



# STATE OF NORTH DAKOTA CONSTRUCTION LAW COMPENDIUM

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This outline is intended to provide a general overview of North Dakota construction law. The discussion on any particular topic is not necessarily an indication of the total law related to an area of North Dakota's construction law. Most construction disputes are governed by contract law. With a few variations, the law applicable to construction disputes in North Dakota is similar to that found in other states.

North Dakota is a modified comparative fault state. N.D.C.C. §32-03.2-02. A Plaintiff may only recover if the fault of all other persons contributing to the injury exceeds the Plaintiff's own fault. Claims will be barred if the Plaintiff is 50% at fault or more. Any damages must be diminished in proportion to the amount of the contributing fault of the claimant. When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party. However, if persons act in concert in committing a tortious act or aid, encourage, ratify, or adopt the act for their benefit, those parties will be jointly liable for all damages attributable to their combined percentage of fault.

## **I. Breach of Contract**

The construction of a home is usually evidenced by a written contract between the owner and the builder. Construction contracts typically contain numerous terms and provisions and form the basis of the agreement between the owner and the builder. Failure to fulfill the obligations contained in the construction contract could give rise to a claim for breach. In North Dakota, breach of contract claims have a six year statute of limitations, which begins to run when the claim accrues. N.D.C.C. §28-01-16(1). North Dakota has adopted a "discovery rule" meaning the claim accrues when "the aggrieved party discovers the facts which constitute the basis for its cause of action or claim for relief," or should have discovered them with reasonably diligent effort. Hebron Public School Dist. No. 13 of Morton County v. U.S. Gypsum Co., 475 N.W.2d 120, 126 (N.D. 1991).

## **II. Negligence**

Construction disputes frequently include claims for negligence. To succeed on a negligence claim, the plaintiff has the burden of demonstrating (1) a duty, (2) breach of that duty, (3) causation, and (4) damages. See Azure v. Belcourt Pub. Sch. Dist., 2004 ND 128, ¶ 9, 681 N.W.2d 816; Koehler v. County of Grand Forks, 2003 ND 44, ¶ 28, 658 N.W.2d 741

## **III. Breach of Warranty**

Construction law claims frequently include causes of action for breach of warranty. The warranties involved can be either express warranties included in the written agreement of the parties, or can also involve implied warranties. Express warranties are contract provisions that make specific promises regarding the project.

In relation to construction projects, North Dakota has recognized the existence of the implied warranties of fitness for particular purpose and the implied duty to provide services in a workmanlike manner. Dobler v. Malloy, 214 N.W.2d 510, 516 (N.D. 1973); Carlson Homes, Inc. v. Messmer, 307 N.W.2d 564 (N.D. 1981). In order to succeed in a claim for breach of implied warranty of fitness for particular purpose, a property owner must show that the contractor held himself out as competent to undertake the contract. The property owner must also show that he has no particular expertise in the kind of work contemplated, furnish no plans, designs, specification, details, or blueprints to the contractor, and the property owner must tacitly or specifically indicate his reliance on the experience and skill of the contractor, after making known to the contractor the specific purposes for which the building is intended. Id. Simply put, facts sufficient to recover under a theory of implied warranty tend to overlap with those constituting negligence. Carlson, 307 N.W.2d 564; Barnes v. Mitzel Builders Inc., 526 N.W.2d 244 (N.D. 1995).

#### **IV. Misrepresentation and Fraud**

Sometimes contractors are sued by owners under theories of fraud or misrepresentation. In North Dakota, fraud is statutorily defined, and is comprised of actual fraud and constructive fraud. N.D.C.C. §9-03-07.

Actual fraud consists of the following acts committed by a party to the contract, with intent to deceive another party or to induce the other party to enter into the contract: 1) suggesting a fact which is not true, by one who does not believe it to be true; 2) asserting without supporting information that which is not true, regardless whether that person believes it to be true 3) suppression of that which is true by one having knowledge or belief of the fact, 4) a promise made without any intention of performing it, or 5) any other act with intent to deceive. N.D.C.C. §9-03-08.

Constructive Fraud is any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under that person, by misleading another to the other's prejudice or to the prejudice of anyone claiming under the other; or in any such act or omission as the law specially declares to be fraudulent without respect to actual fraud. N.D.C.C. §9-03-09.

A cause of action for negligent misrepresentation has been recognized as existing within the definition of constructive fraud. Bourgeois v. Montana-Dakota Utilities Co., 466 N.W.2d 813, 818 (N.D. 1991). Under this theory, negligent misrepresentation exists when one makes a false statement without a sufficient factual basis for that statement that induces another to enter into a contract. Id.

#### **V. Strict Liability**

North Dakota has not specifically adopted strict liability as a cause of action for damages relating to construction projects. In normal circumstances, a contract to provide goods which turn out to

be defective will render the provider of said goods strictly liable under the theory of products liability. N.D.C.C. §28-01.3-04.

With regard to whether defective improvements to real property will be considered “products” and subject to strict product liability, North Dakota has adopted the Bonebrake test. Air Heaters, Inc. v. Johnson Elec., Inc., 258 N.W.2d 649 (N.D. 1977). This test defines how a contract involving a commingling of goods and services is classified when determining whether strict liability will apply. The contract will be considered to be of the same type as its predominant factor, thrust, or purpose. Id., citing Bonebrake v. Cox, 499 F.2d 951 at 960 (8th Cir. Iowa, 1974).

## **VI. Indemnity**

Indemnity is an equitable remedy which permits a party to recover reimbursement from another for the discharge of a liability that, as between the two parties, should have been discharged by the other. Grinnell Mut. Reins. Co. v. Center Mut. Ins. Co., 2003 ND 50, ¶ 40, 658 N.W.2d 363. A right of indemnity may arise by express agreement or by implication. Id.

Implied indemnity may be established if the evidence establishes an implied contract, or if one party is exposed to liability by the action of another party who, in law or in equity, should make good the loss of the other. Johnson v. Haugland, 303 N.W.2d 533, 543 (N.D.1981). Indemnity is an equitable doctrine not amenable to hard and fast rules, and rather than using strict standards, courts must examine carefully both parties' conduct in light of general notions of justice. Nelson v. Johnson, 1999 ND 171, ¶ 20, 599 N.W.2d 246.

## **VII. Statute of Repose/Statute of Limitation**

In North Dakota, suit for any deficiency in the design, planning, supervision or observation of construction of an improvement to real property must be brought within 10 years of substantial completion of the improvement. N.D.C.C. §28-01-44. If an injury occurs during the 10th year after substantial completion, an action may be brought within two years of the injury, but in no circumstances may an action be brought more than twelve years after substantial completion. Id.

## **VIII. Economic Loss Doctrine**

The economic loss rule states that economic loss resulting from damage to a defective product may be recovered in a suit for breach of contract or breach of warranty, but not under tort principles. Clarys v. Ford Motor Co., 1999 ND 72, 592 N.W.2d 573. The North Dakota Supreme Court has not been presented an opportunity to address the economic loss rule in a construction setting.

There is a distinction to be noted in the assessment of economic loss claims under contract law and tort law. The Eighth Circuit Court of Appeals, applying North Dakota law, has held that when a purchasing party could reasonably foresee the harm from the defective product, (in this

particular instance the materials used to build a roof), the law of contracts would provide the remedy and not tort law. However, this assertion would apply only in the case of purely economic loss. Dakota Gasification Co. v. Pascoe Bldg. Systems, a Div. of Amcord, Inc., 91 F.3d 1094, (8th Cir. 1996), Arena Holdings Charitable, LLC v. Harman Professional, Inc., 785 F.3d 292 (8th Cir. 2015).

Consistent with that ruling, the North Dakota Supreme Court has held that a seller in a commercial transaction may not be held liable in negligence or strict liability for economic loss caused by a product when the damage is to the product only. Cooperative Power Ass'n v. Westinghouse Elec. Corp., 493 N.W.2d 661 (N.D. 1992).

### **IX. Recovery from Investigative Costs**

There are no reported cases in North Dakota specifically addressing whether investigative costs are recoverable in a construction defect case.

### **X. Emotional Distress Claims**

There are currently no reported North Dakota cases addressing the issue of whether a homeowner will be able to recover for emotional distress relating to construction defects. North Dakota has recognized causes of action for both intentional infliction of emotional distress and negligent infliction of emotional distress in other settings.

The elements of a claim for intentional infliction of emotional distress are extreme and outrageous conduct that is intentional or reckless and causes severe emotional distress. Zuger v. State, 2004 N.D. 16, ¶13, 673 N.W.2d 615.

Negligent infliction of emotional distress differs from the intentional tort in that it involves the breach of a duty of care, rather than an intentional action. Muchow v. Lindblad, 435 N.W.2d 918 (N.D. 1989). In addition, negligent infliction of emotional distress requires some physical manifestation of harm or other compensable injury. Id. In a claim involving only mental or emotional shock caused exclusively by a plaintiff's apprehension of a negligently caused injury to another person, the plaintiff cannot recover damages for a claim of emotional distress unless the negligent act threatened the plaintiff with physical harm or placed the plaintiff within the zone of danger. Id. at 921.

### **XI. Stigma Damages**

There is no reported opinion from a state court in North Dakota addressing the issue of stigma damages. However, the US District Court for the District of North Dakota has issued an opinion asserting the required elements to establish a successful claim for stigma damages. To establish a claim for stigma damages, the plaintiff must show that there was defamation and a tangible alteration of a legal right or status, such as loss of future endeavors as a result of the stigma. Vukelic v. Bartz, 245 F.Supp.2d 1068 (D.N.D. 2003).

## **XII. Economic Waste**

Generally, the measure of damages for a breach of contract by a general contractor is the cost of repairing the defective work. However, if the cost of repairing the work would be excessive and the injured party is unable to prove the actual loss in value damages will be based on the difference between the fair market value of the property without the defects, and the market price of the property with the defects. Karlinski v. P.R. & H. Lumber & Construction Co., 68 N.D. 522, 281 N.W. 898 (1938); Dittmer v. Nokleberg, 219 N.W.2d 201, 206 (N.D. 1974); and Storebo v. Foss, 325 N.W.2d 223, (N.D. 1982).

## **XIII. Delay Damages and Liquidated Damages**

Damages for delay are generally recoverable in North Dakota. N.D.C.C. §32-03-09.

Liquidated damage provisions are generally void unless the damages to be paid upon breach were difficult to estimate at the time the contract was entered, there was a reasonable endeavor by the parties to fix compensation, and the amount stipulated bears a reasonable relationship to the damages reasonably anticipated upon breach. N.D.C.C. §9-08-04; City of Fargo v. Case Development Co., 401 N.W.2d 529, 531 (N.D. 1987).

The North Dakota Supreme Court has recognized the different treatment of contract claims and tort claims under liquidated damages. The rule for tort cases is that damages should be awarded in an amount which will compensate for all the harm proximately caused by a breach of obligation, regardless of whether it could have been anticipated, excepting therefrom any portion expressly provided for under the law. Bumann v. Maurer, 203 N.W.2d 434 (N.D. 1972). In contract cases, there is a much more narrow scope of liability. A contracting party is only liable for foreseeable injuries resulting from his breach. Id.

## **XIV. Recoverable Damages**

### **A. Direct Damages**

In North Dakota, damages for injuries to real property are generally measured by the difference between the market value before and after the injury, together with any special damages proximately and naturally resulting from the wrong. See Section on **Economic Waste** above.

### **B. Loss of Use**

There are currently no North Dakota cases directly on point as to whether loss of use damages are recoverable in construction cases. However, under the Uniform Commercial Code, as set out in N.D.C.C. §41-02-94, a party can recover damages that are both incidental and consequential to a breach of contract.

### C. Punitive Damages

In North Dakota, punitive or “exemplary” damages may only be awarded for the breach of an obligation not arising from contract, such as tort claims. N.D.C.C. §32-03.2-11. Even then, exemplary damages will only be awarded when the defendant is guilty by clear and convincing evidence of oppression, fraud, or actual malice. Id. When exemplary damages are awarded, the amount is capped at double the amount of compensatory damages awarded, or \$250,000, whichever is greater. Id.

### D. Emotional Distress

In general, North Dakota allows claims for emotional distress stemming from tort actions, but not from breach of contract claims. Muchow v. Lindblad, 435 N.W.2d 918, 922 (N.D. 1989).

### E. Attorney’s Fees, Expert Fees and Costs

North Dakota follows the “American rule” and courts generally do not award attorney fees to the prevailing party. Deacon's Development, LLP v. Lamb, 2006 ND 172, ¶ 11, 719 N.W.2d 379. However, courts are allowed to award fees incurred in responding to a claim for relief that is frivolous to the extent that there is such a complete absence of fact or law that a reasonable person would not think a court would render a favorable judgment, so long as the defending party raises the issue of frivolity in its responsive pleading. N.D.C.C. §28-26-01.

## **XV. Insurance Coverage for Construction Claims.**

An insurer’s duty to defend is much broader than its duty to indemnify. Farmers Union Mut. Ins. Co. v. Decker, 2005 ND 173, 704 N.W.2d 857. An insurer has a duty to defend its insured if there is potential liability or a possibility of coverage for one of the claims. Schultze v. Continental Ins. Co., 2000 ND 209, ¶14, 619 N.W.2d 510 (N.D. 2000).

Typical Commercial General Liability (“CGL”) policies will not insure the insured's work itself, but instead insure consequential damages that stem from that work. Grinnell Mut. Reinsurance Co. v. Lynne, 2004 ND 166, ¶18, 686 N.W.2d 118. These policies usually operate to exclude coverage for faulty workmanship. ACUITY v. Burd & Smith Construction, Inc., 2006 ND 187, ¶16, 721 N.W.2d 33. However, property damage stemming from faulty workmanship is covered to the extent that the bodily injury or property damage is to other than the insured’s work product. Id.

## **XVI. Construction Liens**

A construction lien is a claim against real property for work done or materials supplied for the improvement of real property. North Dakota’s Construction Lien statutes can be found in the North Dakota Century Code Art. §35-27 et seq. A construction lien attaches at the time the first service or material is provided toward improving the property. N.D.C.C. §35-27-03. A lien claimant must provide notice of intent to file a claim against the property, by certified mail, at

least 10 days before a construction lien may be recorded against the property. N.D.C.C. § 35-27-02. This notice should state the name of the persons in possession of the property, a description of the property, the date of the contract, and that a construction lien against the property will be perfected according to law unless the account is settled.

In order to perfect the claim, within 90 days after the person's contribution is done, a construction lien describing the property, stating the amount due, the first and last dates that services or materials were provided, and the person with which the claimant contracted must be recorded with the County Recorder for the county in which the property is located. N.D.C.C. §§ 35-27-13, 35-27-14. This lien should also include proof of service of the notice discussed in the previous paragraph. Failure to record a lien within 90 days of the last date of contribution will make the lien subordinate to purchasers or encumbrancers in good faith and for value whose rights accrue before the lien is filed, and as against the owner to the extent of the amount paid to a contractor before the recording of the lien. N.D.C.C. §35-27-14. A lien may not be filed more than three years after the date of the first item of material or service is provided. Id.

If the account remains unpaid after the recordation of the lien, the lien claimant may enforce the lien in an action before the district court for the county in which the property is situated. N.D.C.C. §35-27-24. Written notice of the lienholder's intent to commence the suit must be served upon the record owner at least 10 days before commencement of the suit. Id. Upon written demand by or on behalf of the owner which has been delivered to the lienor and filed with the county recorder, suit must be commenced and filed and a *lis pendens* (as provided in N.D.C.C. ch. 28-05) must be filed with the County Recorder within 30 days after the date of delivery of the demand or the lien is forfeited. N.D.C.C. §35-27-25. If the lienholder fails to commence a lawsuit within three years of recording the lien, the lien will be deemed satisfied. Id.

A land owner who successfully contests the validity or accuracy of a construction lien in any action in district court must be awarded the full amount of all costs and their reasonable attorney's fees. N.D.C.C. §35-27-24.1. The amount of attorney's fees and costs awarded to a party who successfully contests the accuracy or validity of a construction lien is limited to recovering only those costs and fees reasonably expended in contesting the lien, specifically excluding costs and attorney's fees for issues unrelated to the contest of the construction lien (i.e. in the case of a multiple claim suit). Northern Excavating Co., Inc. vs. Sisters of Mary of the Presentation of Long Term Care, 2012 ND 78, ¶11, 815 N.W.2d 280, 285. This statute was created as part of an effort to prevent situation where construction liens were threatened in order to coerce an owner into settling, rather than litigating, a dispute. Id. at ¶16, 815 N.W.2d at 283.

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific**

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