

**2021 HOUSE INDUSTRY, BUSINESS AND LABOR**

**HB 1454**

# 2021 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee  
Room JW327C, State Capitol

HB 1454  
2/10/2021

## Unlawful interference with business relation.

(9:00) Chairman Lefor called the hearing to order.

Representatives	Attendance
Chairman Lefor	P
Vice Chairman Keiser	P
Rep Hagert	P
Rep Jim Kasper	P
Rep Scott Louser	P
Rep Nehring	P
Rep O'Brien	P
Rep Ostlie	P
Rep Ruby	P
Rep Schauer	P
Rep Stemen	P
Rep Thomas	P
Rep Adams	P
Rep P Anderson	P

### Discussion Topics:

- Common law related to tortious interference of business.

Rep Kading~District 45 introduced the bill. Attachment #6197.

Rick Claybourgh~President to the ND Banker's Association testified in neutral position.

Chairman Lefor closes the hearing. The bill will be held.

**Additional written testimony:** Attachment #5902.

(9:30) End time.

*Ellen LeTang, Committee Clerk*

My Chairman and members of the committee. HB 1454 is in regard to codifying common law held by the North Dakota Supreme Court and provides a specific application as to online relationships.

I am sure you are all familiar with common law but I wanted to provide a very brief description as to the relation between common law and statute.

Common law comprises of law established by courts in the competent jurisdiction and of precedent established by higher courts. Common law began to be developed in approximately the 11th century. All US states follow common law - with a partial exception for Louisiana. The US Supreme Court and the North Dakota Supreme Court both establish what is referred to as common law. Many times through out the history of the state and the United States common law has become codified in statute.

Today, this bill looks to codify the North Dakota Supreme Court's common law related to Tortious Interference of contract and Tortious Interference of potential business relationship. The language for the bill itself was pulled from the case Trade 'N Post v World Duty Free Americas by the North Supreme Court in 2001. The court in the case stated quote "There is a great disparity in the language used by courts to describe the various elements of the tort." So the court moved to set the record as to what qualifies. The court then stated: "We hold that, in order to prevail on a claim for unlawful interference with business, a plaintiff must prove the following essential elements: (1) the existence of a valid business relationship or expectancy; (2) knowledge by the interferer of the relationship or expectancy; (3) an independently tortious or otherwise unlawful act of interference by the interferer; (4) proof that the interference caused the harm sustained; and (5) actual damages to the party whose relationship or expectancy was disrupted."

The court in this case further stated that when the tort applies to Tortious Interference of a potential business relationship, quote "a plaintiff must prove that the defendant's conduct was independently tortious or wrongful." So there are two standards set out, one if there is actually a contract then the standard is knowingly interfering in a relationship. If there isn't an actual contract, the standard is the interference must be independently tortious or wrongful. An example of such would be threatening assault or breach of contract.

Now I know there is a fair amount of nuance in the previously stated legal arguments. But this bill does not change any of the current common law. It simply codifies current common law.

What this bill does address that isn't yet established in North Dakota common law is the inclusion of defining an online relationship in the commercial setting as a potential business relationship for the sake of this tort. An example of this would include, if a business maintained a facebook business profile on which reviews were placed. If a competing business began offering a multitude of reviews in an effort to interfere with potential customers, this would be considered tortious interference of a potential

business relationship. Placing 1 star reviews by itself is not defamation yet it is still an effort to negatively impact potential business relationships.

In the event the activity itself rises to the level of bad faith and collusion with other actors to negatively interfere with another's commercial operation, the penalty would arise to a misdemeanor.

Thank you and I am willing to answer questions.

**LARRY J. RICHARDS**

**ATTORNEY AT LAW**

711 N. Washington Street #202

Grand Forks, ND 58203

Tel: (701) 795-5100

[larry.richards@lawyer.com](mailto:larry.richards@lawyer.com)

February 8, 2021

To: Representative Mike Lefor  
Chairman, North Dakota House of Representative Committee on  
Industry, Business, and Labor

From: Larry Richards, Attorney at Law

RE: Testimony House Bill No. 1454—Unlawful Interference with Business Relation

Mr. Chairman and members of the committee I have reviewed this proposed bill and wanted to make note of a couple of things which you may or may not be aware of. To start, I will qualify my testimony by stating that I am by no means a “legal scholar” on this subject. However, I do have some experience with litigating this type of tort in North Dakota courts so I am just giving you my “two cents” as you might say.

First, it needs to be noted that the North Dakota Supreme Court recognized the tort of “unlawful interference with business” in 2001. See Trade ‘N Post, L.L.C. vs. World Duty Free Americas, et. al., 2001 N.D. 116. In doing do, the North Dakota Supreme Court, after a lengthy judicial analysis of various elements used by other courts, established that the elements of this tort for North Dakota as follows:

“[A] plaintiff must prove the following essential elements: (1) the existence of a valid business relationship or expectancy; (2) knowledge by the interferer of the relationship or expectancy; (3) an independently tortious or otherwise unlawful act of interference by the interferer; (4) proof that the interference caused the harm sustained; and (5) actual damages to the party whose relationship or expectancy was disrupted. See, e.g., Wal-Mart Stores, Inc. v. Sturges, 44 Tex. Sup. Ct. J. 486, No. 98-1107, 2001 WL 228139, at \*1 (Tex. Mar. 8, 2001); see also Schneider, 1999 ND 235, ¶ 26, 603 N.W.2d 869 (actual damages are an essential element of the tort).”

Second, the North Dakota Supreme Court has also recognized the separate and distinct tort of “tortious interference with an existing contract”. This common law tort was detailed in a series of cases in 1997 and 1998. Messiha v. State, 1998 ND 149, ¶ 10, 583 N.W.2d 385; Tracy v. Central Cass Pub. Sch. Dist., 1998 ND 12, ¶ 9, 574 N.W.2d 11 781; Fronteer Directory Co. v. Maley, 1997 ND 162, ¶ 14, 567 N.W.2d 826. In North Dakota, the elements of “tortious interference with an existing contract” is as follows:

“(1) a contract existed, (2) the contract was breached, (3) the defendant instigated the breach, and (4) the defendant instigated the breach without justification.” Hilton v. N.D. Educ. Ass’n, 2002 ND 209, ¶ 24, 655 N.W.2d 60. “Tortious interference requires a person who is not a party to the contract to interfere with the contract.” Van Sickle v. Hallmark & Assocs., Inc., 2008 ND 12, ¶ 25, 744 N.W.2d 532

Thimjon Farms Partnership vs. First International Bank & Trust, 2013 N.D. 160, ¶11.

As I review this statute, this bill appears to create, incorporate and possible merges both of these torts. While it would remain an open question for the North Dakota Supreme Court, the enactment of this bill may—and I would argue probably will—result in the abrogation of the existing torts. In other words, it would replace the common law. This significantly impacts the law in that it casts in doubt the relevance and application of twenty years of North Dakota Supreme Court precedents on these torts as well as that from other states.

I would further argue that the adoption of this bill expands these causes of action. For example, the bill states that a Plaintiff must prove “defendant intentionally and improperly interfered with the contractual of business relationship”. However, with regard to the “unlawful interference with business” tort, the North Dakota Supreme Court refused to adopt the “malicious” or “improper” conduct elements in favor of what I would say is the more burdensome “independently tortious or otherwise unlawful” conduct element. See Trade ‘N Post, L.L.C. vs. World Duty Free America, 2001 N.D. 116, ¶¶37-42. I believe it is more burdensome because I

would say it's harder to show someone acted "possibly unlawfully" rather than just "improperly". In other words, there are situations where you can show someone did something wrong which is not technically conduct that could be unlawful or actionable by law, but was still wrong (i.e. improper) by most persons thinking.

I would also say that proving "[a]ctual, compensatory, incidental, or consequential damages" is a further expansion. Again, in reference to the "unlawful interference with business" tort, in Trade 'N Post, the North Dakota Supreme Court specifically adopted the "actual damages" element. 2001 N.D. 116, ¶36. As an element, "actual damages" is a "stringent standard" where "it is not enough that the Plaintiff shows a reasonable possibility that he would obtained some economic benefit", but show that he or she "would have obtained a benefit". Schneider vs. Schaff, 1999 N.D. 235, ¶26, 603 N.W.2d 869. In adopting this requirement in the Schneider case, the North Dakota Supreme Court specifically quoted the leading legal treatise on the subject—Prosser & Keeton. The addition of other types of damages in this bill does add things. For instance, "consequential damages" adds losses which are merely "reasonably foreseeable" at the time of the wrongdoing or breach of contract, usually stemming from the Plaintiff's involvement with third parties not involved in the case. See Hoffman vs. Stoller, 320 N.W.2d 786, 792 (N.D. 1982).

I give this testimony not to necessarily dissuade you from enacting or changing this area of the law. I do so just to highlight the great impact it could have as well as how important it is that, if you do so, you should be aware of how the language used could greatly impact the rights and privileges current North Dakota citizens have in seeking legal recourse in our Courts.

Finally, please note that, while I am an attorney, I present this testimony in my individual capacity. I do not present this testimony on behalf on any individual, corporation or other entity. I have not and will not receive any compensation for the presentation of this testimony.

Testimony on HB 1454

Pg. 4

2/8/21

Thank you for your time and consideration as well as your service to the State of North Dakota

Sincerely,

*/s/ Larry J. Richards*

Larry J. Richards  
Attorney at Law

LJR

# 2021 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee  
Room JW327C, State Capitol

HB 1454  
2/16/2021

## Unlawful interference with business relation.

(10:04) Chairman Lefor called the hearing to order.

Representatives	Attendance
Chairman Lefor	P
Vice Chairman Keiser	P
Rep Hagert	P
Rep Jim Kasper	P
Rep Scott Louser	P
Rep Nehring	P
Rep O'Brien	P
Rep Ostlie	P
Rep Ruby	P
Rep Schauer	P
Rep Stemen	P
Rep Thomas	P
Rep Adams	P
Rep P Anderson	P

### Discussion Topics:

- Committee work

Ariston Johnson~Johnson & Sundee Law-Attorney from Watford City. Answered questions.

Rep Adams moved a Do Not Pass.

Rep P Anderson second.

<b>Representatives</b>	<b>Vote</b>
Chairman Lefor	Y
Vice Chairman Keiser	Y
Rep Hagert	Y
Rep Jim Kasper	N
Rep Scott Louser	Y
Rep Nehring	Y
Rep O'Brien	Y
Rep Ostlie	Y
Rep Ruby	N
Rep Schauer	N
Rep Stemen	Y
Rep Thomas	Y
Rep Adams	Y
Rep P Anderson	Y

Vote roll call taken Motion carried 11-3-0 & Rep Nehring is the carrier.

(10:23) End time.

*Ellen LeTang, Committee Clerk*

**REPORT OF STANDING COMMITTEE**

**HB 1454: Industry, Business and Labor Committee (Rep. Lefor, Chairman)** recommends **DO NOT PASS** (11 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HB 1454 was placed on the Eleventh order on the calendar.