

INTERIM JUDICIARY COMMITTEE  
Wednesday, August 15, 2012 – 9:00 a.m.

**HOUSE BILL NO. 1365 (enacted)**  
**Study of Statutes of Limitation and Venue Requirements**

Testimony of:

Larry L. Boschee,  
Appearing on behalf of the  
North Dakota Defense  
Lawyers Association

Chairman Nething and Members of the Committee

My name is Larry Boschee and I am appearing for the North Dakota Defense Lawyers Association. The North Dakota Defense Lawyers Association is a statewide association whose member lawyers are primarily engaged in defending civil lawsuits. The North Dakota Defense Lawyers Association opposes the proposed amendment to the venue statutes.

Section 28-04-05 of the North Dakota Century Code provides that unless another statute provides otherwise, an action must be brought in the county in which the defendant or one of the defendants resides. The statute currently provides that if none of the defendants reside here, the plaintiff may sue in whichever county the plaintiff chooses. With the proposed amendment, the statute would provide that if none of the defendants reside here, the plaintiff must sue in the county in which the plaintiff resides or the county in which the cause of action arose.

The proposed amendment to section 28-04-05 of the North Dakota Century Code would violate the Privileges and Immunities Clause of the United States Constitution. U.S. Const. Art. IV, Sec. 2. Under the Privileges and Immunities Clause, “there is a strong constitutional disfavoring of the categorical exclusion of nonresident plaintiffs from a state’s courts under venue statutes when a state resident would be permitted to bring a similar suit.” Morris v. Crown Equip. Corp., 633 S.E.2d 292, 299 (W. Va. 2006). The proposed amendment would preclude a nonresident from suing in North Dakota in situations in which a resident could do so. Consider the following example:

Nathan and Sam, both North Dakota residents, separately contracted with Carl, a California resident, to build separate sets of apartment buildings in South Dakota. Carl traveled to North Dakota to negotiate the contracts and the contracts were signed here. After the contracts were signed, Carl returned to California. Sam moved to South Dakota. Carl never built the apartment buildings, and never set foot in South Dakota.

To sue Carl in North Dakota, (1) a North Dakota court must have personal jurisdiction over him, and (2) venue must exist here. Personal jurisdiction is the power of a court to determine a matter involving a particular person or entity. 16 James W. Moore, Moore’s Federal Practice § 108.02[1] (2012). Venue is a permissible location for the trial. Black’s Law Dictionary 11695 (9th ed. 2010).

In general, for a court of a state to have personal jurisdiction over a nonresident person or entity, that person or entity must have continuous and systematic activities in the state or have directed some activity toward the state related to the cause of action. Beaudoin v. South Texas Blood & Tissue Ctr., 2005 ND 120, ¶¶ 9 -12, 699 N.W.2d 421.

A North Dakota court would have personal jurisdiction over Carl. Carl negotiated and signed the contract in North Dakota. Under the proposed amendment, however, only Nathan could establish venue over Carl in North Dakota. Carl does not reside here, and the cause of action did not arise here. A cause of action for breach of contract arises in the state where performance is to occur. Brevick v. Cunard Steam Ship Co., 247 N.W. 373, 375 (N.D. 1933). Under these facts, that state is South Dakota.

Whether venue exists depends on whether Nathan and Sam live here. Sam could not establish venue here because he does not live here. Because the venue statutes, with the proposed amendment, would allow Nathan, but not Sam, to sue here, they would violate the privileges and immunities clause.

Sam could not sue Carl in South Dakota either because personal jurisdiction would not exist over Carl in South Dakota. Carl had no contacts with South Dakota.

The best way to eliminate forum shopping by out-of-state plaintiffs is to have a limitation period that is similar to what most other states have. Additionally, changes to the venue statutes would not address two fundamental matters that a shorter limitation period would address: (1) preventing stale claims, and (2) bringing North Dakota into the mainstream.