

# JUDICIAL REMEDIES

## CHAPTER 285

### HOUSE BILL NO. 1069

(Representative DeKrey)

AN ACT to amend and reenact subsection 9 of section 32-03.2-11 of the North Dakota Century Code, relating to exemplary damages.

#### **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Subsection 9 of section 32-03.2-11 of the North Dakota Century Code is amended and reenacted as follows:

9. In a civil action involving a motor vehicle accident resulting in bodily injury, it is sufficient for the trier of fact to consider an award of exemplary damages against the driver under the motion procedures provided in subsection 1 if clear and convincing evidence indicates that the accident was caused by a driver who, within the five years immediately preceding the accident has been convicted for violation of section 39-08-01 and who was operating or in physical control of a motor vehicle:
  - a. With an alcohol concentration of at least ~~ten~~ eight one-hundredths of one percent by weight;
  - b. Under the influence of a controlled substance unless a drug that predominantly caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed the drug to the driver;
  - c. Under the influence of alcohol and refused to take a test required under chapter 39-20; or
  - d. Under the influence of a volatile chemical as listed in section 19-03.1-22.1.

At the trial in an action in which the trier of fact will consider an award of exemplary damages, evidence that the driver has been convicted of violating section 39-08-01 or an equivalent statute or ordinance is admissible into evidence.

Approved April 8, 2009  
Filed April 9, 2009

**CHAPTER 286****HOUSE BILL NO. 1205**  
(Representatives Keiser, Wald)  
(Senator Klein)

AN ACT to create and enact chapter 32-03.4 of the North Dakota Century Code, relating to the transfer of structured settlements; and to provide a penalty.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.** Chapter 32-03.4 of the North Dakota Century Code is created and enacted as follows:

**32-03.4-01. Definitions.** For purposes of this chapter:

1. "Annuity issuer" means an insurer that has issued a contract to fund periodic payments under a structured settlement.
2. "Dependent" includes a payee's spouse and minor children and all other persons for whom the payee is legally obligated to provide support, including alimony or support.
3. "Discounted present value" means the present value of future payments determined by discounting those payments to the present using the most recently published applicable federal rate for determining the present value of an annuity, as issued by the United States internal revenue service.
4. "Gross advance amount" means the sum payable to the payee or for the payee's account as consideration for a transfer of structured settlement payment rights before any reductions for transfer expenses or other deductions to be made from such consideration.
5. "Independent professional advice" means advice of an attorney, certified public accountant, actuary, or other licensed professional adviser:
  - a. Who is engaged by a claimant or payee to render advice concerning the legal, tax, and financial implications of a structured settlement or a transfer of structured settlement payment rights;
  - b. Who is not in any manner affiliated with or compensated by the defendant in the settlement or the transferee of the transfer; and
  - c. Whose compensation for rendering the advice is not affected by whether a settlement or transfer occurs or does not occur.
6. "Interested party" means, with respect to any structured settlement, the payee, any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death, the annuity issuer, the structured settlement obligor, and any other party that has continuing rights or obligations under the structured settlement.

7. "Net advance amount" means the gross advance amount less the aggregate amount of the actual and estimated transfer expenses required to be disclosed under subsection 5 of section 32-03.4-02.
8. "Payee" means an individual who is receiving tax-free payments under a structured settlement and proposes to make a transfer of payment rights under the structured settlement.
9. "Periodic payments" includes both recurring payments and scheduled future lump sum payments.
10. "Qualified assignment agreement" means an agreement providing for a qualified assignment within the meaning of section 130 of the Internal Revenue Code [26 U.S.C. 130], as amended.
11. "Settled claim" means the original tort claim or workers' compensation claim resolved by a structured settlement.
12. "Structured settlement" means an arrangement for periodic payment of damages for personal injuries or sickness established by settlement or judgment in resolution of a tort claim or for periodic payments in settlement of a workers' compensation claim.
13. "Structured settlement agreement" means the agreement, judgment, stipulation, or release embodying the terms of a structured settlement.
14. "Structured settlement obligor" means, with respect to any structured settlement, the party that has the continuing obligation to make periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement.
15. "Structured settlement payment rights" means rights to receive periodic payments under a structured settlement, whether from the structured settlement obligor or the annuity issuer, if at least one of the following applies:
  - a. The payee is domiciled in, or the domicile or principal place of business of the structured settlement obligor or the annuity issuer is located in, this state;
  - b. The structured settlement agreement was approved by a court in this state; or
  - c. The structured settlement agreement is expressly governed by the laws of this state.
16. "Terms of the structured settlement" includes, with respect to any structured settlement, the terms of the structured settlement agreement, the annuity contract, any qualified assignment agreement and any order or other approval of any court or other governmental authority that authorized or approved such structured settlement.
17. "Transfer" means any sale, assignment, pledge, hypothecation, or other alienation or encumbrance of structured settlement payment rights made by a payee for consideration. The term does not include the creation or perfection of a security interest in structured settlement

payment rights under a blanket security agreement entered with an insured depository institution, in the absence of any action to redirect the structured settlement payments to the insured depository institution, or an agent or successor in interest thereof, or otherwise to enforce the blanket security interest against the structured settlement payment rights.

18. "Transfer agreement" means the agreement that provides for a transfer of structured settlement payment rights.
19. "Transfer expenses" means all expenses of a transfer which are required under the transfer agreement to be paid by the payee or deducted from the gross advance amount, including court filing fees, attorney's fees, escrow fees, lien recordation fees, judgment and lien search fees, finder's fees, commissions, and other payments to a broker or other intermediary. The term does not include preexisting obligations of the payee payable for the payee's account from the proceeds of a transfer.
20. "Transferee" means a party acquiring or proposing to acquire structured settlement payment rights through a transfer.

**32-03.4-02. Required disclosures to payee.** At least three days before the date on which a payee signs a transfer agreement, the transferee shall provide to the payee a separate disclosure statement, in bold and in at least fourteen-point type, setting forth:

1. The amounts and due dates of the structured settlement payments to be transferred;
2. The aggregate amount of the payments;
3. The discounted present value of the payments to be transferred, which must be identified as the "calculation of current value of the transferred structured settlement payments under federal standards for 'valuing annuities'", and the amount of the applicable federal rate used in calculating the discounted present value;
4. The gross advance amount;
5. An itemized list of all applicable transfer expenses, other than attorney's fees and related disbursements, payable in connection with the transferee's application for approval of the transfer and the transferee's best estimate of the amount of any such fees and disbursements;
6. The net advance amount;
7. The amount of any penalties or liquidated damages payable by the payee in the event of any breach of the transfer agreement by the payee; and
8. A statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, no later than the third business day after the date the agreement is signed by the payee.

**32-03.4-03. Approval of transfers of structured settlement payment rights.** A direct or indirect transfer of structured settlement payment rights is not effective and a structured settlement obligor or annuity issuer may not be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been approved in advance in a final court order based on the following express findings by the court:

1. The transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents and whether the transaction, including the discount rate used to determine the gross advance amount and the fees and expenses used to determine the net advance amount, are fair and reasonable. If the court makes the findings as outlined in this subsection, there is not a requirement for the court to find that an applicant is suffering from a hardship to approve the transfer of structured settlement payments under this subsection;
2. The payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received that advice or knowingly waived the advice in writing; and
3. The transfer does not contravene any applicable statute or the order of any court or other governmental authority.

**32-03.4-04. Effects of transfer of structured settlement payment rights.** Following a transfer of structured settlement payment rights under this chapter:

1. The structured settlement obligor and the annuity issuer are discharged and released from all liability for the transferred payments as to all parties except the transferee;
2. The transferee is liable to the structured settlement obligor and the annuity issuer:
  - a. If the transfer contravenes the terms of the structured settlement, for any taxes incurred by those parties as a consequence of the transfer; and
  - b. For any other liabilities or costs, including reasonable costs and attorney's fees, arising from compliance by those parties with the order of the court or arising as a consequence of the transferee's failure to comply with this chapter;
3. Neither the annuity issuer nor the structured settlement obligor may be required to divide any periodic payment between the payee and any transferee or assignee or between two or more transferees or assignees; and
4. Any further transfer of structured settlement payment rights by the payee may be made only after compliance with all of the requirements of this chapter.

**32-03.4-05. Procedure for approval of transfers.**

1. An application for approval of a transfer of structured settlement payment rights under this chapter must be made by the transferee and may be brought in the county in which the payee resides, in the county

in which the structured settlement obligor or the annuity issuer maintains its principal place of business, or in any court that approved the structured settlement agreement.

2. At least twenty days before the scheduled hearing on any application for approval of a transfer of structured settlement payment rights under section 32-03.4-03, the transferee shall file with the court and serve on all interested parties a notice of the proposed transfer and the application for its authorization. The notice must include:
  - a. A copy of the transferee's application;
  - b. A copy of the transfer agreement;
  - c. A copy of the disclosure statement required under section 32-03.4-02;
  - d. A list of each of the payee's dependents and each dependent's age;
  - e. Notification that any interested party is entitled to support, oppose, or otherwise respond to the transferee's application, either in person or by counsel, by submitting written comments to the court or by participating in the hearing;
  - f. Notification of the time and place of the hearing; and
  - g. Notification of the manner in which and the time by which written responses to the application must be filed in order to be considered by the court, which may be not less than fifteen days after service of the transferee's notice.

**32-03.4-06. No waiver by payee.** The requirements of this chapter may not be waived by any payee.

**32-03.4-07. Disputes decided under state law.** Any transfer agreement entered on or after the effective date of this chapter by a payee who resides in this state must provide that disputes under the transfer agreement, including any claim that the payee has breached the agreement, must be determined in and under the laws of this state. Such a transfer agreement may not authorize the transferee or any other party to confess judgment or consent to entry of judgment against the payee.

**32-03.4-08. Life-contingent payments not to be transferred - Exception.** A transfer of structured settlement payment rights may not extend to any payments that are life-contingent unless, before the date on which the payee signs the transfer agreement, the transferee has established and has agreed to maintain procedures reasonably satisfactory to the annuity issuer and the structured settlement obligor for periodically confirming the payee's survival and giving the annuity issuer and the structured settlement obligor prompt written notice in the event of the payee's death.

**32-03.4-09. No payee liability for failure to comply with chapter.** A payee who proposes to make a transfer of structured settlement payment rights may not incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee or any assignee based on any failure of the transfer to satisfy the conditions of this chapter.

**32-03.4-10. Effect of chapter on existing laws and transfer agreements.**

This chapter does not authorize any transfer of structured settlement payment rights in contravention of any law nor does this chapter imply that any transfer under a transfer agreement entered before August 1, 2009, is valid or invalid.

**32-03.4-11. Transferee solely responsible for certain requirements.**

In any transfer of structured settlement payment rights, compliance with the requirements of section 32-03.4-02 and fulfillment of the conditions of section 32-03.4-03 are the sole responsibility of the transferee. Neither the structured settlement obligor nor the annuity issuer bears any responsibility for, or any liability arising from, noncompliance with those requirements or failure to fulfill those conditions.

**32-03.4-12. Penalty.** Any transferee that willfully violates this chapter is guilty of an infraction. A second or subsequent violation of this chapter is a class B misdemeanor.

**32-03.4-13. Applicability of chapter.** This chapter applies to any transfer of structured settlement payment rights under a transfer agreement entered after July 31, 2009. This chapter does not imply that any transfer under a transfer agreement reached before August 1, 2009, is either effective or ineffective.

Approved March 24, 2009  
Filed March 24, 2009

**CHAPTER 287****HOUSE BILL NO. 1104**

(Judiciary Committee)

(At the request of the Office of Management and Budget)

AN ACT to amend and reenact subsection 1 of section 32-12.2-11 of the North Dakota Century Code, relating to exempt records.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Subsection 1 of section 32-12.2-11 of the North Dakota Century Code is amended and reenacted as follows:

1. The following records in the possession of the office of management and budget or a public entity are privileged and exempt and are not subject to section 44-04-18 or section 6 of article XI of the Constitution of North Dakota:
  - a. Records containing information relating to that portion of the funds or liability reserves of the risk management fund established for the purpose of satisfying a specific pending or reasonably predictable claim against the state or a state employee; and
  - b. Incident reports, investigation reports, or other risk management fund records of a pending or reasonably predictable claim against the state or a state employee.

Approved March 5, 2009

Filed March 5, 2009

**CHAPTER 288****SENATE BILL NO. 2256**

(Senators Fischer, G. Lee, J. Lee, Miller)  
(Representatives Kasper, Nelson, Nottestad)

AN ACT to amend and reenact section 32-12.2-13 of the North Dakota Century Code, relating to contracts between the state and a political subdivision; and to declare an emergency.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Section 32-12.2-13 of the North Dakota Century Code is amended and reenacted as follows:

**32-12.2-13. Contract between the state and a political subdivision.** A contract between the state and a political subdivision may not contain a provision that requires one party to assume the liability of the other or the liability of a third party or to bear the costs of defense of actions against the other or against a third party; ~~unless the agreement is entered into in good faith and is set forth in a separate writing signed by both parties and supported by adequate consideration which must be stated in the agreement.~~

**SECTION 2. EMERGENCY.** This Act is declared to be an emergency measure.

Approved April 22, 2009  
Filed April 23, 2009

**CHAPTER 289****HOUSE BILL NO. 1122**

(Government and Veterans Affairs Committee)  
(At the request of the Office of Management and Budget)

AN ACT to amend and reenact section 32-12.2-15 of the North Dakota Century Code, relating to authorization of agencies to limit the liability to the state of certain contracting parties.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Section 32-12.2-15 of the North Dakota Century Code is amended and reenacted as follows:

**32-12.2-15. Contracts limiting liability to the state - Assumption of certain excess liability by the risk management fund.** Notwithstanding any provision in this chapter to the contrary, if the attorney general and the director of the office of management and budget determine it is in the best interest of the state, an agency may agree to limit the liability of a contractor to the state. The liability limitation must be approved by the attorney general and director of the office of management and budget in writing and may only be approved for contracts for the purchase or lease of, or services related to, software, communication, or electronic equipment. For any uninsured losses, the director of the office of management and budget may approve the risk management fund to assume all or part of the contractor's liability to the state in excess of the limitation. Contracts for economic forecasting for the office of management and budget may contain a provision limiting the state's ability to seek and recover indirect consequential damages if the director of the office of management and budget and the attorney general determine that such services cannot be effectively obtained without such limitation and that the limitation does not pose any significant risk of loss to the state and is in the best interests of the state. A contract under this section may not limit any direct loss to the state or loss resulting from property damage or personal injury.

Approved March 19, 2009

Filed March 24, 2009

## CHAPTER 290

### HOUSE BILL NO. 1430

(Representatives Thoreson, DeKrey, Klemin, Koppelman)  
(Senators Dotzenrod, Nething)

AN ACT to create and enact chapter 32-46 of the North Dakota Century Code, relating to successor corporation asbestos-related liabilities.

#### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1.** Chapter 32-46 of the North Dakota Century Code is created and enacted as follows:

**32-46-01. Definitions.** As used in this chapter:

1. "Asbestos claim" means a claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos, including:
  - a. The health effects of exposure to asbestos, including a claim for personal injury or death, mental or emotional injury, risk of disease or other injury, or the costs of medical monitoring or surveillance;
  - b. A claim made by or on behalf of a person exposed to asbestos, or a representative, spouse, parent, child, or other relative of the person; and
  - c. A claim for damage or loss caused by the installation, presence, or removal of asbestos.
2. "Corporation" means a corporation for profit, including a domestic corporation organized under the laws of this state or a foreign corporation organized under laws other than the laws of this state.
3. "Innocent successor" means a corporation that assumes or incurs or has assumed or incurred successor asbestos-related liabilities that is a successor and became a successor before January 1, 1972, or is any of that successor corporation's successors.
4. "Successor asbestos-related liabilities" means a liability, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, which is related to asbestos claims and were assumed or incurred by a corporation as a result of or in connection with a merger or consolidation, or the plan of merger or consolidation related to the merger or consolidation with or into another corporation, or that is related in any way to asbestos claims based on the exercise of control or the ownership of stock of the corporation before the merger or consolidation. The term includes liabilities that, after the time of the merger or consolidation for which the fair market value of total gross assets is determined under section 32-46-04, were or are paid or otherwise discharged, or committed to be paid or otherwise discharged,

by or on behalf of the corporation, or by a successor of the corporation, or by or on behalf of a transferor, in connection with settlements, judgments, or other discharges in this state or another jurisdiction.

5. "Transferor" means a corporation from which successor asbestos-related liabilities are or were assumed or incurred.

#### **32-46-02. Applicability.**

1. The limitations in section 32-46-03 apply to an innocent successor corporation.
2. The limitations of section 32-46-03 do not apply to:
  - a. Workers' compensation benefits paid by or on behalf of an employer to an employee under the provisions of title 65, or a comparable workers' compensation law of another jurisdiction;
  - b. A claim against a corporation that does not constitute a successor asbestos-related liability; or
  - c. An obligation under the National Labor Relations Act, 29 U.S.C. 151 et seq., or under a collective bargaining agreement.

#### **32-46-03. Measure of liabilities.**

1. Except as further limited in subsection 2, the cumulative successor asbestos-related liabilities of an innocent successor corporation are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation. The innocent successor corporation does not have responsibility for successor asbestos-related liabilities in excess of this limitation.
2. If the transferor had assumed or incurred successor asbestos-related liabilities or liabilities in connection with a prior merger or consolidation with a prior transferor, then the fair market value of the total assets of the prior transferor determined as of the time of the earlier merger or consolidation must be substituted for the limitation set forth in subsection 1 for purposes of determining the limitation of liability of an innocent successor corporation.

#### **32-46-04. Establishing fair market value of total gross assets.**

1. An innocent successor corporation may establish the fair market value of total gross assets for the purpose of the limitations under section 32-46-03 through any method reasonable under the circumstances, including:
  - a. By reference to the going concern value of the assets or to the purchase price attributable to or paid for the assets in an arms-length transaction; or
  - b. In the absence of other readily available information from which the fair market value may be determined, by reference to the value of the assets recorded on a balance sheet.

2. Total gross assets include intangible assets.
3. To the extent total gross assets include liability insurance that was issued to the transferor whose assets are being valued for purposes of this section, the applicability, terms, conditions, and limits of the insurance are not affected by this chapter, nor does this chapter otherwise affect the rights and obligations of an insurer, transferor, or successor under an insurance contract or any related agreements, including preenactment settlements resolving coverage-related disputes, and the rights of an insurer to seek payment for applicable deductibles, retrospective premiums, or self-insured retentions or to seek contribution from a successor for uninsured or self-insured periods or periods where insurance is uncollectible or otherwise unavailable. Without limiting the foregoing, to the extent total gross assets include any such liability insurance, a settlement of a dispute concerning the liability insurance coverage entered into by a transferor or successor with the insurers of the transferor before the effective date of this Act are determinative of the total coverage of the liability insurance to be included in the calculation of the transferor's total gross assets.

#### **32-46-05. Adjustment.**

1. Except as provided in subsections 2 through 4 of this section, the fair market value of total gross assets at the time of the merger or consolidation increases annually at a rate equal to the sum of:
  - a. The prime rate as listed in the first edition of the Wall Street Journal published for each calendar year since the merger or consolidation, unless the prime rate is not published in that edition of the Wall Street Journal, in which case any reasonable determination of the prime rate on the first day of the year may be used; and
  - b. One percent.
2. The rate found in subsection 1 may not be compounded.
3. The adjustment of the fair market value of total gross assets continues as provided in subsection 1 until the date the adjusted value is first exceeded by the cumulative amounts of successor asbestos-related liabilities paid or committed to be paid by or on behalf of the innocent successor corporation or a predecessor or by or on behalf of a transferor after the time of the merger or consolidation for which the fair market value of total gross assets is determined.
4. An adjustment of the fair market value of total gross assets may not be applied to any liability insurance that may be included in the definition of total gross assets by subsection 3 of section 32-46-04.

**32-46-06. Scope of chapter.** This chapter applies to all asbestos claims filed against an innocent successor on or after the effective date of this Act. This chapter also applies to any pending asbestos claims against an innocent successor in which trial has not commenced as of the effective date, except that any provisions of these sections which would be unconstitutional if applied retroactively must be applied prospectively.

Approved March 24, 2009

Filed March 24, 2009