



Insurance, Claims and Liability Law

**NORTH
DAKOTA
EDITION**

*Brownson & Linnihan,
PLLP's Annual Summary
of North Dakota Law is
Designed with Insurance and
Corporate Risk Managers
and Claims Handlers in
Mind— Updated for 2016*

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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.

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

<p>6 YEARS (N.D.C.C. § 28-01-16)</p>
Action upon a Liability Created by Statute
Fraud
Action for Trespass on Real Property
Other Injury to the Person, including Products Liability and Negligence

<p>N.D.C.C. § 26.1-26-51</p>
<p><i>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, <u>or</u> six years after performance of the service for which the claim arose</i></p>

Insurance Law

Within ten business days, an insurer must acknowledge, act on and respond to a claim-related communication from an insured.

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
- ✓ Is competent, trustworthy, financially responsible, and has a good personal and business reputation

Nonresident Insurance Producers

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

After a proof of loss statement is completed, an insurer must:

- *Affirm or deny coverage within a reasonable time*
- *Notify the insured/claimant of acceptance or denial of the claim in writing within 60 business days and retain a copy of the notice in the claim file*
- *If a claim is denied or a compromise settlement is proposed, provide the insured with a prompt, reasonable explanation*

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.

North Dakota requires the owner of an [automobile](#) to carry liability, uninsured and underinsured, and no fault insurance.

No Fault

Regardless of fault, under the no fault model, an insured's own insurer pays the insured's damages in the event of an accident. No-fault is designed to compensate persons involved in a car accident while limiting tort recovery and fault-based litigation.

No-fault benefits cover: (1) accidental bodily injury to the owner of an insured vehicle and all relatives of the owner occupying the vehicle or hit by a vehicle or motorcycle as a pedestrians; (2) benefits for economic losses resulting from accidental bodily injury sustained by another individual while occupying the insured vehicle; and (3) accidental bodily injury to any pedestrian after being struck by the insured automobile.

To seek noneconomic damages from another insured individual above and beyond no-fault benefits, an injured party must demonstrate: (a) he is insured, and (b) his injury is a serious one.

A serious injury is defined as an accidental bodily injury resulting in:

- *Death, dismemberment, or serious and permanent disfigurement;*
- *Disability beyond 60 days; or*
- *Medical expenses over \$2,500.00*

Dram Shop

Under North Dakota's dram shop statute, every person or spouse, child, parent, guardian, or employer of a person injured by an obviously intoxicated person has a claim against the individual who knowingly disposed, sold, bartered, or gave away alcoholic beverages to a person under twenty-one years old, an incompetent, or an obviously intoxicated person. If death ensues, the survivors of the victim are entitled to damages proportionate to their injuries resulting from the death. The statute does not replace or otherwise alter the common law duty of bar and night club owners to protect patrons from assault where reasonable cause exists as to conduct likely to endanger the safety of patrons.

The dram shop [statute](#) does not cover claims on behalf of the intoxicated person, her estate, or her personal representatives, or claims by adult passengers in a vehicle driven by the intoxicated person, or by estates or personal representatives of those passengers.

North Dakota courts hold that passengers in an automobile driven by an intoxicated person do not owe a duty to those in oncoming traffic if they do not furnish the intoxicated person with alcohol or interfere in the driving of the vehicle.

Uninsured and Underinsured Motorist Coverage

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.

Uninsured and Underinsured Coverage - continued

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.

Insurers must provide underinsured insurance coverage at limits equal to those of uninsured coverage. Underinsured coverage must also pay the amount of damages an insured is entitled to collect for bodily injury, disease, sickness, or death from the owner and/or operator of an underinsured automobile arising out of the ownership, maintenance, or use of that vehicle.

The maximum liability of the underinsured coverage is the lesser of either the limits of the underinsured coverage, or compensatory damages not covered and established by agreement, settlement, or judgment with the person or entity liable for the injury or death.

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.

Product Liability Claims

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.

Defective Condition

In a defective condition action, 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

A failure to warn action 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 negligence theory, the focus is on whether or not a manufacturer's conduct with regard to providing or not providing warnings satisfies the reasonable care standard.

Under a strict liability theory, the failure to warn analysis focuses on whether warnings provided were adequate to avoid exposing ordinary users to unreasonable danger.

Professional Liability Actions

Medical Malpractice

A plaintiff must commence a medical malpractice action within two years after a claim accrues. 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.

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.

Legal Malpractice claims must be brought within two years, but the limitations period does not begin to run until the client has incurred damage from the alleged malpractice, and is tolled until the client either knows or should know of damage incurred, the cause of the damage, and her attorney's possible negligence.

To state a legal malpractice claim against an attorney, a plaintiff-client must show:

- *The existence of an attorney-client relationship;*
- *That the attorney owed a duty to the client;*
- *That the attorney breached that duty; and*
- *That the attorney's breach of duty proximately caused the client's damages.*

Besides doctors and lawyers, North Dakota plaintiffs may also bring malpractice claims against other professionals pursuant to statutory law.

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.

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." For instance, courts consider whether a position requires advanced education, training, or intellectual skills.

Professional malpractice claims are subject to a two year statute of limitations.

Employment Law

Discrimination

North Dakota's Human Rights Act prohibits an employer from engaging in discriminatory practices on account of an employee's:

- *Race*
- *Color*
- *Religion*
- *Sex*
- *National origin*
- *Age*
- *Physical disability*
- *Mental disability*
- *Status with respect to marriage or public assistance*
- *Participation in lawful activities outside of the workplace during non-working hours*

Under the [Act](#), an employer's failure to make reasonable accommodations for an otherwise qualified individual with a physical or mental disability, or on the basis of religion, qualifies as a discriminatory practice.

Termination

Pursuant to North Dakota law, employment is presumed to be at-will. In an at-will employment relationship, an employer may terminate an employee with or without cause. The North Dakota Supreme Court has, however, recognized a public policy exception to the employer's right to terminate an employee in an at-will employment situation. The exception applies when a constitutional or statutory provision, which prohibits termination of the at-will employee at issue, supports the public policy alleged.

Parties can also modify the at-will employment presumption by contract.

To receive damages on a claim for breach of employment contract, the nature and origin of the damages must be clearly ascertainable.

Whistleblower Claims

The North Dakota employer retaliation statute provides that employers may not discharge, discipline, threaten to discipline, or otherwise penalize an employee because he reports a violation or suspected violation of law, in good faith, to his employer, a governmental agency, or a law enforcement official. Employers also may not penalize an employee if he is requested by a public body or official to participate in an investigation, or if he refuses to perform an action he believes to be unlawful at the request of the employer.

An employee asserting a violation of the retaliation statute may file a civil lawsuit seeking injunctive relief, actual damages, or both, within 180 days after the alleged violation, after completion of proceedings initiated by the department of labor, or after completion of any grievance procedure available to the employee, whichever is later. If recourse is available to an employee through a collective bargaining agreement, contract, or certain public employee rights, the employee must exhaust that option for relief prior to commencing any civil action.

Relief

If the court finds that an [employer](#) violated the retaliation statute, the employer may be ordered to: (1) reinstate the employee, (2) make back payment for up to two years after the violation (though this may be reduced by interim earnings or amounts earnable by the employee from the same employer), and/or (3) reinstate the employee's benefits.

Under some circumstances, the employer may also be subject to an order granting permanent or temporary injunctive relief against it, and/or awarding the employee his attorneys' fees.

To establish a Retaliation Claim, an employee must show:

- He engaged in activity protected by the statute;
- The employer took adverse action against him; and
- A causal connection between his activity and the employer's adverse action.

The causal connection element requires more than speculation or conjecture, but circumstantial evidence is sufficient to establish an inference of causation. If an employee establishes a prima facie claim by a preponderance of the evidence, the burden of proof shifts to the employer to rebut the presumption of unlawful discrimination by demonstrating, by a preponderance of the evidence, that it had a legitimate, nondiscriminatory reason for actions taken with regard to the employee.

Asbestos Personal Injury and Wrongful Death Cases

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 three counties:

Cass County
(Fargo)

Grand Forks County
(Grand Forks)

Morton County
(Mandan)

A wrongful death claim is available to a decedent’s surviving husband or wife, if any, children, if any, surviving parent(s), surviving grandparent, personal representative, or another person who had had primary physical custody of the decedent – in that order. Such a claim is usually based on a wrongful or negligent act, which would have entitled the decedent to maintain an action for damages had death not resulted.

Wrongful death actions are subject to a **two year** limitations period. A wrongful death cause of action begins to accrue upon the death of the decedent, unless such death results from malpractice. In that case, the two year period begins to toll on the date the malpractice is discovered.

Damages awarded in these actions must be in proportion to the injury resulting from the deceased’s death.

Under the *Lohrmann* test, adopted by courts in most jurisdictions, a plaintiff must establish the following to prevail on a defendant asbestos containing product 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
- ✓ 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.

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.

Civil Wrongful Death Actions

In a wrongful death action, a plaintiff may recover economic damages, including those arising from:

- *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*
- *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.

Overview of Fault

Comparative fault

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.

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).

Government Immunities

Discretionary function immunity,

in North Dakota, protects political subdivisions from liability for acts and omissions of employees while performing a discretionary function or duty. To determine whether this immunity applies, a court must assess whether the employee conduct at issue was discretionary – that is, whether the act required decision-making or choice, and if the challenged conduct was the kind of discretionary function the immunity defense was designed to protect.

Statutory Cap on Liability

Pursuant to North Dakota statute, the liability of a political subdivision is limited to \$250,000 per person and \$500,000 for injury to three or more persons.

A political subdivision may not be held liable for exemplary damages.

Qualified Immunity

Qualified immunity aims to safeguard the ability of government officials to exercise discretion and authority while performing public duties.

To successfully assert the qualified immunity defense in a civil action, a public official must demonstrate that her actions did not violate a clearly established statutory or constitutional right of which a reasonable person would have been aware.

If a reasonable official could have believed the conduct at issue in a qualified immunity case was lawful, then qualified immunity will apply, warranting dismissal of a claim.

On the other hand, if the law at issue was clearly established at the time of the alleged conduct such that a reasonable [official](#) would or should have known of its status, the defense may not succeed.

Whether qualified immunity applies is generally a question of law to be resolved by the court. Still, on occasion, a fact finder may be required to determine the reasonableness of an official's conduct.

Recoverable 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. In personal injury and wrongful death actions, plaintiffs may recover both economic and noneconomic damages.

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.

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.

A plaintiff whose contributory fault was as great as the combined fault of others who contributed to her injury is barred from recovering damages.

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. 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. 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. A defendant may respond to the plaintiff's motion by filing an affidavit or submitting his own deposition testimony in opposition.

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. And, exemplary damages are only available if a plaintiff is entitled to compensatory damages.

If awarded, exemplary damages may not exceed two times the amount of compensatory damages awarded, or \$250,000, whichever is greater. In a jury trial, the jury may not be informed of this limit on exemplary damages prior to deliberations. But, if a jury award exceeds the exemplary damages limit, it is subject to reduction by the court.

Collateral Source Offset and Prejudgment Interest

Pursuant to North Dakota statute, 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* 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.

Life insurance, death and retirement benefits, and insurance or benefits purchased by a recovering party are excepted from the definition of a *collateral source*.

At trial, evidence of collateral source payments or to show a plaintiff's potential access to government benefits is barred by North Dakota courts.

Prejudgment Interest

North Dakota law provides that prejudgment interest may be awarded in an action not arising from contract, and in every case involving oppression, fraud or malice *at the discretion of the court or jury.*

Business Torts

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.

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.

Injunctive Relief in Business Tort Actions

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. A court may also, in some instances, compel affirmative acts by a party to protect a trade secret.

Federal Preemption

Certain kinds of claims are subject to federal preemption under the Supremacy Clause of the United States [Constitution](#). Federal preemption allows for invalidation of state laws in conflict with federal law, resulting in the application of federal law to certain state claims.

Federal law may also expressly preempt state law where a court concludes that a piece of federal legislation is so comprehensive in its scope that it occupies an entire field.

Examples of federal laws preempting state law, at least in part, include:

The Employee Retirement Income Security Act of 1974 ([ERISA](#)) (preempts state laws on employee benefit plans, but not state laws regulating securities, banking or insurance)

Home Owners' Loan Act (HOLA)

The Interstate Commerce Commission (ICC) Termination [Act](#) (preempts state laws regulating price, routes, services of motor carriers, but does not invalidate any state's safety regulatory authority)

Federal Employers' Liability Act (FELA)

The National Labor Relations Act (NLRA) (preempts all laws regulating activities such as unfair labor practices, picketing and strike activities, and [claims](#) arguably subject to the Act)

The National Bank Act (NBA) (preempts burdensome and duplicative state regulations hindering the authority of national banks to engage in the business of [banking](#))

Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)

Federal Railroad Safety Act (FRSA)

Comprehensive Environmental Response, Compensation and Liability Act ([CERCLA](#))

Medicare in Personal Injury Actions

Reporting Requirements

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. While fines of up to \$1,000 per day for failure to provide such notice are threatened, it is unclear whether Medicare will actually enforce its new, stringent rules.

Settlements of \$300 or more must be [reported](#) to Medicare, but some experts are urging that any and all settlements involving a Medicare-eligible claimant be reported.

Upon a payment, settlement, award, or judgment, notice should be provided to the Medicare Benefits Coordination & Recovery Center (BCRC), which contains:

- ✓ The total amount of the settlement
- ✓ The total amount of PIP or Med-Pay benefits
- ✓ The amount of attorneys' fees paid by the Beneficiary
- ✓ The procurement expenses paid by the Beneficiary
- ✓ The date the case settled

Preserving Medicare's Future Interests

Attorneys and claims adjusters involved in personal injury actions with Medicare-eligible claimants must address Medicare's financial interests. Upon settling or securing a judgment in these cases, participants must reimburse Medicare for past payments made on behalf of the claimant. Medicare's future interests, however, must also be considered.

Parties may arrange for what is called a Medicare set-aside, to include an additional pool of money in the settlement award, representing the amount of the anticipated 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.

Settlement Agreements

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*. 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.

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. 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 other, nonsettling defendant tortfeasors.

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.

General Practice Points

In North Dakota, a defendant must serve an answer to a complaint within 21 days after a case is commenced by service of a summons and complaint. *See*, N.D.R.Civ.P. 12.

Also, under Rule 12, defenses to any claim for relief set forth in a pleading must be alleged in a responsive pleading, if required. *Id.*

Parties may assert certain defenses by motion, including the following:

- Lack of subject-matter jurisdiction;
- Lack of personal jurisdiction;
- Improper venue;
- Insufficient process;
- Insufficient service of process;
- Failure to state a claim upon which relief can be granted; and
- Failure to join a party under Rule 19.

Rule 12 also provides that if no responsive pleading is required, a party may assert any defense to a claim for relief at trial. *Id.* Likewise: “No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.” *Id.*

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.

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.

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. *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 Rule 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.

-Additional Resources-



[Minnesota Laws](#)

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[North Dakota Courts](#)

[North Dakota Department of Health](#)

[North Dakota Constitution](#)

[North Dakota Workforce Safety & Insurance](#)

[State of North Dakota](#)

[North Dakota Rules of Civil Procedure \(N.D.R.Civ.P.\)](#)

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The partners at Brownson & Linnihan, Robert D. Brownson, Thomas J. Linnihan, Kristi K. Brownson, Patrick M. Biren and Thomas J. Norby are litigators and seasoned defense attorneys practicing in Minnesota, North Dakota, Wisconsin, and throughout the country.

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