownson PLLC Attorneys:
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Claims Handling and the North Dakota Century Code

In general, Chapter 26.1 of the North Dakota Century Code regulates all aspects of insurance in the state of North Dakota, including, but not limited to matters of claims handling and proof of loss.

Unfair Practices

North Dakota Century Code § 26.1-04-03(9) regulates unfair claims handling by insurers

- Committing any of the following acts, if done without just cause and if performed with a frequency indicating a general business practice is prohibited:
    - An insurer must not ***knowingly misrepresent*** pertinent facts of a policy provision relating to the coverages at issue to claimants. N.D.C.C. § 26.1-04-03(9)(a).
    - An insurer must ***acknowledge with reasonable promptness*** pertinent communications with respect to claims arising under insurance policies. N.D.C.C. § 26.1-04-03(9)(b).
    - An insurer must ***adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.*** N.D.C.C. § 26.1-04-03(9)(c).
    - An insurer must ***attempt in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear.*** N.D.C.C. § 26.1-04-03(9)(d).
    - Making it a policy of appealing an arbitration in favor of the insured for the purpose of compelling the insured to accept a settlement or compromise less than the amount awarded in arbitration. N.D.C.C. § 26.1-04-03(9)(f).
    - Attempting settlement or compromise of claims on the basis of applications which were altered without notice, knowledge, or consent of the insured. N.D.C.C. § 26.1-04-03(9)(g).
    - Attempting settlement of a claim for less than the amount to which a reasonable person would have believed one was entitled by reference to written or printed advertising material accompanying or made a part of an application. N.D.C.C. § 26.1-04-03(9)(h).
    - Failing to affirm or deny coverage of claims within a reasonable time after proof of loss has been completed. N.D.C.C. § 26.1-04-03(9)(j).

If a court finds that an insurer has committed any of the above acts with such "frequency indicating a genera business practice," then an insurer can be found to have committed bad faith. *Moore v. American Family Mut Ins. Co*., 576 F.3d 781, 786 (8th Cir. 2009).

Claims Handling – Loss and Notice of Loss

North Dakota Century Code § 26.1-32 regulates a loss, and notice of loss, by the insured

- ***Efficient Proximate Cause Doctrine -*** Under N.D.C.C. § 26.1-32-01, an insurer is liable for a loss proximately caused by a peril insured against even though a peril is not contemplated by the insurance contract may have been the remote cause of the loss. However, an insurer is not liable for a loss of which the peril insured against was only a result of the remote cause. This *efficient proximate cause doctrine* is only applicable if **separate, distinct, and totally unrelated causes contribute to the loss.**

- ***An insurer may contract out of the efficient proximate cause doctrine.*** N.D.C.C. § 26.1-32-03.

- ***Loss in Attempted Rescue of Thing Insured -*** Under N.D.C.C. § 26.1-32-02, an insurer is liable for a loss during the attempted rescue of the thing insured from a peril insured against even if the loss itself is the result of a peril not insured against.

- ***Best Evidence for Proof of Loss -*** Under N.D.C.C. § 26.1-32-06, when a preliminary proof of loss is required by an insurance policy, the insured is not bound to give such proof as would be necessary in a court, but it is sufficient for the insured to give the best evidence which the insured has at the time.

Proof of Loss and Waiver N.D.C.C. § 26.1-32-08

After a notice of loss is completed, an insurer must:

- *Within **20 days** furnish a blank form of proof of loss to the insured or beneficiary;*

- *Upon receipt, the insured or beneficiary has **60 days** in which to make a proof of loss;*

- ***If the insurer fails to furnish the form within 20 days, the insurer has waived the requirement of the proof of loss.***

Duties of the Insurer

Duty to Defend & Duty to Indemnify

An insurer's duty to defend is broader that its duty to indemnify. *Forsman v. Bues, Brews, and Bar-B-Ques, Inc.*, 903 N.W.2d 524, 535 (N.D. 2017). But an "insurer's duty to defend and duty to indemnify its insured are two separate and distinct contractual obligations and, are determined by applying different standards." *Id. citing, Tibert v. Nodak Mut. Ins. Co.*, 816 N.W.2d 31 (N.D. 2012) (internal quotations omitted).

An insurer has a duty to defend an underlying action against its insured if the allegations in the complaint give rise to potential liability or a possibility of coverage under the insurance policy. *See, Midwest Cas. Co v. Whitetail*, 596 N.W.2d 341 (N.D. 1999); *see also Schultze v. Continental Ins. Co.,* 619 N.W.2d 510, 513 (N.D. 2000) (no duty to defend where no possibility of coverage); *Ohio Cas. Ins. Co. v. Horner*, 583 N.W.2d 804 (N.D. 1998).

Step 1: Is there a possibility of coverage?
If YES, then the insurer has the duty to defend.

How does an insurer determine the possibility of coverage? North Dakota courts look to the allegations of the complaint in determining whether the insurer has a duty to defend. *Forsman,* 903 N.W.2d at 536. "While the duty to defend focuses on the complaint's allegations, the duty to indemnify generally is determined by the actual result in the underlying action." *Id., citing Tibert*, 816 N.W.2d at 43; *see also Hannman v. Continental W. Ins. Co.*, 575 N.W.2d 445 (N.D. 1998).

In *Tibert*, the North Dakota Supreme Court explained the obligations an insurer has in deciding whether the duty to defend exists in considering whether a policy exclusion applies:

> "[I]f the allegations pleaded in the complaint viewed at the time of tender include any potential liability or possibility of coverage under the policy, there is a duty to defend, and the insurer cannot simply refuse to provide a defense in the hope that the facts as determined by the factfinder in the underlying lawsuit preclude coverage under a policy exclusion. The insurer is not free to refuse to provide a defense, wait until the case is tried, and then with the benefit of hindsight claim the jury's resolution of disputed factual allegations is res judicata on the issue of duty to defend. ***The insurer's duty to defend is set by the pleadings and must be determined as of the time the defense it tendered; it is not affected by 'the course and outcome of the litigation.*** An insurer facedwith legitimate questions whether the factual allegations in the complaint create a duty to defend has an immediate remedy to resolve the question. The insurer (or the insured) can bring a declaratory judgment action to determine duty to defend before the underlying action is tried. *See* N.D.C.C. § 32–23–06. However, ***'[w]here a claim potentially may become one which is within the scope of the policy,' and the insurer does not avail itself of its right to seek an immediate declaratory judgment under N.D.C.C. § 32–23–06, the insurance company's refusal to defend at the outset of the controversy is a decision it makes at its own peril."***

Tibert, 816 N.W.2d at 44 (internal citations omitted).

"Any doubt of whether the duty to defend exists must be resolved in favor of the insured." *Id.* at 42 (citing *Schultze,* 619 N.W.2d at 514-15).

Step 2: Upon ultimate resolution, is there an actual basis for liability? Does an exclusion apply?
If the first is YES, and the second is NO, then the insurer has the duty to indemnify.

Duties of the Insurer – *Continued*

Duty to Act Fairly and in Good Faith

"An insurer has a duty to act fairly and in good faith in its contractual relationship with its policyholders." *Fetch v. Quam*, 623 N.W.2d 357, 361 (N.D. 2001) (citing *Hanson v. Cincinnati Life Ins. Co.*, 571 N.W.2d 363, 369 (N.D. 1997)).

"This duty of good faith imposed on an insurer, which has its genesis in the contractual relationship between the insurer and its policyholders, is ***implied by law to include a duty of fair dealing in paying claims, providing defense to claims, negotiating settlements, and fulfilling all other contractual obligations***. *Fetch*, 623 N.W.2d at 361 (emphasis added); *see also Whitetail*, 596 N.W.2d at 345; *Dvorak v. Am. Family Mut. Ins. Co.*, 508 N.W.2d 329, 331-32 (N.D. 1993); N.D.C.C. § 26.1-04-03.

"The test for bad faith is ***whether the insurer acts unreasonably*** in handling an insured's claim by failing to compensate the insured, without proper cause, for loss covered by the policy." *Hanson*, 571 N.W.2d at 369-70 (emphasis added).

"Whether an insurer has acted in bad faith is ordinarily a factual question to be determined by the trier of fact." *Fetch*, 623 N.W.2d at 361, *citing Corwin Chrysler – Plymouth, Inc. v. Westchester Fire Ins. Co.*, 279 N.W.2d 638, 643-44 (N.D. 1979).

An insurer only owes this duty of good faith and fair dealing to the insured and other intended claimants and beneficiaries who have a contractual relationship to the insurer. *Dvorak,* 508 N.W.2d at 331-32. ("An insurer's duty of good faith and fair dealing is owed to the insured… but does not extend to injured claimants who have no contractual relationship with the insurer."); s*ee also Szarkowski v. Reliance Insurance Co.*, 404 N.W.2d 502 (N.D. 1987) (duty applied to third party who was an intended claimant and beneficiary under the contract).

Moreover, this duty extends to matters of settlement. *Dvorak,* 508 N.W.2d at 332; *see also* N.D.C.C. § 26.1-04- 03(9).

Coverage Disputes and Actions

Declaratory Judgment Actions

In the event of a coverage dispute between an insurer and insured because of a claim, either may bring an action for declaratory relief.

Declaratory Judgments in North Dakota are governed by the N.D.C.C § 32-23. Under this chapter of the Code "A court of record within its jurisdiction shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force and effect of a final judgment or decree." N.D.C.C § 32-23-01.

Attorneys' Fees

Insurers in North Dakota should note that in some cases when an insurer is the one to bring the action for declaratory judgment, the insurer may be obligated to pay the insured's attorney's fees. *See State Farm Fire and Cas. Co. v. Sigman*, 508 N.W.2d 323, 326-27 (N.D. 1993) (noting that an insured does not enter an insurance contract intending to purchase a lawsuit). However, an insurer is not obligated to pay attorney's fees in all cases. The Supreme Court of North Dakota has specifically held that "[a]bsent specific contractual or statutory authority, the 'American Rule' requires parties to bear their own attorney's fees." *State Farm Mut. Auto Ins. Co. v. Estate of Gabel*, 539 N.W.2d 290, 294 (N.D. 1995) (affirming denial of attorney's fees by distinguishing from *Sigman*).

Attorneys' fees are also recoverable under North Dakota law as damages if the insured can show a breach of the insurer's duty to defend. *Farmers Union Mut. Ins. Co. v. Decker*, 704 N.W.2d 857, 862-63 (N.D. 2005) (citing *Sigman*, 508 N.W.2d at 326).

Reservation of Rights

Under North Dakota law, an insurer who questions whether or not it has a duty to defend can do one of two things:

1) determine the answer by bringing a declaratory judgment action for a decision on its duty to defend. *Decker*, 704 N.W.2d at 868 (citing N.D.C.C. § 32–23–06).

OR

2) defend the suit under a reservation of rights. *Id.* (citing *Mobile Oil Corporation v. Maryland Cas. Co.,* 288 Ill.App.3d 743, 224 Ill.Dec. 237, 681 N.E.2d 552, 560 (1997)).

Coverage Disputes:
Construction of the Policy

Similar to Minnesota, in North Dakota, the insured bears the initial burden of demonstrating coverage while the insurer carries the burden of establishing the applicability of exclusions. *Forsman v. Blues, Brews and Bar-B-Ques, Inc.*, 903 N.W.2d 524, 531 (N.D. 2017).

Interpretation of an insurance contract is a question of law fully reviewable on appeal. *Tibert v. Nodak Mut. Ins. Co.*, 816 N.W.2d 31, 35 (N.D. 2012).

In determining whether there is coverage, North Dakota courts independently examine and construct the insurance contract. *Grinnell Mut Reinsurance Co. v. Thies*, 755 N.W.2d 852 (N.D. 2008).

> "Our goal when interpreting insurance policies, as when construing other contracts, is to give effect to the mutual intention of the parties as it existed at the time of contract. We look first to the language of the insurance contract, and if the policy language is clear on its face, there is no room for construction. ***If coverage hinges on an undefined term, we apply the plain, ordinary meaning of the term in interpreting the contract. While we regard insurance policies as adhesion contracts and resolve ambiguities in favor of the insured, we will not rewrite a contract to impose liability on an insurer if the policy unambiguously precludes coverage.*** We will not strain the definition of an undefined term to provide coverage for the insured. We construe insurance contracts as a whole to give meaning and effect to each clause, if possible. The whole of a contract is to be taken together to give effect to every part, and each clause is to help interpret the others."

Id. (internal quotations omitted); s*ee also K & L Homes, Inc. v. American Family Mut. Ins. Co.*, 829 N.W.2d 724, 727-28 (N.D. 2013).

Exclusions

Exclusions from coverage must be clear and explicit and are strictly construed against the insurer. *Wisness v. Nodak Mut. Ins. Co.*, 806 N.W.2d 146, 150 (N.D. 2011). However, while "strictly construed, a contract will not be rewritten to impose liability when the policy unambiguously precludes coverage. *Forsman*, 903 N.W.2d at 530-31 (citing *K & L Homes*, 829 N.W.2d at 727-28).

First, the Court will examine the policy's coverages before examining the exclusions. *Forsman*, 903 N.W.2d at 531. "If and only if a coverage provision applies to the harm at issue will the court then examine the policy's exclusions and limitations of coverage." *Wisness*, 806 N.W.2d 146.

"An exclusionary provision, or the absence of one, cannot be read to provide coverage that does not otherwise exist." *Id.* Similarly, while an exception to an exclusion results in coverage, "an exception to an exclusion is incapable of initially providing coverage; rather, an exception may become applicable if, and only if, there is an initial grant of coverage under the policy and the relevant exclusion containing the exception operates to preclude coverage." *Forsman*, 903 N.W.2d at 531 (quoting *K & L Homes*, 829 N.W.2d at 728).

Coverage Disputes:
Policy Risks, Coverage, and Defenses

Reasonable Expectations of the Insured

The Supreme Court of North Dakota has expressly declined to adopt the doctrine of reasonable expectations and will only apply the doctrine upon a finding that the language of the policy is sufficiently ambiguous. *See Nationwide Mut. Ins. Companies v. Lagodinski*, 683 N.W.2d 903, 911-12 (N.D. 2004); *Western Nat'l Mut. Ins. Co. v. Univ. of North Dakota*, 643 N.W.2d 4, 13 (N.D. 2002); *RLI Ins. Co. v. Heling*, 520 N.W.2d 849, 854-55 (N.D. 1994).

No Direct Actions Against Insurers

Unlike some states, North Dakota has no direct-action rule or statute. Rather, Supreme Court of North Dakota has been clear that direct actions against an insurer are not allowed. *Dvorak.*, 508 N.W.2d at 331 ("Absent a clause in the insurance contract bestowing the right to bring a direct action against the insurer, an injured party's claim must be asserted against the tortfeasor, not the tortfeasor's insurer."); *see Shermoen v. Lindsay*, 163 N.W.2d 738 (N.D. 1968) ("North Dakota has no such direct-action statute...").

Policy Defenses

Nonpayment of premiums by an insured will result in a lapse or cancellation of coverage under a policy. *Sjoberg v. State Auto. Ins. Ass'n of Des Moines, Iowa*, 48 N.W.2d 452, 453 (N.D. 1951); *See also* N.D.C.C. § 26.1-40-02(1)(a) (as applicable to automobile insurance and warranties). North Dakota courts have enforced the denial of coverage of a loss occurring during a lapse of coverage due to nonpayment of a premium. *Meyer v. National Fire Ins. Co. of Hartford, Conn*, 269 N.W. 845, 846(N.D. 1936); However, as a condition to the benefit of the insurer, the defense of nonpayment can be waived. *See Hanson v. Cincinnati Life Ins. Co.*, 571 N.W.2d 363, 366-67 (N.D. 1997). A waiver may be established by express agreement or inference from acts or conduct. *Id.* The issue of waiver is a question of fact. *Id.* at 367; *see also Beauchamp v. Retail Merchants' Ass'n Mut. Fire Ins. Co.*, 165 N.W. 545, 549 (N.D. 1917).

Misrepresentations by an insure in an insurance application is grounds for rescinding or avoiding an insurance policy if the misrepresentation is made with an actual intent to deceive or if it increases the risk of loss. *Industrial Com'n of North Dakota v. McKenzie County Nat. Bank*, 518 N.W.2d 174, 177 (N.D. 1994) (citing *Lindlauf v. Northern Founders Ins. Co.*, 130 N.W.2d 86 (N.D. 1964). Whether the misrepresentation is made with an actual intent to deceive is a question of fact for the jury as reasonable minds could differ. *Lindlauf*, 130 N.W.2d at 87. However, whether a misrepresentation increases the risk of loss under the policy could be a question of fact or a question of law for the court to decide, depending on the type of misrepresentation. *See Industrial Com'n of North Dakota*, 518 N.W.2d at 178 (holding the issue of marketable title of property is one free from reasonable doubt and thus a question of law for the court).

Lack of Cooperation by an insured, usually contained in a cooperation clause under the policy, operates to relieve the insurer of liability if the insured does not substantially comply in assisting the insurer with her claim or suit. *Wilson v. Farmers Ins. Group*, 655 N.W.2d 414, 416 (N.D. 2003). Whether an insured substantially cooperated is usually a question of fact for the jury, precluding summary judgment. *Id.*

Willful Act- Under N.D.C.C. § 26.1-32-04, an insurer is not liable for a loss caused by the willful act of the insured, but the insurer is not exonerated by the negligence of the insured or by the negligence of the insured's agents or others.

Licensing and Continuing Insurance Education

North Dakota Resident Licensing

To apply for a resident insurance producer license, an applicant must submit a uniform application to the commissioner and meet the following requirements:

- 18 years of age or older
- Has not committed any act that is grounds for denial, suspension, or revocation
- Paid the application fees
- Successfully passed necessary examinations
- Submit to a fingerprint background check
- Is competent, trustworthy, financially responsible, and has a good personal and business reputation

North Dakota Nonresident Licensing

Nonresident insurance producers may receive a nonresident license if they:

- Have a current license as a resident in good standing in another state
- Submit the proper request for licensure and pay required fees
- Submit either a home state application for licensure or a completed uniform application through the National Insurance Producer Registry (NIPR)
- Live in a state that has awarded nonresident insurance producer licenses to residents of North Dakota

N.D.C.C. § 26.1-02.1-02.1 prohibits a person convicted of a felony involving dishonesty or breach of trust from participating in the business of insurance. A license cannot be issued to anyone with this type of conviction.

Businesses acting as insurance producers must submit a uniform business entity application to the commissioner to obtain an insurance producer license. Before approving the application, the commissioner must conclude that the business entity has paid the application fee and has appointed a principal producer responsible for the entity's compliance with state insurance laws and regulations.

To meet continuing education requirements, a licensed resident insurance producer must complete 24 hours of approved courses over a two-year period, with at least three hours of ethics. Up to 12 hours of coursework over the minimum requirement in a 12-month period may be credited to the next period. The commissioner must receive evidence of participation in continuing education coursework and may reduce or waive the number of hours required for individuals with licenses limited to a specific product.

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Professional Liability

General Principles of Professional Liability
Insurance Agent/ Agency Liability
Lawyers, Doctors, and Other Professionals

Questions? **Contact Brownson PLLC Attorneys**
Robert Brownson
Kristi Brownson

General Principles of Professional Liability

Professional liability claims, at its basic level, is an expansion of tort law and the legal concepts of ***negligence, breach of contract, breach of fiduciary duty, negligent misrepresentation, and even fraud.***

As such, in every case, the basic four principles apply:

- *Was there a duty or contract?*
- *Did the professional breach that duty or contract?*
- *Did that breach cause damages?*
- *Were there actually damages?*

Elements of Negligence for Professional Liability

1. **Duty -** of the professional to such skill, prudence and diligence as other members of his profession commonly possess and exercise;
2. **Breach -** of that professional duty;
3. **Causation -** a causal connection between the negligent conduct of the professional and the resulting damage; and,
4. **Damage** – actual loss or damage resulting from the professional's negligence.

Fiduciary Relationship

In North Dakota, a fiduciary relationship is "something approximating business agency, professional relationship, or family tie impelling or inducing the trusting party to relax the care and vigilance…ordinarily exercised." *Nesvig v. Nesvig*, 676 N.W.2d 73, 80 (N.D. 2004) (quoting *Matter of Estate of Lutz*, 563 N.W.2d 90, 98 (N.D. 1997).

In a fiduciary relationship, the superior party has a duty to act in the dependent party's best interest. *Lutz,* 563 N.W.2d at 98.

A **fiduciary** relationship exists when one is under a **duty** to act for, or to give advice for the benefit of another upon matters within the scope of the relationship. *Id.*

In general, the standard of care held to any professional is to act as a similar reasonably prudent professional would act under the same circumstances.

Insurance Agent and Insurance Agency Liability

Rawlings Standard of Care

North Dakota has adopted the Minnesota standard of care for insurance agents as established in *Gabrielson v. Warnemunde*, 443 N.W.2d 540 (Minn. 1989); *see Rawlings v. Fruhwirth*, 455 N.W.2d 574, 577 (N.D. 1990). Thus, the duty imposed:

> **"[R]equires an insurance agent to exercise the skill and care which a reasonably prudent person engaged in the insurance business would use under similar circumstances." *Rawlings,* 455 N.W.2d at 577.**
>
> **Further, this duty is "limited to the duties imposed in any agency relationship to act in good faith and follow instructions." *Id.***

"[A]n insurance agent assumes only those duties normally found in an agency relationship, including the obligation to deal with his principal in good faith and to carry out instructions, ***and he assumes no duty to advise merely by such relationship***. However, **where an agent also holds himself out as a consultant and counselor, he does have a duty to advise the insured as to his insurance needs, particularly where such needs have been brought to the agent's attention. And in so doing, he may be held to a higher standard of care than that required of the ordinary agent since he is acting as a specialist.** Accordingly, the agent may be liable to an insured for the damage suffered by his failing to inform him as to a potential source of loss and by his failing to recommend insurance therefor." *Id.* at 576-77.

"Absent an agreement to the contrary, an agent has no duty beyond what he or she has specifically undertaken to perform for the client.[] Thus, the agent is under no affirmative duty to take other actions on behalf of the client if the typical principal agent relationship exists." *Gabrielson*, 443 N.W.2d 540, 543-44.

"Unless there is a special circumstance or relationship, the agent's duty is to act in good faith and to simply follow the instructions of the insured." S*cottsdale Ins. Co. v. Transport Leasing/Contract, Inc.*, 671 N.W.2d 186, 196 (Minn. App. 2003).

As such, under North Dakota law, insurance agents do not have a duty to act affirmatively, absent a special relationship. *Rawlings,* 455 N.W.2d at 577.

When is there a "Special Relationship?"

North Dakota courts look to whether special circumstances exist to create a special relationship that would require an agent to take action not specifically requested by the insured. *APM, LLLP v. TCI Ins. Agency, Inc.*, 877 N.W.2d 34, 38 (N.D. 2016).

In upholding the *Rawlings* standard, in 2016 the Supreme Court of North Dakota held that a special relationship must be "something more than the standard policyholder-insurer relationship [] in order to create a question of fact as to the existence of a special relationship obligating the insurer to advise the policyholder about his or her insurance coverage. **There must be, in a long-standing relationship, some type of interaction on a question of coverage, with the insured relying on the expertise of the insurance agent to the insured's detriment."**
APM, LLLP, 877 N.W.2d at 38 (quoting *Rawlings*, 455 N.W.2d at 578).

Lawyers, Doctors, and Other Professionals

Lawyers

Legal malpractice claims are subject to a 2-year limitation period in North Dakota. The Supreme Court of North Dakota has defined legal malpractice as the "failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result that injury, loss, or damage to the recipient of the use of those services or to those entitled to rely upon them." *Johnson v. Haugland*, 303 N.W.2d 533, 538 (N.D. 1981).

To prove an attorney malpractice claim, the plaintiff-client must meet the following elements:

- Existence of an attorney-client relationship;
- A duty to the client
- A breach of that duty by the attorney
- And damages to the client proximately caused by the breach of that duty.

Wastvedt v. Vaaler, 430 N.W.2d 561, 564-65 (N.D. 1988).

"Before an attorney's advice or conduct can be the proximate cause of damage, the [client] must establish that the advice or conduct falls below the applicable standard of care and constitutes therefore a breach of **duty**." *Id.* at 565."The standard of care or **duty** to which an attorney is held in the performance of **professional** services is that degree of skill, care, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in the state." *Id.*

Doctors

A plaintiff must commence a medical malpractice action within two years after a claim accrues. *See* N.D.C.C. § 28- 01-18(3). An action against a physician or licensed hospital must not extend beyond six years of the alleged malpractice unless a physician or hospital fraudulently prevented discovery of the act or omission at issue. *Id.*

Under N.D.C.C. § 28-01-46, to prove a medical malpractice claim, a plaintiff must offer expert evidence, in the form of an affidavit, to establish: the applicable standard of care, a violation of that standard, and a causal relationship between the violation and the alleged harm, within three months of commencing the malpractice action.

A court may extend the deadline for serving an expert affidavit for good cause if a plaintiff requests an extension within the three-month period after an action is commenced. *Id.*

Other Professionals

Besides doctors and lawyers, North Dakota plaintiffs may also bring malpractice claims against other professionals pursuant to statutory law. N.D.C.C. § 28-01-18(3)

The applicable statute does not identify particular professionals subject to malpractice claims, but courts have held that architects and engineers qualify as professionals, while electricians and certified financial planners do not. *See Sime v. Tvenge Associates Architects & Planners, P.C.*, 488 N.W.2d 606, 609 (N.D. 1992) (holding architects and engineers are professionals for malpractice actions); *Jilek v. Berger Elec., Inc.*, 441 N.W.2d 660 (N.D. 1989) (electricians not professional); *Kunt v. Muehler*, 603 N.W.2d 43 (N.D. 1999) (financial planners not professionals).

To determine whether an individual is a professional and therefore subject to being sued under the statute, North Dakota courts assess whether the occupation at issue satisfies the definition of "profession." *See Sime*, 488 N.W.2d 608-09. For instance, courts consider whether a position requires advanced education, training, or intellectual skills. *Id.*

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Asbestos Claims in North Dakota

Questions? Contact Brownson PLLC Attorneys:
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Asbestos Claims in North Dakota

In North Dakota, asbestos personal injury cases are placed in "sets" by county.

Sets may include six to thirty (or more) separate plaintiffs.

Within the sets, cases are grouped by filing date.

The majority of pending cases in North Dakota are in the following three counties:

- Cass County (Fargo)
- Grand Forks County (Grand Forks)
- Morton County (Mandan)

The North Dakota Supreme Court has not addressed the question of how much exposure evidence a plaintiff in an asbestos personal injury or wrongful death case must offer to raise a material issue of fact as to causation in order to survive a defendant's motion for summary judgment.

Traditionally, district courts apply the *Lohrmann* "frequency, regularity and proximity" test in determining causation. *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986).

Under the *Lohrmann* test, adopted by courts in most jurisdictions, a plaintiff must establish the following to prevail against a defendant asbestos manufacturer or supplier's motion for summary judgment:

- Exposure to an asbestos-containing product made by the defendant;
- Frequency and regularity of such exposure;
- That such exposure was in proximity to where the plaintiff actually worked; and,
- Injury to the plaintiff as a result of such exposure.

Since North Dakota is a "several" liability state, there is no joint liability. In asbestos cases, a defendant may be liable only for the percentage of fault attributed to it by the finder of fact and will not be allocated any portion of the fault of any other party, even if certain shares of such fault are not recoverable to the plaintiff.

ALRA ASBESTOS LIABILITY RISK ANALYSIS GROUP

Brownson PLLC Attorney Robert Brownson is a founding member of the ALRA Group, an organization providing counsel to companies and forecasting the future of asbestos litigation.

The ALRA Group is a team of highly experienced defense lawyers who, for nearly 30 years, have represented international, national, regional, and local defendants in asbestos litigation in every major jurisdiction throughout the United States.

- ALRA Group members include six preeminent lawyers who have handled and supervised the defense of more than 300,000 asbestos bodily injury cases.
- Their experience includes work as National Coordinating Counsel for Defendants in diverse industries comprising all major aspects of the products and exposures giving rise to asbestos bodily injury claims.
- As national, regional, and local state counsel, they have handled trials, settlements, and appeals, of numerous cases, including major consolidated cases ranging from dozens, to thousands, of individual claims, and the major class action cases containing hundreds, to tens of thousands, of individual claims.
- Most importantly, the hallmark of their efforts has been success amid the shifting, complex sands of asbestos litigation.

Asbestos litigation has bankrupted scores of otherwise viable companies. This trend continues and investors need sound business advice. As members of the ALRA Group, we analyze asbestos risks for business, insurance and financial clients and predict their future asbestos liability.

The ALRA Group has a proven track record in counseling companies about asbestos liability risk management strategies.

Members of the ALRA Group have been at the forefront of developing, analyzing, and presenting, scientific, technical, and medical developments pertaining to asbestos exposure, and disease.

Uniquely, members of the ALRA Group have managed and handled the funding of expense, and settlement, of asbestos bodily injury cases, over a period of many years, for a diverse group of Defendants, and major insurance companies.

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Regulatory Law

Regulation and Rule-Making Overview

Regulatory Enforcement Actions

OSHA Regulations in North Dakota

Questions? Contact Brownson PLLC Attorneys

Regulation & Rule-Making Overview

Most people are familiar with the process of making "law" through the legislature, where elected representatives propose and publicly debate a bill that becomes law when signed by the chief executive, such as the President, a governor or a mayor. ***In other cases, the legislature may pass a law that empowers federal, state or local agencies to make administrative "rules" that have the power of law.*** The rationale behind empowering non-elected administrators to make law is that regulatory agencies are assumed to have special expertise in complicated areas such as insurance, health, technology and agriculture. Often the expectation is that the legislative body will pass a law addressing a general public policy goal, and a designated government agency is then authorized to develop and enforce specific rules designed to accomplish that goal.

This process does not always go smoothly.

As public sentiment and political power shift, or when new information about a particular challenge comes to light, the desired alignment between legislative goals and administrative rules may become strained. Further, because regulatory agencies have affirmative authority to enforce rules and punish alleged offenders, legal conflicts with agencies may arise where consumers, industries, or other government officials take issue with the application of executive power to mandate or restrict certain activity. ***Ultimately, legal conflicts with agencies can be resolved by the courts, but short of litigation, there are other means to address conflicts with regulatory agencies.***

Proposals to enact or amend regulatory law at all levels is addressed through specific rule-making procedures.

At the federal level, agencies use a **"notice and comment"** process, which engages the industry and the public for comments on the proposed rule or activity. As might be expected, public comments submitted in response to controversial rule proposals can cover a broad divergent range of views. **However, the comment period is the only opportunity for direct public engagement with the agency, and a unified and consistent response from stakeholders can be an effective means to influence regulatory decisions.** After the close of the comment period, the agency considers all of the comments and in most cases publishes an official response to the issues raised in the comments. The agency may accept or reject alternative proposals, or may table the proposed rule for further review in light of issues raised in the comments. Final rules are published in the Federal Register and that point become law on the appointed date.

At the state level, unlike the federal "notice and comment" process, **North Dakota does not require agencies to first engage the public for comment on a proposed rule**. Instead, at the state level, North Dakota agencies are required to **first obtain the Attorney General's opinion on the legality of the rule before publishing the rule in the Administrative Code.**

Brownson attorneys have prepared formal comments and have appeared before many state and federal agencies representing various industry stakeholders interested in determining regulatory intent and advocating for industry positions.

Regulatory Enforcement Actions

Regulations, rules, and ordinances have the force and effect of law, and are enforced as such by the applicable agency or authority. For example, violations of FDA regulations could result in the issuance of a warning letter, or a seizure of adulterated or misbranded products, or even criminal prosecution. Further, recent legislative changes authorize FDA officials to enter and inspect private property. The disciplinary action taken depends on the nature of the violation. Decisions of federal agencies can be appealed through an administrative hearing. To the extent the determination at the administrative hearing is unfavorable, and the agency processes are considered "exhausted", an appeal may be made to the federal court.

Brownson attorneys have successfully represented clients in informal negotiations and in formal seizure and violation proceedings before FDA, DEA and OSHA.

OSHA Regulations in North Dakota

OSHA, the Occupational Safety and Health Administration, is a federal agency that regulates workplace safety and health by setting and enforcing workplace standards. Brownson attorneys advise and assist clients in ensuring that they meet the standards set by OSHA.

As a highly agricultural state, OSHA's regulations as to maintaining the safety of farm equipment is particularly of note:
"Operating Instructions. At the time of initial assignment and at least annually thereafter, the employer shall instruct every employee in the safe operation and servicing of all covered equipment with which he is or will be involved, including at least the following safe operating practices:

(i) Keep all guards in place when the machine is in operation;
(ii) Permit no riders on farm field equipment other than persons required for instruction or assistance in machine operation;
(iii) Stop engine, disconnect the power source, and wait for all machine movement to stop before servicing, adjusting, cleaning, or unclogging the equipment, except where the machine must be running to be properly serviced or maintained, in which case the employer shall instruct employees as to all steps and procedures which are necessary to safely service or maintain the equipment;
(iv) Make sure everyone is clear of machinery before starting the engine, engaging power, or operating the machine;
(v) Lock out electrical power before performing maintenance or service on farmstead equipment."
1928.57(a)(6)(i)-(v).

"Guardrails or fences shall be capable of protecting against employees inadvertently entering the hazardous area." 1928.57(a)(10)
Guards must be installed to prevent employees from coming into contact with hazards created by machinery. *See* 1928.57(a)(7). And, "[u]nless otherwise specified, each guard and its support shall be capable of withstanding the force that a 250 pound individual, leaning on or falling against the guard, would exert upon that guard." 1928.57(a)(8)(ii)

"Guards, shields, and access doors shall be in place when the equipment is in operation." 1928.57(b)(4)(i).

H2A Labor Workers and the Heightened need for OSHA Training

In the last several years, North Dakota farmers have been hard-pressed in finding local qualified workers for farm labor. This has resulted in many North Dakota farming operations to look abroad for candidates. Using the H2A visa program for seasonal agricultural workers, North Dakota farmers have found eager and reliable employees to fill the gaps of the ever increasing local market. While the majority of H2A workers that come to the U.S. for seasonal labor positions come from Mexico, an increasing number, especially in North Dakota, originate from South Africa – a highly agricultural country where farming is still a manual labor process and has not become as modernized as here in the U.S. As a result, South African H2A workers who come to the U.S., and North Dakota specifically, do not have the experience of farming with highly technical tractors and machinery. Thus, it is essential that employers of H2A workers ensure that they are trained in the machinery and safety practices in order to meet the standards and regulations set by OSHA.

To read more about the increase of H2A workers in North Dakota, see
https://bismarcktribune.com/news/state-and- regional/north-dakota-farms-find-labor-in-far-off-lands/article_fe37dd06-bf45-58aa-bad5-eafef9206374.html

Judgments, Settlements, and Releases

Collateral Source Offset & Prejudgment Interest
Damages
Settlement Agreements and Releases

Collateral Source Offset & Prejudgment Interest

Collateral Source Offset

Pursuant to N.D.C.C. §32-03.2-06, a party responsible for payment of economic damages may apply to the court for a reduction of the damage award by the amount of such award that is covered by a collateral source.

A *collateral source payment* is: "*[A]ny sum from any other source paid or to be paid to cover an economic loss which need not be repaid by the party recovering economic damages...*" N.D.C.C. §32- 03.2-06

IT DOES NOT INCLUDE life insurance, death and retirement benefits, insurance, or benefits purchased by a recovering party. *Id.*

It further does not include charitable gifts to which the injured party might receive. *See Dewitz by Nuestel v. Emery*, 508 N.W.2d 334, 341 (N.D. 1993). As the Supreme Court of North Dakota held in *Emery*, "[t]he legislative history of N.D.C.C. § 32-03.2-06 indicates the legislature's intent, as part of tort reform, was to change the collateral source rule to eliminate double recovery from sources such as Workers Compensation and Social Security…. [t]he legislative history does not mention charitable gifts." *Id.* Moreover, "[u]nlike insurance proceeds which are paid on account of a legal obligation triggered by economic loss, charitable gifts are given out of love and a sense of community." *Id.* As a result, "[s]uch gifts are intended to compensate families for expenses which have not and cannot be paid from any other source" as required under the statute. *Id.*

Prejudgment Interest

Prejudgment interest is governed by N.D.C.C. § 32-03-05 which states, ***"In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given in the discretion of the court or jury."***

The statute gives broad discretion to the trier of fact, whether court or jury, on whether or not to award prejudgment interest. *Gonzalez v. Tounjian*, 665 N.W.2d 705, 717 (N.D. 2003) (citing *Grinnell Mut. Reinsurance Co. v. Center Mut. Ins. Co.*, 658 N.W.2d 363 (N.D. 2003)). North Dakota courts will not overturn an award of prejudgment interest unless it is found that "[t]he trier of fact abuse[d] its discretion" by acting "in an arbitrary, unreasonable, or unconscionable manner" whereby it is found that "its decision is not the product of a rational mental process leading to a reasoned determination, or it it misinterprets or misapplies the law." *Gonzalez*, 665 N.W.2d at 717.

As such, the trier of fact has broad discretion to award prejudgment interest on both past economic and non-economic damages. *Id.* at 717; *see also Kriedt v. Burlington Northern R.R.*, 615 N.W.2d 153, 159 (N.D. 2000) (upholding jury award of six percent interest on non-economic and economic damages). However, the Supreme Court of North Dakota has specifically denied the award of prejudgment interest on future damages. *Gonzalez*, 665 N.W.2d at 718-19 ("There is an inherent illogic to awarding prejudgment interest on future damages" as "[b]y definition, future damages are expenses which the plaintiff has not yet incurred at the time of trial, and which will only arise at some future date…[i]nterest is ordinarily viewed as compensation for the use of money for a period of time, due when the period has passed." *Id.* at 717-18.

Damages

Economic and Noneconomic Damages

In North Dakota, money damages may be recovered by a person who suffers a detriment as a result of the unlawful act or omission by another. N.D.C.C. § 32-03-01. In personal injury and wrongful death actions, plaintiffs may recover both economic and noneconomic damages. N.D.C.C. § 32-03.2-04.

Recoverable economic damages include costs arising from medical expenses and medical care; expenses for rehabilitation services and custodial care; loss of earnings and earning capacity; loss of income or support; funeral and burial costs; the cost of substitute domestic services; loss of employment, business or employment opportunities; and other monetary losses. N.D.C.C. § 32-03.2-04(1).

Noneconomic damages recoverable through a personal injury or wrongful death claim include damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, or humiliation, and other nonmonetary damages. N.D.C.C. § 32-03.2-04(2)

A plaintiff whose contributory fault was as great as the combined fault of others who contributed to her injury is barred from recovering damages. N.D.C.C. § 32-03.2-02.

Exemplary Damages

In North Dakota, punitive damages are called exemplary damages and are meant to punish defendants, rather than compensate plaintiffs.

Exemplary damages may be awarded in addition to compensatory damages in any case involving the breach of an obligation, ***other than a claim arising from contract***, or in actions where clear and convincing evidence shows that a defendant has engaged in oppression, fraud, or actual malice. N.D.C.C. § 32-03.2-11(1). Plaintiffs may not seek exemplary damages in a complaint but must file a motion to amend the pleadings after an action has been commenced to add a claim for exemplary damages. *Id.* Such a motion must be supported by one or more affidavits or by deposition testimony demonstrating the basis for a plaintiff's exemplary damage claim. *Id.* A defendant may respond to the plaintiff's motion by filing an affidavit or submitting his own deposition testimony in opposition. *Id.*

North Dakota courts allow amendment of the pleadings to assert a claim for exemplary damages only upon sufficient proof to support a finding by the trier of fact that a preponderance of the evidence shows oppression, fraud, or actual malice by the non-moving party. *Id.* Further, exemplary damages are only available if a plaintiff is entitled to compensatory damages. N.D.C.C. § 32-03.2-11(2).

If awarded, exemplary damages may not exceed two times the amount of compensatory damages awarded, or $250,000, whichever is greater. N.D.C.C. § 32-03.2-11(4) In a jury trial, the jury may not be informed of this limit on exemplary damages prior to deliberations. *Id.* But, if a jury award exceeds the exemplary damages limit, it is subject to reduction by the court. *Id.*

Settlements and Releases

North Dakota law favors compromise and settlement efforts, and usually courts refrain from setting aside settlement agreements unless parties demonstrate fraud, duress, undue influence, or other circumstances warranting the courts' involvement.

Miller v. Shugart Release

In 1992, North Dakota recognized the validity of the type of agreement utilized in the Minnesota Supreme Court case of *Miller v. Shugart*. *Sellie v. North Dakota Ins. Guar. Ass'n*, 494 N.W.2d 151 (N.D. 1992). This form of settlement allows an insured to consent to judgment in favor of a plaintiff, provided the plaintiff satisfies the judgment out of proceeds solely from the insured's policy. *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982).

An example of this kind of settlement in the context of an automobile claim, may be illustrative. In such a case, a *Miller v. Shugart* agreement allows an injured plaintiff to settle with an insured car owner and/or driver and to have a judgment entered in the amount of a stipulated sum (to be collected only from the proceeds of applicable insurance), even while the insurer is litigating coverage. Once coverage is determined, if it found that coverage exists, such a plaintiff would be entitled to recover the amount of the stipulated judgment, up to the limits of the applicable policy, in a garnishment action against the insurer. That is, as long as the insurer received notice of the earlier agreement, the agreement did not result from fraud or collusion, and the agreement was reasonable.

Bartels Agreement

The Supreme Court of North Dakota validated this release in 1979 in the *Bartels v. City of Williston* case. *Bartels v. City of Williston*, 276 N.W.2d 113 (N.D. 1979). A *Bartels* release allows a plaintiff to settle a claim against one tortfeasor and have that tortfeasor dismissed from an action, without affecting the plaintiff's rights against the other, nonsettling defendant tortfeasors. *Id.*

Once settling tortfeasors are released, there remains to be determined the percentage of fault attributable to the nonsettling tortfeasors for the plaintiff's injuries. Ultimately, the plaintiff's recovery is limited to the jury's decision as to such an amount deemed attributable to the remaining defendants.

Other Areas of Potential Liability

Personal Injury
Liability Wrongful
Death Actions
Business Liability
Products Liability
Premises Liability and
Defenses Automobile
Liability Comparative Fault

Personal Injury Liability Coverage

Although included in most insurance exclusions, as a matter of policy in North Dakota, intentional acts are specifically precluded from indemnification under The North Dakota Century Code. *See Tibert*, 816 N.W.2d at 37.

N.D.C.C. §9-08-02 provides: "All contracts which have for their object, directly or indirectly, the exempting of anyone from responsibility for that person's own fraud or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

N.D.C.C. §26.1-32-04 provides: "An insurer is not liable for a loss caused by the willful act of the insure, but the insurer is not exonerated by the negligence of the insured or of the insured's agents or others."

Further, North Dakota Courts have repeatedly held that an intentional act exclusion precludes coverage for the natural and probable consequences of an intentional act. *Tibert,* 816 N.W.2d at 37. In determining the insured's intent, courts follow the "classic tort doctrine." *Id.* If found, an insurer does not have a duty to defend an insured "found liable for damages for injuries resulting from the insured's willful, wanton physical assault of a person." *Id.* at 38.

North Dakota Courts have held that claims for personal injury and property damage, although they may occur simultaneously, must be severable in settlement. *See Mtizel v. Schatz*, 175 N.W.2d 659, 668-69 (N.D. 1970).

Medicare in Personal Injury Actions

Medicare functions as a secondary payer, meaning it will not pay for medical expenses in situations where primary insurance pays, or if self-insurance exists.

In 2007, Congress passed legislation requiring primary plans, including employers, workers' compensation insurers, auto and liability insurers, group plans and programs, and third-party administrators, responsible for payment in cases involving Medicare-eligible claimants to provide notice of a claim to Medicare.

Settlements of $300 or more must be reported to Medicare, but to be safe all settlements involving a Medicare-eligible claimant should be reported.

To preserve future interests in Medicare, attorneys and claims adjusters involved in personal injury actions with Medicare-eligible claimants must upon settlement or judgment, reimburse Medicare for past payments made on behalf of the claimant. The parties may further arrange for a Medicare set-aside, which is an additional pool of money in the settlement award, anticipating a future lien that may be asserted by Medicare for costs paid on future medical bills of a settling claimant.

A Medicare set-aside in personal injury cases is functionally similar to Medicare Set Aside (MSA) Trusts in workers' compensation actions. In these matters, MSAs have been required since 1989, and parties place funds into an MSA trust designated for payment of future medical costs upon settlement or judgment. Then, a claimant may draw on those funds to pay for medical expenses and will not be entitled to further Medicare benefits until the trust monies are depleted.

Medicare set-asides are not mandatory, but as the procedures for protecting Medicare's secondary payer interests become more established, it is advisable that all parties to personal injury cases remember to account for Medicare's present and future interests.

Wrongful Death Actions

Every state has its own rules when it comes to wrongful death actions, North Dakota is no different.

Under N.D.C.C. § 32-21-01, a wrongful death action may be brought ***"[w]henever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured, if death had not ensued, to maintain an action and recover damages in respect thereof,*** then and in every such case the person who, or the corporation, limited liability company, or company which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or of the tort-feasor, and although the death shall have been caused under such circumstances as amount in law to felony."

An action for wrongful death may only be maintained by the following persons, in this order:

- Surviving spouse;
- Surviving children;
- Surviving parents;
- Surviving grandparents;
- A personal representative; or,
- A person who has had primary physical custody of the decedent before the wrongful act.

If one of these people entitled to bring an action refuses or neglects to do so within a period of 30 days after the demand to do so by the next person in line, that next person may then bring an action.

See N.D.C.C. § 32-21-03.

Damages – A "jury shall give damages as it finds proportionate to the injury resulting from the death to the persons entitled to the recovery." N.D.C.C. § 32-21-02.

Areas of such recovery include:

- *Medical expenses and care;*
- *Rehabilitation services;*
- *Custodial care;*
- *Loss of earnings and earning capacity;*
- *Loss of income or support;*
- *Burial costs;*
- *Cost of substitute domestic services;*
- *Loss of employment, business or employment opportunities; and,*
- *Other monetary losses.*

Recoverable noneconomic damages may arise from: pain and suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, fear of injury, loss or illness, loss of society and companionship, loss of consortium, injury to reputation, humiliation, or other nonmonetary damage.

Business Liability

North Dakota law provides for causes of action in various business torts, including misappropriation of confidential information and misappropriation of trade secrets. N.D.C.C. § 47-25.1

In North Dakota, a trade secret is: *[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.* N.D.C.C. § 47-25.1-01(4).

Misappropriation is the acquisition of another's trade secret by one who knows, or has reason to know, it was secured through improper means; or, the disclosure or use of another's trade secret without the express or implied consent of its originator. N.D.C.C. § 47-25.1-01(2).

Injunctive Relief

Generally, under the North Dakota Rules, a temporary restraining order may issue with less notice than is required for a preliminary injunction. For a TRO, the moving party must submit a proposed complaint for injunctive relief with her motion, and must file the motion, proposed complaint, and other moving papers no more than one court business day after such a motion is submitted.

A preliminary injunction is meant to prevent irreparable injury until a court decides whether a permanent injunction will issue at trial. A court may issue a preliminary injunction only when the moving party has served a motion, supporting memorandum of law, and other moving papers on the opposing party at least 14 days prior to the date for the hearing on the motion for preliminary injunction.

In business tort cases, a court may issue an injunction to bar actual or threatened misappropriation of a trade secret for such a reasonable time as to avoid any commercial advantage that might have been derived from such act. N.D.C.C. § 47-25.1-02(1).

In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could be prohibited. Exceptional circumstances include a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable. N.D.C.C. § 47-25.1-02(2).

Statute of Limitations for Misappropriation

"An action for misappropriation must be brought **within 3 years** after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered." N.D.C.C. § 47-25.1-06.

Products Liability

Product liability claims may be alleged in the context of negligence, strict liability, or breach of warranty actions.

Under North Dakota law, **negligence claims** focus on **whether a manufacturer's conduct satisfied the standard of reasonable care,** while **strict liability claims** focus on **whether the product at issue was unreasonably dangerous.**

Design Defect

In an action on design defect, a plaintiff must demonstrate the following:

- That the product was defective in design or manufacture;
- That the defect existed when the product left the manufacturer's control;
- That the defect rendered the product at issue ***unreasonably dangerous***;
- That the product did not undergo a substantial change in its condition prior to reaching the consumer; and,
- That the defect proximately caused the plaintiff's injury.

A product is defective in design or condition if it does not operate reasonably and safely under ordinary or intended uses.

Failure to Warn

An action on a manufacturer's failure to warn is based on ***the duty of a manufacturer to provide adequate warnings with respect to intended use(s) of a product and/or reasonably foreseeable use(s) of a product.***

Under a theory of negligence, the trier of fact's focus is on whether or not a manufacturer's conduct in regard to providing, or failing to provide warnings, breached the manufacturer's duty of reasonable care.

Under a strict liability theory, determining whether a manufacturer failed to warn its consumers focuses on the question of whether the warnings provided were adequate to avoid exposing ordinary users to unreasonable danger.

Manufacturing Defect

A plaintiff may bring a manufacturing defect claim when, as an ordinary consumer, she was unable to anticipate the danger posed by a product.

In these cases, the focus is on the condition of a product, rather than on the acts or omissions of its manufacturer.

Premises Liability and Defenses

Landowners and occupiers owe a duty to maintain their land in a reasonably safe condition. Landowners have a right to use and develop their property, but must take reasonable measures to prevent injury in conducting dangerous activities or if hazardous conditions exist on their premises. Adequate warnings are not always sufficient to eliminate landowner liability.

North Dakota has abolished the distinction between the duty owed by landowners to invitees and licensees, but has retained the distinction with regard to trespassers. An owner or occupier owes no affirmative duty to warn trespassers of dangerous conditions and must only refrain from willfully or wantonly exposing a trespasser to hidden dangers or injury. It is only when a trespasser's presence becomes known that an owner or occupier has a duty to exercise ordinary care to avoid injuring the trespasser.

Snow and Ice: Landowners and occupiers must use "reasonable care" to prevent dangerous conditions like snow and ice accumulation. For abutting public sidewalks, landowners are not liable due to the mere fact that snow or ice is present, but only if they engage in an act or omission that creates an "unreasonably dangerous condition." Municipalities are exempt from liability for injuries resulting from snow and ice on municipal sidewalks unless an officer, governing body, or marshal possesses actual knowledge of a dangerous condition at least 48 hours prior to an injury. Also, municipalities are not liable for injuries resulting solely from slippery conditions, but if snow or ice is allowed to remain for long periods of time and becomes an obstruction, they may be liable for the accumulation or for failure to exercise due care by spreading salt or sand.

Government Property: Political subdivisions, including school districts, must use the same reasonable care as landowners and are liable for injuries caused by a condition on or use of public property and for injuries caused by the negligent or wrongful acts or omissions of employees acting within the scope of their employment.

Open and Obvious: The open and obvious doctrine is a factor in comparative fault analysis. A landowner owes entrants a more limited duty when a dangerous condition is "open and obvious," but when a landowner anticipates that a dangerous condition will cause an entrant physical harm, she has a duty of reasonable care even if the condition is open and obvious. Distracting circumstances, like a store display, may excuse a plaintiff's inattentiveness to an obvious hazard.

Lack of Knowledge: A landowner or occupier's duty to warn is based on the notion that she has superior knowledge of dangerous conditions. A warning is not necessary when an individual is aware of the danger at issue.

Recreational Use: Recreational use immunity shields landowners and political subdivisions from liability to recreational entrants and for premises under recreational use. There is no duty to warn recreational entrants of dangerous conditions or to keep recreational premises safe, but this immunity does not apply to an individual who enters a premises to provide goods or services at the request of an owner or where a for-profit business owner directly or indirectly invites entrants for commercial purposes or during periods of commercial activity.

Automobile Liability

In North Dakota, every vehicle must be minimally insured to provide up to $25,000 for bodily injuries or death sustained in a single accident, up to $50,000 total per accident, up to $25,000 for the destruction of property in a single accident, up to $30,000 in no fault benefits, and up to $25,000 in uninsured benefits to one individual and up to $50,000 total, per accident. The underinsured coverage must mirror the uninsured coverage limits.

Uninsured and underinsured coverage provide protection when an insured's liability coverage is insufficient to cover damages and the vehicle of the other individual involved in an accident is uninsured or underinsured.

An automobile is uninsured if: (a) it is not covered by a liability insurance policy; (b) the insurer refuses to provide coverage; (c) the insurer denies coverage; (d) the insurer becomes insolvent; or (e) the identity of the owner or operator cannot be ascertained and the injury or death of the insured victim is caused by physical contact of the automobile with the insured, physical contact of the vehicle with a vehicle occupied by the insured, or is verified by a disinterested witness.

A vehicle is underinsured when: (a) it is covered by a bodily injury liability insurance policy or bond, but the limit of the policy or bond is less than the applicable limit for underinsured coverage pursuant to the insured's policy, or has been reduced by payments to others injured in the accident to an amount less than the insured's underinsured coverage limit.

Uninsured coverage must pay the amount of damages an insured is entitled to collect for bodily injury, disease, sickness or death, from the owner or operator of an uninsured automobile arising out of the ownership, maintenance, or use of the uninsured vehicle.

The maximum amount of uninsured coverage is the lesser of the limits of liability of the uninsured insurance, or the amount of compensatory damages established by agreement, settlement, or judgment with or for the individual or entity liable for the injury or death, but not recovered.

The serious injury requirement applicable to no-fault coverage does not limit or qualify an insurer's liability as to uninsured coverage.

Other Insurance and Priority of Payment

Damages an insured is entitled to collect from uninsured or underinsured coverage must be reduced by amounts paid or payable under workforce safety or insurance law, valid automobile medical payments, personal injury protection ("PIP") insurance, or similar vehicle coverage.

If an insured is entitled to uninsured or underinsured coverage under more than one policy, the maximum recoverable amount may not exceed the highest limit of coverage provided for any one automobile under the policy. If more than one policy applies, a policy covering an automobile occupied by the injured person at the time of the accident has priority over a policy covering a vehicle not involved in the accident under which the injured individual is a named insured, which in turn has priority over a policy covering a vehicle not involved in the accident under which the injured person is an unnamed insured.

Comparative Fault

N.D.C.C. § 32-03.2-02

In the late 1980s, North Dakota adopted a modified comparative fault approach, rejecting the rule of joint and several liability in favor of imposing several liability upon defendants.

Under the comparative fault model, a jury determines the percentage of fault attributable to a single defendant in producing an injury to a plaintiff, and the defendant is held liable only for that assessed percentage of the overall damages.

Because of this rule, there is no third-party practice in the State of North Dakota. That is, a defendant cannot bring other defendants into a case in attempt to avoid liability. To mitigate liability, however, a defendant may request that the finder of fact determine the amount of damages attributable to others besides the defendant, including non-parties, by including those individuals on a jury form.

> *Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury.* N.D.C.C. § 32-03.2-02.

Joint and Several Liability and Contribution - Acting in Concert

Although North Dakota has adopted the rule of several liability, defendants remain jointly and severally liable for all resulting damages in cases where multiple defendants acted in concert, aided or encouraged a tortious act, or ratified or adopted a tortious act.

When two or more parties become jointly or severally liable for the same injury in tort, a tortfeasor who pays more than his pro rata share of such common liability has a right to contribution in the amount paid in excess of his pro rata share, provided he did not act willfully or wantonly in causing the injury. Likewise, a liability insurer that fulfilled its obligation as insurer also has a right of contribution if it paid more than the insured tortfeasor's share of common liability.

Contributory Fault

A plaintiff's contributory fault reduces the amount of the recoverable damages in proportion to the amount of the plaintiff's fault. Contributory fault bars a plaintiff from recovering damages where a plaintiff's fault is as great as the combined fault of all others who contributed to the injury (i.e. 50% or more).

The partners at Brownson PLLC are litigators and seasoned defense attorneys practicing in Minnesota, North Dakota, Wisconsin, and throughout the country.

Brownson PLLC attorneys represent corporations, insurance companies, public entities and individuals in civil litigation matters in the state, federal and appellate courts, and before administrative agencies.

Our attorneys practice in insurance, asbestos and toxic exposure, professional liability, workers' compensation, and regulatory law defense.

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