

## STATUTES OF LIMITATION AND VENUE REQUIREMENTS IN CIVIL ACTIONS STUDY - BACKGROUND MEMORANDUM

Section 1 of 2011 House Bill No. 1365 (attached as [Appendix A](#)) directs the Legislative Management to study statutes of limitation and venue requirements for civil actions in North Dakota. This section requires that the study must include a review of the limitation on the length of time that has passed since a cause of action arose and whether the time limitations in current law remain appropriate or should be changed and the extent to which claims are filed in North Dakota courts for claims otherwise prohibited in other states due to the relevant statute of limitation having expired. The section also requires that the study include a review of the venue requirements for bringing a civil action in North Dakota and whether the venue requirements should be amended to limit claims being brought in this state by nonresidents who have no connection to this state. House Bill No. 1365, as introduced, (attached as [Appendix B](#)) would have changed the statute of limitations for an action for an injury or rights of another not arising upon contract from a six-year statute of limitations to a three-year statute of limitations. The bill was amended in the House to provide for a Legislative Management study.

### STATUTES OF LIMITATION

Statute of limitations is the term commonly applied to a statute that prescribes the periods beyond which a plaintiff may not bring a civil action. Statutes of limitations are intended to give potential plaintiffs a reasonable time to present their claims and to protect potential defendants and the courts from having to deal with cases that are impaired by the loss of evidence such as by the death or disappearance of witnesses, the disappearance of documents, or fading memories. The primary purposes of statutes of limitations are to compel a plaintiff to exercise the right to bring an action within a reasonable time so the opposing party has a fair opportunity to defend; to prevent undue delays in bringing a suit on a claim; to protect defendants from the burden of litigating stale claims; to encourage promptness and diligence in bringing actions; and to promote judicial efficiency.

Courts have held that state legislatures have broad latitude to set limitation periods under the due process clause of the United States Constitution, and state legislatures constitutionally may limit the duration of the right to bring an action on a claim. Statutes of limitations are presumptively constitutional. The Michigan Supreme Court has held that statutes of limitations should be upheld unless the consequences are so harsh and unreasonable that they have the effect of denying a plaintiff access to the courts. 51 Am. Jur. 2d § 35

Although statutes of limitation for civil and criminal actions are contained throughout the North Dakota

Century Code, statutes of limitation with respect to most tort and contract actions are primarily found in Chapter 28-01. The statutes of limitation in this chapter include:

- **Actions having 20-year limitations** - Action against abstractor for an error or omission in an abstract (§ 28-01-45).
- **Actions having 10-year limitations** - Judgments of any court of the United States; contracts affecting title to real property; any action for the foreclosure of a mortgage upon real estate (§ 28-01-15); Actions for relief not otherwise provided for by law (§ 28-01-22).
- **Actions having 6-year limitations** - Contracts not affecting real property or subject to the Uniform Commercial Code; collection of debt on account; collection of rents; trespass; injury to personal property; injury to the person or rights of another not arising upon contract, when not otherwise expressly provided; fraud (§ 28-01-16).
- **Actions having 3-year limitations** - Actions against a sheriff or coroner based upon an act or omission of an official duty; action upon a statute for a penalty or forfeiture; foreclosure of a construction lien (§ 28-01-17); Actions against the state or its employees acting within the scope of their employment (§ 28-01-22.1); Action against a real estate broker for a breach of duty relating to a real estate transaction (§ 28-01-48).
- **Actions having 2-year limitations** - Libel, slander, assault, battery, false imprisonment; action upon a statute for a forfeiture or penalty to the state; professional malpractice (up to six years for medical malpractice); wrongful death; recovery of damages arising under Chapter 5-01 (§ 28-01-18); Actions founded on right of homestead (§ 28-01-21).
- **Actions having 1-year limitations** - Actions against a sheriff or other officer for the escape of a prisoner (§ 28-01-10).

Section 28-01-25 provides for an extension on the limitations of actions for those individuals who, at the time the claim for relief accrues, are under the age of 18 years, who are mentally ill, or who are imprisoned for a term less than for life. This section provides that the time of the disability is not a part of the time limited for the commencement of the action.

### UNIFORM CONFLICT OF LAWS - LIMITATIONS ACT

In 1985 the Legislative Assembly adopted the Uniform Conflict of Laws - Limitations Act. This uniform Act, which has been codified as

Chapter 28-01.2, provides that limitations laws are to be treated as substantive rather than procedural and that courts are to apply the statute of limitations of the state whose law governs the substantive issues in the case. According to the drafters of the uniform Act, the purpose of treating the statute of limitations as substantive rather than procedural is to discourage "[f]orum shopping by delay-prone plaintiffs, or by their attorneys, with suits filed in states with long limitation periods." 12 U.L.A. 156.

Section 28-01.2-02 provides that except for an unfairness exception provided for in Section 28-01.2-04, if a claim is substantively based upon the law of one other state, the limitation period of that state applies. If a claim is substantively based upon the law of more than one state, the limitation period of one of those states chosen by the law of conflict of laws of this state applies. The section also provides that the limitation period of this state applies to all other claims. Section 28-01.2-03 provides that if the statute of limitations of another state applies to a claim in this state, the other state's relevant statutes governing tolling and accrual apply in computing the limitation period, but that state's governing conflict of laws do not apply. Section 28-01.2-04, which is known as the "escape clause," provides that if the court determines that the limitation period of another state is substantially different from the limitation period of this state and that limitation has not afforded a fair opportunity to sue upon or it imposes an unfair burden in defending against the claim, the limitation period of this state applies.

The North Dakota Supreme Court, in the recent case of *Vicknair v. Phelps Dodge Industries, Inc.*, 794 N.W.2d 746 (N.D. 2011), addressed issues relating to Chapter 28-01.2. This case and its predecessor, *Vicknair v. Phelps Dodge Industries, Inc.*, 767 N.W.2d 185 (N.D. 2009), are discussed later in this memorandum.

## **VENUE REQUIREMENTS IN CIVIL ACTIONS**

In order to hear and decide a case, a court must have jurisdiction over the parties involved (personal jurisdiction); jurisdiction over the subject matter involved (subject matter jurisdiction); and proper venue.

Venue, as commonly understood, is the place where the power of the court to adjudicate is to be exercised--the place where a case may be or should be heard. The primary function of a venue requirement is to provide a convenient, logical, and orderly forum for litigation.

Chapter 28-04 addresses the appropriate venue for civil actions in the state's courts. Under Section 28-04-01, an action relating to real property must be brought in the county in which the subject matter of the action is situated.

Section 28-04-02 provides that for the recovery of personal property that is being held in order to compel

payment and for recovery on an insurance policy for loss or damage to the property insured, the action must be tried in the county in which the subject of the action or some part of the subject is situated.

For the recovery of a penalty or forfeiture imposed by statute or a cause of action against a public officer, Section 28-04-03 provides that the case must be tried in the county where the cause or some part of the cause arose.

Section 28-04-03.1 provides that an action against the owner or driver of any motor vehicle arising out of negligent driving, operation, management, or control of the motor vehicle must be brought either in the county where the action arose, in the county of the residence of the defendant, or in the county of the residence of the majority of the defendants.

Section 28-04-04 provides that an action against a domestic corporation or limited liability company must be brought in the county designated in the plaintiff's complaint if the corporation or company transacts business in that county.

Section 28-04-05 addresses those actions having venue where the defendant resides. This section provides that in all other cases, except motor vehicle cases, the action must be brought in the county in which the defendant or one of the defendants resides at the time of the commencement of the action. This section provides that if none of the defendants reside in the state, the action must be brought in the county that the plaintiff designates in the summons.

Section 28-04-07 authorizes the court to change venue if the county designated in the complaint is not the proper county; if there is reason to believe that an impartial trial cannot be had in that county; if the convenience of witnesses and the ends of justice would be promoted by the change; or if taking into account the court's calendar and the number of jury cases for trial, moving the venue would allow for a prompt trial of those cases.

The North Dakota Rules of Civil Procedure provide the rules with respect to a court's jurisdiction over a person. Under Rule 4(b)(1), a court may exercise personal jurisdiction over a person found with, domiciled in, organized under the laws of, or maintaining the person's principal place of business in this state as to any claim for relief. Rule 4(b)(2) provides that a court of this state may exercise personal jurisdiction over a person based upon that person's contacts with the state. Some of those contacts include transacting any business in the state; contracting to supply goods or services in the state; committing a tort within or without the state causing injury to another person or property in the state; owning, using, or possessing property in the state; contracting to insure another person or property within the state; acting as a director, manager, trustee, or officer of a corporation organized under the laws of the state; enjoying any other legal status or capacity within the state; or engaging in any other activity, including cohabitation or sexual intercourse, within the state. Rule 4(b)(5) provides that if the court finds that

in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action.

### **HOUSE BILL NO. 1365**

As previously mentioned, House Bill No. 1365, as introduced, would have changed the statute of limitations for an action for an injury or rights of another not arising upon contract from a six-year statute of limitations to a three-year statute of limitations. The bill was amended in the House to provide for a Legislative Management study.

#### **Testimony in Support of House Bill No. 1365**

Testimony from the North Dakota Chamber of Commerce in support of the introduced bill indicated that only North Dakota, Minnesota, and Maine have a six-year statute of limitations for personal injury claims. The testimony indicated that the remaining states have either a two-year or three-year statute of limitations for personal injury cases. According to the testimony, shortening the length of time in which a claim must be brought would help ensure the evidence of an accident or injury is still available. The testimony also indicated that another reason the North Dakota Chamber of Commerce asked for the introduction of the legislation was because of the emerging trend of nonresident plaintiffs with no connection to North Dakota who opt to use the state's court system to bring claims for injuries sustained in other states. The testimony noted that when a plaintiff is time-barred from pursuing an action in another state because the statute of limitations had run, the claims are brought to North Dakota to take advantage of the longer limitations period.

Testimony from the Property Casualty Insurers Association of America in support of the introduced bill indicated that there are a number of public policy reasons for reducing the statute of limitations in personal injury actions, including preventing the diminishing value of evidence, fairness to the parties, and to give all parties involved a sense of finality. The testimony pointed out that because all injuries are not known immediately and a shorter limitations period could be harsh, the courts have adopted the discovery rule under which the statute of limitations period does not begin to run until the plaintiff discovers or reasonably should have discovered the injury. Other testimony in support of the introduced bill from the North Dakota Defense Lawyers Association indicated that a shorter statute of limitations for personal injury cases would help prevent stale claims, would bring North Dakota into the mainstream, and would help prevent forum shopping.

#### **Testimony in Opposition to House Bill No. 1365**

Testimony in opposition to House Bill No. 1365 from several private attorneys indicated that reducing the number of years within which an injury claim must

be made would have the effect of restricting the rights of individuals who have been injured in accidents but do not start a lawsuit within three years of the date of the accident. The testimony also indicated that this change likely would have the unintended consequence of increasing the number of lawsuits in the state. Other testimony in opposition to the bill indicated that the state's litigation environment is continually rated as one of the best in the nation by the business community because the state is considered nonlitigious in comparison to other states. It was noted that one of the primary reasons for this rating is that disputes are resolved outside of the litigation process through settlement negotiations. The testimony emphasized that the six-year limitation allows time for the settlement process to work. It was noted that a shorter limitations period would result in more litigation because there would not be enough time to resolve claims after the person heals.

#### **Cases of *Vicknair v. Phelps Dodge Industries, Inc.***

A number of those testifying in opposition to House Bill No. 1365 indicated that a three-year statute of limitation would help prevent plaintiffs from forum shopping. The testimony drew attention to a case decided by the North Dakota Supreme Court in which 13 plaintiffs, none of whom had a connection to the state, filed a suit in the state against the defendant--an asbestos company with a connection to the state. In that case, *Vicknair v. Phelps Dodge Industries, Inc.*, 767 N.W.2d 185 (N.D. 2009), the plaintiffs brought an action against defendants, claiming they became ill or disabled after being exposed to asbestos-containing products. The defendants were residents of or did business within North Dakota. The plaintiffs were residents of states other than North Dakota and did not claim their asbestos exposure occurred in North Dakota. The defendants moved to dismiss the action, arguing that North Dakota was an inconvenient forum to conduct the litigation. The trial court granted summary dismissal on the basis of forum non conveniens under North Dakota Rules of Civil Procedure Rule 4(b)(5). On appeal, the court held that the trial court abused its discretion in granting the motion. Because the statute of limitations had expired in all jurisdictions except North Dakota, the Supreme Court held that no alternative forum existed. According to the court, an alternative forum had to exist before a forum non conveniens motion could be granted. The court reversed the judgment and remanded the case for further proceedings.

In the subsequent case of *Vicknair v. Phelps Dodge Industries, Inc.*, 794 N.W.2d 746 (N.D. 2011), the plaintiffs contended the district court erred in concluding that the "escape clause" in Section 28-01.2-04 did not apply and that North Dakota's six-year personal injury statute of limitations did not govern their claims but rather the plaintiffs were subject to the statute of limitations in each plaintiff's state of residency. The Supreme Court concluded

that plaintiffs, as the parties urging application of the "escape clause," bore the burden of establishing that an exception applied. The court held that because plaintiffs failed to present any evidence demonstrating that they were not afforded a fair opportunity to sue upon their claims by the other states' limitation periods, they failed to raise a genuine issue of material fact on an issue upon which they bore the burden of proof, and summary judgment was appropriate. According to the court, North Dakota's six-year statute of limitations did not apply, and plaintiffs' claims were barred by the applicable statutes of limitations in the plaintiffs' state. The court further concluded that the district court did not err in refusing to allow additional time for discovery before ruling on the summary judgment motion.

### Related Issue

In any discussion relating to a review of the venue requirements for bringing a civil action in North Dakota and whether the venue requirements should be amended to limit claims being brought in this state by nonresidents who have no connection to this state, it is important to include discussion of the Privileges and Immunities Clause of Article IV, Section 2, of the United States Constitution. This section provides, in part, that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The United States Supreme Court, in *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), held:

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

On the subject of access to courts, American Jurisprudence 2d, Constitutional Law, Section 769, states:

Among the privileges and immunities of citizenship is included the right of access to courts for the purpose of bringing and maintaining actions. This privilege includes the right to employ the usual remedies for the enforcement of personal rights in actions of every kind. **While a state may decide**

**whether and to what extent its courts will entertain particular causes, any policy the state may choose to adopt must operate in the same way upon citizens of other states as upon its own, and the privileges it affords to the latter class it must afford to the same extent to the other, but not to any greater extent.** (emphasis supplied)

The United States Supreme Court addressed the issue of a state's limitation on its courts in *McKnett v. St. Louis & S.F. Ry. Co.*, 272 U.S.230 (1934). In this case the Court stated:

The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens.

In a 2006 West Virginia case--*Morris v. Crown Equipment Corp.*, 633 S.E.2d 292 (W.Va. 2006), a resident of Virginia suffered a leg injury at his place of employment in Virginia while operating a standup forklift that was distributed and serviced by the defendant--a West Virginia corporation. Morris appealed the decision of the circuit court that held that as a nonresident of West Virginia, his complaint was dismissed for improper venue based upon West Virginia Code Section 56-1-1(c), which states, in relevant part:

(c) Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state: Provided, That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.

In a civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of the plaintiff without prejudice to

refiling in a court in any other state or jurisdiction.

The West Virginia Supreme Court of Appeals held that under the Privileges and Immunities Clause of the United States Constitution, West Virginia Code Section 56-1-1(c) did not apply to civil actions filed against West Virginia citizens and residents.

### **SUGGESTED STUDY APPROACH**

The committee in its study of statutes of limitation and venue requirements for civil actions in North Dakota may wish to approach this study as follows:

- Request information regarding the laws of other states with respect to statutes of limitation and venue requirements;
- Request information regarding the number of cases filed in the state by nonresident plaintiffs;
- Request information and testimony from the North Dakota Chamber of Commerce, the North Dakota Defense Lawyers Association, the State Bar Association of North Dakota, and other interested persons regarding issues relating to statutes of limitation and venue requirements; and
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:2