JUDICIAL PROCEDURE, CIVIL

CHAPTER 323

SENATE BILL NO. 2542
(Senators W. Stenehjem, Maxson)
(Representatives Dorso, Mahoney)
(Approved by the Delayed Bills Committee)

ASBESTOS CLAIM LIMITATIONS

AN ACT to create and enact a new section to chapter 28-01 of the North Dakota Century Code, relating to limitation of actions for certain asbestos claims by public building owners.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 28-01 of the North Dakota Century Code is created and enacted as follows:

Limitation of action for asbestos claims.

1. The legislative assembly finds that it is in the interest of the general public, particularly those persons who may bring claims regarding materials containing asbestos in public buildings and those against whom the claims may be brought, to set a specific date by which public building owners must bring a cause of action for removal or other abatement costs associated with the presence of asbestos in their buildings. By enactment of this statute of limitations, the legislative assembly does not imply that suits would otherwise be barred by an existing limitations period.

2. Notwithstanding any other law to the contrary, any action to recover costs for removal and replacement of asbestos or materials containing asbestos from a public building; to recover costs for other measures taken to locate, correct, or ameliorate any problem related to asbestos in a public building; or for reimbursement for removal and replacement, correction, or amelioration of an asbestos problem in a public building, must be commenced prior to August 1, 1997. Any such action which would otherwise be barred before August 1, 1997, as a result of expiration of the applicable period of limitation, is revived or extended. An asbestos action revived or extended under this subsection must be commenced prior to August 1, 1997.

3. For purposes of this section, "public building" means any building owned by any county, city, township, school district, park district, or any other unit of local government, the state or any agency, industry, institution, board, or department thereof.

Approved May 5, 1993
Filed May 6, 1993

CHAPTER 324

SENATE BILL NO. 2351
(Senators Tallackson, Dotzenrod, Goetz)
(Representatives R. Berg, Hokana, Payne)

TORT REFORM

AN ACT to create and enact chapter 28-01.3 of the North Dakota Century Code, relating to products liability; to amend and reenact section 13 of chapter 404 of the 1987 Session Laws of North Dakota and sections 32-03.2-02 and 32-03.2-11 of the North Dakota Century Code, relating to comparative fault and punitive damages; and to repeal section 15 of chapter 404 of the 1987 Session Laws of North Dakota, and chapter 28-01.1 and section 32-03.2-03 of the North Dakota Century Code, relating to the expiration date of legislation concerning tort liability, products liability, and comparative fault.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 13 of chapter 404 of the 1987 Session Laws of North Dakota is amended and reenacted as follows:

SECTION 13. REPEAL. ~~If this Act does not contain an expiration date, North Dakota Century Code sections~~ Section 9-10-07 of the North Dakota Century Code and section 32-03-07 of the North Dakota Century Code as amended by section 1 of 1987 Senate Bill No. 2058, as approved by the fiftieth legislative assembly, are hereby repealed.

SECTION 2. AMENDMENT. Section 32-03.2-02 of the 1991 Supplement to the North Dakota Century Code is amended and reenacted as follows:

32-03.2-02. Modified comparative fault. Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering. 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, except that any persons who act in concert in committing a tortious act or aid or encourage the act, or ratifies or adopts the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault. Under this section, fault includes negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, ~~and~~ failure to avoid injury~~. Under this section, fault does not include~~

~~any~~, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect.

SECTION 3. AMENDMENT. Section 32-03.2-11 of the 1991 Supplement to the North Dakota Century Code is amended and reenacted as follows:

32-03.2-11. When court or jury may give exemplary damages.

1. In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or malice, actual or presumed, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant. Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an applicable legal basis for awarding exemplary damages and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

2. If either party so elects, the trier of fact shall first determine whether compensatory damages are to be awarded before addressing any issues related to exemplary damages. Evidence relevant only to the claim for exemplary damages is not admissible in the proceeding on liability for compensatory damages. If an award of compensatory damages has been made, the trier of fact shall determine whether exemplary damages are to be awarded.

3. Evidence of a defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages.

4. If the trier of fact determines that exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater; provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court.

5. In order for a party to recover exemplary damages, the finder of fact shall find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following principles and factors:

   a. Whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;

   b. The degree of reprehensibility of the defendant's conduct and the duration of that conduct; and

c. Any of the following factors as to which evidence is presented:

(1) The defendant's awareness of and any concealment of the conduct;

(2) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; and

(3) Criminal sanctions imposed on the defendant for the same conduct that is the basis for the exemplary damage claim, these to be taken into account if offered in mitigation of the exemplary damage award.

SECTION 4. Chapter 28-01.3 of the North Dakota Century Code is created and enacted as follows:

28-01.3-01. Limitation on ad damnum clause. If a complaint filed in a products liability action prays for a recovery of money in an amount equal to or less than fifty thousand dollars, the amount must be stated. If a recovery of money in an amount greater than fifty thousand dollars is demanded, the pleading must state merely that recovery of reasonable damages in an amount greater than fifty thousand dollars is demanded. This action may be superseded by an amendment to the North Dakota Rules of Civil Procedure.

28-01.3-02. Alteration or modification of product is defense to action. No manufacturer or seller of a product may be held liable in any products liability action where a substantial contributing cause of the injury, death, or damage to property was an alteration or modification of the product, which occurred subsequent to the sale by the manufacturer or seller to the initial user or consumer, and which changed the purpose, use, function, design, or intended use or manner of use of the product from that for which the product was originally designed, tested, or intended.

28-01.3-03. Liability of nonmanufacturing sellers.

1. In any products liability action maintained against a seller of a product who did not manufacture the product, the seller shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing the personal injury, death, or damage to property.

2. After the plaintiff has filed a complaint against the manufacturer and the manufacturer has or is required to have answered or otherwise pleaded, the court shall order the dismissal of the claim against the certifying seller, unless the plaintiff can show any of the following:

   a. That the certifying seller exercised some significant control over the design or manufacture of the product, or provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the personal injury, death, or damage to property.

   b. That the certifying seller had actual knowledge of the defect in the product which caused the personal injury, death, or damage to property.

c. That the certifying seller created the defect in the product which caused the personal injury, death, or damage to property.

3. The plaintiff may at any time prior to the beginning of the trial move to vacate the order of dismissal and reinstate the certifying seller if the plaintiff can show any of the following:

a. That the applicable statute of limitation bars a product liability action against the manufacturer of the product allegedly causing the injury, death, or damage.

b. That the identity of the manufacturer given to the plaintiff by the certifying defendant was incorrect.

28-01.3-04. Indemnity of seller. If a product liability action is commenced against a seller, and it is alleged that a product was defectively designed, contained defectively manufactured parts, had insufficient safety guards, or had inaccurate or insufficient warning; that such condition existed when the product left the control of the manufacturer; that the seller has not substantially altered the product; and that the defective condition or lack of safety guards or adequate warnings caused the injury or damage complained of; the manufacturer from whom the product was acquired by the seller must be required to assume the cost of defense of the action, and any liability that may be imposed on the seller. The obligation to assume the seller's cost of defense should also extend to an action in which the manufacturer and seller are ultimately found not liable.

28-01.3-05. Determination of defective product. No product may be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.

28-01.3-06. Definitions. As used in this chapter:

1. "Manufacturer" means a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product prior to the sale of the product to a user or consumer. The term includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer.

2. "Product liability action" means any action brought against a manufacturer or seller of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formula, installation, preparation, assembly, testing, packaging, labeling, or sale of any product, or the failure to warn or protect against a danger or hazard in the use, misuse, or unintended use of any product, or the failure to provide proper instructions for the use of any product.

3. "Seller" means any individual or entity, including a manufacturer, wholesaler, distributor, or retailer, who is engaged in the business of selling or leasing any product for resale, use, or consumption.

4. "Unreasonably dangerous" means that the product is dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer, or user of that product in that community considering the product's characteristics, propensities, risks, dangers, and uses, together with any actual knowledge, training, or experience possessed by that particular buyer, user, or consumer.

SECTION 5. REPEAL. Section 15 of chapter 404 of the 1987 Session Laws of North Dakota, chapter 28-01.1 of the North Dakota Century Code, and section 32-03.2-03 of the 1991 Supplement to the North Dakota Century Code are repealed.

Approved March 31, 1993
Filed April 1, 1993

CHAPTER 325

SENATE BILL NO. 2087
(Judiciary Committee)
(At the request of the Supreme Court)

CIVIL ACTION VENUE

AN ACT to create and enact a new section to chapter 28-04 of the North Dakota Century Code, relating to venue of trials in civil actions.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 28-04 of the North Dakota Century Code is created and enacted as follows:

Venue of trials. Notwithstanding any other provision of this chapter, if the county seats of adjoining counties are less than ten miles apart and are located in the same judicial district, the district court or county court may hold any trial or hearing in either county. In the case of a jury trial, the jury panel must be composed of residents of the county of venue as would otherwise be determined under this chapter even if the case is not tried in that county.

Approved March 4, 1993
Filed March 5, 1993

CHAPTER 326

HOUSE BILL NO. 1453
(Representatives Pyle, Ness)

NONPROFIT PENSION PLAN EXEMPTION

AN ACT to amend and reenact subsection 3 of section 28-22-03.1 of the North Dakota Century Code, relating to exemptions from judicial process.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 3 of section 28-22-03.1 of the North Dakota Century Code is amended and reenacted as follows:

3. Pensions, annuity policies or plans, and life insurance policies which, upon the death of the insured, would be payable to the spouse, children, or any relative of the insured dependent, or likely to be dependent, upon the insured for support and which have been in effect for a period of at least one year; individual retirement accounts; Keogh plans and simplified employee pension plans; and all other plans qualified under section 401 of the Internal Revenue Code [Pub. L. 83-591; 68A Stat. 134; 26 U.S.C. 401] and section 408 of the Internal Revenue Code [Pub. L. 93-406; 88 Stat. 959; 26 U.S.C. 408], and pension or retirement plans sponsored by nonprofit corporations or associations organized and operated exclusively for one or more of the purposes specified in 26 U.S.C. 501(c)(3), and proceeds, surrender values, payments, and withdrawals from such pensions, policies, plans, and accounts, up to one hundred thousand dollars for each pension, policy, plan, and account with an aggregate limitation of two hundred thousand dollars for all pensions, policies, plans, and accounts. The dollar limit does not apply to the extent this property is reasonably necessary for the support of the resident and that resident's dependents, except that the pensions, policies, plans, and accounts or proceeds, surrender values, payments, and withdrawals are not exempt from enforcement of any order to pay spousal support or child support, or a qualified domestic relations order under sections 15-39.1-12.2, 39-03.1-14.2, and 54-52-17.6. As used in this subsection, "reasonably necessary for the support" means required to meet present and future needs, as determined by the court after consideration of the resident's responsibilities and all the present and anticipated property and income of the resident, including that which is exempt.

Approved April 8, 1993
Filed April 9, 1993

CHAPTER 327

HOUSE BILL NO. 1336
(Representatives St. Aubyn, Oban, Soukup)
(Senators Dotzenrod, Keller)

ENERGY CONSERVATION STANDARDS

AN ACT to amend and reenact subdivision a of subsection 1 of section 28-32-01, sections 54-21.2-03, and 54-21.2-04 of the North Dakota Century Code, relating to exclusions from the definition of administrative agency and the state energy code for new building construction.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

[1] **SECTION 1. AMENDMENT.** Subdivision a of subsection 1 of section 28-32-01 of the North Dakota Century Code is amended and reenacted as follows:

a. The office of management and budget except with respect to rules relating to the Model Energy Code as required under section 54-21.2-03, rules relating to the central personnel system as authorized under section 54-44.3-07, rules relating to state purchasing practices as required under section 54-44.4-04, rules relating to records management as authorized or required under chapter 54-46, and rules relating to the central microfilm unit as authorized under chapter 54-46.1.

SECTION 2. AMENDMENT. Section 54-21.2-03 of the North Dakota Century Code is amended and reenacted as follows:

54-21.2-03. Energy conservation standards. The standards for energy conservation in new building construction, for thermal design conditions and criteria for buildings, and for adequate thermal resistance in regard to the design and selection of mechanical, electrical service, and illumination systems and equipment which will enable the effective use of energy in new buildings, must at least equal the energy conservation code based on the ~~American Society of Heating, Refrigerating, and Air Conditioning Engineers Standard 90-75 and any amendments or additions thereto.~~ Council of American Building Officials Model Energy Code, 1989 Edition. The office of management and budget shall adopt rules to implement, update, and amend the Model Energy Code.

SECTION 3. AMENDMENT. Section 54-21.2-04 of the North Dakota Century Code is amended and reenacted as follows:

54-21.2-04. Inspections. All construction or work for which a permit is required pursuant to section 11-33-18, subsection 6 of section 40-05-02, or other

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[1] NOTE: Subsection 1 of section 28-32-01 was also amended by House Bill Nos. 1047, 1193, 1264, and 1400 and Senate Bill Nos. 2215 and 2228, chapters 135, 186, 328, 80, 173, and 236.

similar grant of authority is subject to inspection by the local building inspector. ~~Each political subdivision of the state~~ The governing body of a city, county, or township that elects to administer and enforce an energy conservation standard shall adopt and enforce the ~~provisions of this chapter~~ state energy conservation standards. The state energy conservation standards may be amended by cities, counties, and townships to conform to local needs. No construction ~~shall~~ may be covered without inspection approval, and there must be a final inspection on all buildings when completed and ready for occupancy. The building inspector may cause any structure to be reinspected.

Approved April 1, 1993
Filed April 2, 1993

CHAPTER 328

HOUSE BILL NO. 1264
(Representatives Oban, St. Aubyn)

STATE BUILDING CODE

AN ACT to amend and reenact subdivision a of subsection 1 of section 28-32-01 and section 54-21.3-03 of the North Dakota Century Code, relating to exclusions from the definition of administrative agency and the state building code; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

[1] **SECTION 1. AMENDMENT.** Subdivision a of subsection 1 of section 28-32-01 of the North Dakota Century Code is amended and reenacted as follows:

a. The office of management and budget except with respect to rules relating to the state building code as authorized or required under section 54-21.3-03, rules relating to the central personnel system as authorized under section 54-44.3-07, rules relating to state purchasing practices as required under section 54-44.4-04, rules relating to records management as authorized or required under chapter 54-46, and rules relating to the central microfilm unit as authorized under chapter 54-46.1.

SECTION 2. AMENDMENT. Section 54-21.3-03 of the 1991 Supplement to the North Dakota Century Code is amended and reenacted as follows:

54-21.3-03. State building code - Amendments.

1. The state building code consists of the ~~most recently published~~ Uniform Building Code with any existing supplements ~~including~~ and the Uniform Mechanical Code with any existing supplements as referenced by the Uniform Building Code, except that section 504(f) of the Uniform Mechanical Code is amended to read as follows:

Section 504(f). LPG Appliances.

Liquefied petroleum gas burning appliances, both automatically and manually controlled, may be installed in basements or similar locations only if (a) the appliances are of an American gas association-approved type and installed in accordance with national fire protection association pamphlets 54 and 58, (b) automatically controlled appliances are equipped with safety shutoff devices of the

[1] NOTE: Subsection 1 of section 28-32-01 was also amended by House Bill Nos. 1047, 1193, 1336, and 1400 and amended by Senate Bill Nos. 2215 and 2228, chapters 135, 186, 327, 80, 173, and 236.

complete shutoff type, and (c) gas piping has been pressure tested and proven to be gastight.

~~This code must be implemented by and may be amended by rules adopted by the~~ The director of the office of management and budget ~~under chapter 28-32~~ shall adopt rules to implement and periodically update the code and may adopt rules to amend the code.

2. For the purposes of manufactured homes, the state building code consists of the manufactured homes construction and safety standards under 24 CFR 3280 adopted pursuant to the Manufactured Housing Construction and Safety Standards Act [42 U.S.C. 5401 et seq.].

3. The governing body of a city, township, or county that elects to administer and enforce a building code shall adopt and enforce the state building code. However, the state building code may be amended by cities, townships, and counties to conform to local needs.

SECTION 3. EFFECTIVE DATE. This Act becomes effective on August 1, 1994.

Approved April 1, 1993
Filed April 2, 1993

CHAPTER 329

HOUSE BILL NO. 1079
(Judiciary Committee)
(At the request of the Office of Administrative Hearings)

ADMINISTRATIVE PRACTICES

AN ACT to amend and reenact subsection 8 of section 28-32-01, subsections 1 and 3 of section 28-32-05, subsection 1 of section 28-32-14, subsection 6 of section 28-32-15, and subsections 2, 4, and 6 of section 28-32-17 of the North Dakota Century Code, relating to administrative practices and procedures.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 8 of section 28-32-01 of the North Dakota Century Code is amended and reenacted as follows:

8. "Party" means each person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party. An administrative agency may be a party.

SECTION 2. AMENDMENT. Subsections 1 and 3 of section 28-32-05 of the North Dakota Century Code are amended and reenacted as follows:

1. a. For contested cases involving a complaint and a specific-named respondent, a complainant shall prepare and file a clear and concise complaint with the agency having subject matter jurisdiction of a proceeding. The complaint shall contain a concise statement of the claims or charges upon which the complainant relies including reference to the statute or rule alleged to be violated, and the relief sought.

   b. When a complaint is filed, the appropriate administrative agency shall serve a copy of the complaint ~~and a notice for hearing~~ upon the respondent personally or by certified mail, as the agency may direct, at least forty-five days before the time specified for a hearing on the complaint.

   c. Unless a statute or rule otherwise requires or specifically provides for suspension or revocation without a hearing, the administrative agency shall designate the time and place for the hearing and shall serve a copy of the notice for hearing upon the respondent personally or by certified mail, as the agency may direct, at least twenty days before the time specified for the hearing on the complaint. Service of the notice of hearing may be waived in writing by the respondent, or the parties may agree on a definite time and place for hearing with the consent of the agency having jurisdiction.

   d. A complaint may be served less than forty-five days before the time specified for a hearing on the complaint and a notice for hearing on a complaint may be served less than ~~forty-five~~ twenty days before the

time specified for hearing if otherwise authorized by statute. However, no administrative hearing regarding the renewal, suspension, or revocation of a license may be held fewer than ten days after the licensee has been served, personally or by certified mail, with a copy of a notice for hearing along with an affidavit, complaint, specification of issues, or other document alleging violations upon which the license hearing is based.

~~c.~~ e. ~~The notice for hearing shall state the time and place for the hearing on the complaint. The notice for hearing~~ A complaint may inform the respondent that an answer to the complaint must be served upon the complainant and the agency ~~giving the notice~~ with which the complaint is filed within twenty days after service of the complaint ~~and notice for hearing~~, or the agency may deem the complaint to be admitted. If the respondent fails to answer as requested within twenty days after service of the complaint ~~and notice for hearing~~, the agency may enter an order in default as the facts and law may warrant.

f. Service by certified mail is complete as of the date of certification.

g. ~~If a~~ A respondent ~~is~~ may be given less than ~~forty-five days' notice before a hearing pursuant to another statute, the notice may allow less than~~ twenty days to answer the complaint, pursuant to another statute, but no respondent may be required to answer a complaint in less than five days and an answer must be served on the complainant and the agency ~~giving the notice~~ with which the complaint is filed at least two days before the hearing on the complaint.

~~d.~~ h. In an emergency, in a contested case, the agency, in its discretion, may serve a complaint fewer than forty-five days before the hearing and notice ~~a contested case~~ the hearing on ~~a~~ the complaint by giving less than ~~forty-five~~ twenty days' notice. ~~Every~~ But, every party to an emergency proceeding shall be given a reasonable time within which to serve an answer and to prepare for the hearing, which may be extended by the agency upon good cause being shown.

3. a. If the administrative action does not involve a complaint and a specific-named respondent ~~or is not a contested case~~, the provisions of subsection 1 of this section do not apply.

b. An administrative agency may adopt rules establishing practices or procedures for proceedings which do not involve a complaint and a specific-named respondent ~~or which are not contested cases~~, including agency hearings on applications seeking some right, privilege, or authorization from an agency, or appeals to the agency of some other agency action. All ~~noncontested case proceedings or~~ proceedings which do not involve a complaint and a specific-named respondent must comply with another statute or rules of practice or procedure adopted pursuant to statute by an administrative agency. Notice pursuant to a rule must provide for at least ~~fifteen~~ twenty days' notice before the hearing except in cases of emergency or when a shorter notice period is necessary to comply with the requirements of federal statutes, rules, or standards.

SECTION 3. AMENDMENT. Subsection 1 of section 28-32-14 of the North Dakota Century Code is amended and reenacted as follows:

1. Any party before an administrative agency who is aggrieved by the final order of the agency, within fifteen days after notice has been given as required by section 28-32-13, may file a petition for reconsideration with the agency. Filing of the petition is not a prerequisite for seeking ~~administrative or~~ judicial review.

SECTION 4. AMENDMENT. Subsection 6 of section 28-32-15 of the North Dakota Century Code is amended and reenacted as follows:

6. ~~An~~ A bond or other undertaking for costs on appeal must be ~~executed~~ filed by the appellant~~, with sufficient surety to be approved by the judge of the district court, upon conditions requiring the appellant to prosecute the appeal without delay and to pay all costs adjudged against the appellant in the district court~~ as is required by appellants for costs on appeal in civil cases under the rules of appellate procedure. The bond or other undertaking must be filed with the clerk of the district court with the notice of appeal, must be made to the state of North Dakota, and may be enforced by the agency concerned for and on behalf of the state as obligee. A bond or other undertaking is not required when filing fees have been waived by a district court pursuant to section 27-01-07 or when the costs of preparation and filing of the record of administrative agency proceedings have been waived by a district court pursuant to subsection 3 of section 28-32-17.

SECTION 5. AMENDMENT. Subsections 2, 4, and 6 of section 28-32-17 of the North Dakota Century Code are amended and reenacted as follows:

2. Within thirty days, or a longer time as the court by order may direct, after an appeal has been taken to the district court as provided in this chapter, and after payment by the appellant of the estimated cost of preparation and filing of the entire record of the proceedings before the agency, the administrative agency concerned shall prepare and file in the office of the clerk of the district court in which the appeal is pending the original or a certified copy of the entire record of proceedings before the agency, or an abstract of the record as may be agreed upon and stipulated by the parties. Upon receiving a copy of the notice of appeal and specifications of error pursuant to subsection 4 of section 28-32-15, the administrative agency shall notify the party appealing of the estimated costs of preparation and filing of the record. Thereafter, the party appealing shall pay the administrative agency the estimated costs required by this subsection. If the actual costs of preparation and filing of the entire record of the proceedings is greater than the estimated costs, the party appealing shall pay to the agency the difference. If the actual costs are less than the estimated costs, the agency shall pay to the party appealing the difference. Any payment for the costs of preparation and filing of the record must be paid into the ~~general~~ insurance recovery fund and is hereby appropriated as a refund to the agency for the purposes of defraying the costs of preparing and filing the record. An agency may contract with any person or another agency to prepare and file the record of any proceeding before the agency.

4. The agency record of the proceedings, as applicable, must consist of only the following:

   a. The complaint, answer, and other initial pleadings or documents.

   b. Notices of all proceedings.

   c. Any prehearing notices, transcripts, documents, or orders.

   d. Any motions, pleadings, briefs, petitions, requests, and intermediate rulings.

   e. A statement of matters officially noticed.

   f. Offers of proof and objections and rulings thereon.

   g. Proposed findings, requested orders, and exceptions.

   h. The transcript of the hearing prepared for the person presiding at the hearing, including all testimony taken, and any written statements, exhibits, reports, memoranda, documents, or other information or evidence considered before final disposition of proceedings.

   i. Any recommended or proposed order, recommended or proposed findings of fact and conclusions of law, final order, final findings of fact and conclusions of law, or findings of fact and conclusions of law or orders on ~~consideration~~ reconsideration.

   j. Any information considered pursuant to section 28-32-07.

   k. Matters placed on the record after an ex parte communication.

   ~~l. Any other document that the agency believes is relevant to the appeal.~~

   ~~m. Any other document that is not privileged and which is a public record that the appellant requests the agency to include in the record, if relevant to the appeal.~~

6. The record on review of agency rulemaking action, as applicable, must consist of only the following:

   a. All agency notices concerning proposed rulemaking.

   b. A copy of the proposed rule upon which written and oral submissions were made.

   c. A copy of the rule as submitted for publication.

   d. Any opinion letters by the attorney general as to a rule's legality or the legality of the agency's rulemaking action.

   e. A copy of any interim rule and the agency's findings and statement of the reasons for an interim rule.

   f. The regulatory analysis of a proposed rule.

   g. The transcript of any oral hearing on a proposed rule.

h. All written submissions made to the agency on a proposed rule.

i. Any staff memoranda or data prepared for agency consideration in regard to the proposed rule.

j. Any other document that the agency believes is relevant to the appeal.

k. Any other document that is not privileged and which is a public record that the appellant requests the agency to include in the record, if relevant to the appeal.

Approved April 14, 1993
Filed April 15, 1993

CHAPTER 330

HOUSE BILL NO. 1356
(Representatives Tollefson, Hanson, Soukup)
(Senators Dotzenrod, Keller, Tennefos)

ADMINISTRATIVE RULEMAKING PROCEDURES

AN ACT to amend and reenact sections 28-32-02, 28-32-02.2, subsection 5 of section 28-32-03, and section 28-32-21.1 of the North Dakota Century Code, relating to administrative agency rulemaking procedures.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 28-32-02 of the North Dakota Century Code is amended and reenacted as follows:

28-32-02. Rulemaking power of agency - Adoption deadlines - Hearing notice - Emergencies - Attorney general's opinion.

1. Every administrative agency ~~is authorized to~~ may adopt, and from time to time to amend or repeal, reasonable rules in conformity with the provisions of any statute administered or enforced by the agency.

2. Any rule change, including a creation, amendment, or repeal, made to implement a statutory change must be adopted and filed with the office of the legislative council within nine months of the effective date of the statutory change. If an agency needs additional time for the rule change, a request for additional time must be made to the legislative council. The legislative council may extend the time within which the agency must adopt the rule change if the request by the agency is supported by evidence that the agency needs more time through no deliberate fault of its own.

3. The agency shall adopt a procedure whereby all interested persons are afforded reasonable opportunity to submit data, views, or arguments, orally or in writing, concerning the proposed rule, including data respecting the impact of the proposed rule. In case of substantive rules, the agency shall conduct an oral hearing. The agency shall consider fully all written and oral submissions respecting a proposed rule prior to the adoption, amendment, or repeal of any rule not of an emergency nature. The agency shall make a written record of its consideration of all written and oral submissions contained in the rulemaking record respecting a proposed rule.

4. The agency's notice of the proposed adoption, amendment, or repeal of a rule must include a short, specific explanation of the proposed rule and the purpose of the proposed rule, identify at least one location where interested persons may review the text of the proposed rule, provide the address to which written data, views, or arguments concerning the proposed rule may be sent, provide a phone number at which a copy of the rules and regulatory analysis may be requested, and, in the case of a substantive

rule, provide the time and place set for each oral hearing. The notice must be filed with the office of the legislative council and published at least twice in each daily newspaper of general circulation published in this state. The agency shall mail a copy of the notice to each person who has made a timely request to the agency for a mailed copy of the notice. The agency may mail or otherwise provide a copy of the notice to any person who is likely to be an interested person. The agency shall mail or deliver a copy of the rules to any person requesting a copy. The agency may charge for the actual cost of providing copies of the proposed rule. At least thirty days must elapse between the later of the date of the ~~first~~ second publication of the notice or the date the legislative council mails copies of an agency's notice and the ~~end of the period in which written or oral data, views, or arguments concerning the proposed rules will be received. If no request has been made to the legislative council for copies of the notices, the~~ date of the hearing. The thirty-day period begins on the ~~fifth~~ first business day of the month in which the notices ~~would have been~~ must be mailed ~~if a request had been made~~ or on the date of the second publication, whichever is later. ~~If a request has been made to the legislative council for copies of the notices~~ Subject to subsection 5, notices filed on or before the last calendar day of the preceding month must be mailed by the legislative council on ~~or before the fifth~~ the first business day of ~~each~~ the following month to any person making a request. The agency shall allow, after the conclusion of any rulemaking hearing, a comment period of not less than thirty days during which data, views, or arguments concerning the proposed rulemaking will be received by the agency and made a part of the rulemaking record to be considered by the agency.

5. The legislative council shall establish a procedure whereby any person may request and receive mailed copies of all filings made by agencies pursuant to subsection 4. The legislative council may charge for providing copies of the filings.

6. If the agency finds that emergency rulemaking is necessary because of imminent peril to the public health, safety, or welfare, or because a delay in rulemaking is likely to cause a loss of revenues appropriated to support a duty imposed by law upon the agency, the agency may declare the proposed rule to be an interim final rule effective on a date no earlier than the date of filing with the legislative council of the notice required by subsection 4. A final rule adopted after consideration of all written and oral submissions respecting the interim final rule, which is substantially similar to the interim final rule, is effective as of the declared effective date of the interim final rule. The agency's finding, and a brief statement of the reasons therefor, must be filed with the office of the legislative council, along with any final rule adopted. The agency shall take appropriate measures to make interim final rules known to every person who may be affected by them. An interim final rule is ineffective one hundred eighty days after its declared effective date unless first adopted as a final rule.

7. Every rule proposed by any administrative agency must be submitted to the attorney general for an opinion as to its legality before final adoption, and the attorney general shall promptly furnish each such opinion. The attorney general may not approve any rule as to legality when ~~the rule~~

~~merely repeats or paraphrases the text of the statute purported to be implemented by the rule. The attorney general may not approve any rule as to legality where~~ the rule exceeds the statutory authority of the agency or is written in a manner that is not concise or easily understandable, or when the procedural requirements for adoption of the rule in this chapter are not met. The attorney general ~~may suggest~~ shall advise an agency of any revision or rewording of a rule necessary to ~~meet~~ correct objections as to legality.

SECTION 2. AMENDMENT. Section 28-32-02.2 of the North Dakota Century Code is amended and reenacted as follows:

28-32-02.2. Regulatory analysis.

1. An agency shall issue a regulatory analysis of a proposed rule if~~,~~ ~~within:~~

   a. Within twenty days after the last published notice date of a proposed rule ~~adoption~~ hearing, a written request for the analysis is filed by the governor or ~~an agency. The agency proposing the rule shall issue a regulatory analysis if the~~ a member of the legislative assembly; or

   b. The proposed rule is expected to have an impact on the regulated community in excess of fifty thousand dollars. The analysis under this subdivision must be available on or before the first date of public notice as provided for in section 28-32-02.

2. The regulatory analysis must contain:

   a. A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

   b. A description of the probable impact, including economic impact, of the proposed rule;

   c. The probable costs to the agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues; and

   d. A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why the methods were rejected in favor of the proposed rule.

3. Each regulatory analysis must include quantification of the data to the extent practicable.

4. The agency shall ~~make~~ mail or deliver a copy of the regulatory analysis ~~available~~ to any ~~interested~~ person who requests ~~an opportunity to review~~ a copy of the regulatory analysis. The agency may charge for the actual cost of providing copies of the regulatory analysis.

5. If required under subsection 1, the preparation and issuance of a regulatory analysis is a mandatory duty of the agency proposing a rule. ~~A writ of mandamus may issue under the terms and conditions provided for in chapter 32-34 upon the application of a party beneficially interested~~

~~and aggrieved by an agency's failure to prepare and issue a required regulatory analysis.~~ Errors in a regulatory analysis, including erroneous determinations concerning the impact of the proposed rule on the regulated community, are not a ground upon which the invalidity of a rule may be asserted or declared.

SECTION 3. AMENDMENT. Subsection 5 of section 28-32-03 of the North Dakota Century Code is amended and reenacted as follows:

5. A rule is invalid unless adopted in substantial compliance with ~~section 28-32-02~~ this chapter. However, inadvertent failure to supply any person with a notice required by section 28-32-02 does not invalidate a rule. Notwithstanding subsection 2 of section 28-32-15, an action to contest the validity of a rule on the grounds of noncompliance with this chapter may not be commenced more than two years after the effective date of the rule.

SECTION 4. AMENDMENT. Section 28-32-21.1 of the North Dakota Century Code is amended and reenacted as follows:

28-32-21.1. Actions against administrative agencies - Attorneys' fees and costs.

1. In any civil judicial proceeding involving as adverse parties an administrative agency and a party not an administrative agency or an agent of an administrative agency, the court must award the party not an administrative agency reasonable attorneys' fees and costs if the court finds in favor of that party and, in the case of a final agency order, determines that the administrative agency acted without substantial justification.

2. This section applies to an administrative or civil judicial proceeding brought by a party not an administrative agency against an administrative agency for judicial review of a final agency order, or for judicial review pursuant to this chapter of the legality of agency rulemaking action or a rule adopted by an agency as a result of the rulemaking action being appealed.

3. Any attorneys' fees and costs awarded pursuant to this section must be paid from funds available to the administrative agency the final order, rulemaking action, or rule of which was reviewed by the court. The court may withhold all or part of the attorneys' fees from any award if the court finds the administrative agency's action, in the case of a final agency order, was substantially justified or that special circumstances exist which make the award of all or a portion of the attorneys' fees unjust.

4. Nothing in this section shall be construed to alter the rights of a party to collect any fees under other applicable law.

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