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Right to a Jury Trial in Equitable Cases

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THE RIGHT TO A JURY TRIAL IN EQUITABLE CASES

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I. INTRODUCTION

The question of whether the issues within a civil case[1] entitle a party to a jury trial has been the subject of repeated and intense argument before the North Dakota Supreme Court in recent years.[2] Initially, the right to a jury trial depends upon the status of the case as an action at law or an action in equity.[3] However, if legal issues which entitle a party to a jury are raised in an equitable case,[4] the legal issues are tried to a jury, and the equitable issues are later tried to the court.[5] Whether a defendant is entitled to a jury in an equitable case depends on whether the defendant raises a legal or equitable issue,[6] and whether, assuming a legal issue, it is a counterclaim or a defense.[7]

II. ORIGINS OF THE JURY TRIAL IN NORTH DAKOTA

The constitutional right to a civil trial by jury[8] is found in the

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1. The scope of this article is limited to North Dakota civil actions.

2. See, for recent examples, First Am. Bank West v. Michalenko, 501 N.W.2d 330 (N.D. 1993); Sargent County Bank v. Wentworth, 500 N.W.2d 862 (N.D. 1993); Cook v. Hansen, 499 N.W.2d 94 (N.D. 1993); Farm Credit Bank v. Rub, 481 N.W.2d 451 (N.D. 1992); Adolph Rub Trust v. Rub, 474 N.W.2d 73 (N.D. 1991), *cert. denied,* 112 S. Ct. 1276 (1992), *reh'g denied,* 112 S. Ct. 1713 (1992); First Nat'l Bank and Trust v. Brakken, 468 N.W.2d 633 (N.D. 1991); Land Office Co. v. Clapp-Thomssen Co., 442 N.W.2d 401 (N.D. 1989).

3. Dakota Bank and Trust Co. v. Federal Land Bank, 437 N.W.2d 841, 844 (N.D. 1989) (citations omitted).

4. First Am. Bank West v. Michalenko, 501 N.W.2d 330, 332 (N.D. 1993). Although there is no absolute right to a jury trial in an equitable case, the North Dakota Supreme Court has never recognized the converse right to have an equitable action tried to the court without a jury. *Id.* A trial court may on its own initiative try a nonjury case with an advisory jury. N.D. R. CIV. P. 39(c).

5. Ask, Inc. v. Wegerle, 286 N.W.2d 290, 296 (N.D. 1979).

6. Northwestern Bell Tel. Co. v. Cowger, 303 N.W.2d 791, 794 (N.D. 1981).

7. Great Plains Supply Co. v. Erickson, 398 N.W.2d 732, 735 (N.D. 1986).

8. The right to a civil jury trial contained in the Seventh Amendment to the United States Constitution does not apply to the states, which implies that a federal claim under the Fourteenth Amendment is not available. *See* Alexander v. Virginia, 413 U.S. 836 (1973), *reh'g denied,* 414 U.S. 881 (1973); Nebraska ex rel. Douglas v. Schroeder, 384 N.W.2d 626, 629 (Neb. 1986). However, the Seventh Amendment did extend to the territory of Dakota, and hence, is a source of precedent when interpreting the North Dakota Constitution if the

North Dakota Constitution, which provides in part: "The right of trial by jury shall be secured to all, and remain inviolate."[9] However, that right exists as it was known and understood when the constitution was adopted in 1889.[10] This means that any modification of the common law right to a jury trial which was adopted before our first state constitution was enacted will be included within this definition.[11]

Our right to a jury trial has been preserved as it existed at the time our constitution was enacted.[12] If there was no right to a jury trial for a particular issue in 1889, then there is no constitutional right to a jury trial on that issue today.[13] Therefore, the full scope of the right to a jury trial is different than the general question of whether an issue is equitable or legal, although those terms have often been used in determining the scope of this right.[14] This usage occurred because the historical distinction[15] between courts of law, in which there was a right to a jury trial, and courts of equity, in which there was no such right,[16] largely determined whether there was a right to a jury trial when the constitution was adopted.[17]

III. DETERMINING WHETHER AN ISSUE IS LEGAL OR EQUITABLE

Difficulties arise in determining whether a particular issue will be equitable or legal because the answer may depend upon the

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North Dakota Constitution, statutes or court precedent does not address the issue. Power v. Williams, 205 N.W. 9, 11-12 (N.D. 1925).

9. N.D. CONSTITUTION, art. I, § 13. *See also* N.D. R. CIV. P. 38(a). "The right of trial by jury as declared by the constitution of the United States or by the constitution of the state of North Dakota or as given by a statute of the United States or of the state of North Dakota shall be preserved to the parties inviolate." *Id.*

10. Smith v. Kunert, 115 N.W. 76, 77 (N.D. 1907) (referring to the Constitution of 1889 and quoting that "the right to trial by jury shall be secured to all and remain inviolate").

11. Barry v. Truax, 99 N.W. 769, 771-72 (N.D. 1904) (noting that territorial statutes providing for a change of venue in criminal cases are incorporated into the constitutional right to a jury trial in derogation of the common law right to a trial in the county in which the offense occurred).

12. City of Bismarck v. Altevogt, 353 N.W.2d 760, 764 (N.D. 1984).

13. *In re* R.Z., 415 N.W.2d 486, 488 n.1 (N.D. 1987) (conceding that "there was no right to a jury trial in mental health proceedings in 1889" and holding that there was no constitutional right to a jury trial in the present proceeding). However, a statute could provide a nonconstitutional right to a jury trial. *See* N.D. R. CIV. P. 38(a).

14. *See* First Nat'l Bank and Trust v. Brakken, 468 N.W.2d 633, 635 (N.D. 1991).

15. *See* Landers v. Goetz, 264 N.W.2d 459, 462 (N.D. 1978). New causes of action are analogized to the older common law causes of action in determining whether the federal right to a civil jury trial extends to the new cause of action. Tull v. United States, 481 U.S. 412, 417 (1987).

16. *See* General Elec. Credit Corp. v. Richman, 338 N.W.2d 814, 817 (N.D. 1983). This distinction is retained despite the merger of law and equity into one form of action.

17. *See* Tull v. United States, 481 U.S. 412, 417 (1987).

remedy which is being sought as much as the nature of the subject.[18] The North Dakota Supreme Court has stated that the right to a jury trial exists today in those cases which involve a right to a jury trial when the state constitution was adopted.[19] The court has compared modern cases with both the subject matter and the remedy sought in pre-1889 cases, but the court has not specified an exact method of inquiry.[20] The United States Supreme Court has established a method to determine whether a new cause of action, such as one created by statute, is legal or equitable by comparing it to suits tried in courts of law and suits tried in courts of equity in the eighteenth century.[21] The federal method does not contradict North Dakota law and may be a useful method of analysis if a complex new issue arises in North Dakota.[22]

Under the federal method, both the subject of the action and the nature of the remedy sought must be examined.[23] As mentioned earlier, the cause of action is compared to eighteenth century actions at law or actions in equity.[24] However, the proper characterization of "the relief sought is 'more important' than finding a precisely analogous common law cause of action . . . ."[25] The underlying purpose of the remedy sought is important.

As an example of how courts look to the underlying remedy when defining the purpose of the action, in *Tull v. United States*,[26] the federal government sought a civil penalty for violations of the Clean Water Act. The government sought civil penalties and an injunction against a developer who had filled in protected wetlands.[27] Because the action was more akin to an action at law for punishment than an action in equity for disgorging improper prof-

18. 27 AM. JUR. 2d *Equity* §§ 52, 53; *Tull*, 481 U.S. at 417 ("To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity . . ., the Court must examine both the nature of the action and the remedy sought.").

19. City of Bismarck v. Altevogt, 353 N.W.2d 760, 764 (N.D. 1984).

20. *See id.* at 765. Although *Altevogt* is a criminal case, it was cited in a civil case, *In re* R.Z., 415 N.W.2d 486, 488 n.1 (N.D. 1987), and it cited to a civil case, General Electric Credit Corp. v. Richman, 338 N.W.2d 814 (N.D. 1983). This implies that the holding in *Altevogt* would apply to civil cases on this issue.

21. Tull v. United States, 481 U.S. 412, 417 (1987).

22. Of course, the North Dakota Constitution preserves the right to a jury trial as it existed when it was adopted in 1889, Smith v. Kunert, 115 N.W. 76, 77 (N.D. 1908), while the federal Constitution preserves that right as it existed when the Seventh Amendment was adopted in 1791, Pernell v. Southall Realty, 416 U.S. 363, 374 (1974). Variations in this or other particular details do not affect the method of analysis.

23. *Tull*, 481 U.S. at 417.

24. *Id.*

25. *Id.* at 421 (citations omitted).

26. *Id.* at 414-15.

27. *Id.*

its, the court stated that the defendant had a right to a jury trial.[28]

North Dakota has essentially made the same analysis without actually stating the method outright. For example, the North Dakota Supreme Court addressed the right to a jury in a case involving the alleged violation of local dog control ordinances.[29] The court examined the nature of the case—the violation of a city ordinance—and compared the present state law with statutes dating back to Territorial days.[30] The court concluded that the statute gave the defendant a right to a jury trial, despite the fact that petty offenses do not entitle the defendant to a jury trial as a matter of constitutional right.[31] This method of analysis, by examining prior similar statutes defining the action, parallels the method of analysis adopted by the United States Supreme Court in *Tull*.

Many actions have been defined as legal or equitable by statute or by the supreme court. Equity actions include actions for cancellation of a contract,[32] the foreclosure of a mortgage,[33] divorce,[34] quieting title,[35] specific performance,[36] and an injunction or preventive relief.[37] Special proceedings, such as applications for writs of certiorari,[38] mandamus,[39] and prohibition,[40] are tried to a judge, as are applications for a writ of habeas corpus.[41]

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28. *Tull*, 481 U.S. at 424-25.

29. City of Bismarck v. Altevogt, 353 N.W.2d 760, 761, 764-65 (N.D. 1984).

30. *Id.* at 764-65.

31. *Id.* at 765-66.

32. Fedorenko v. Rudman, 71 N.W.2d 332, 335 (N.D. 1955). "Rescission of a contract, whether the object of a suit in equity or an action at law, is governed by equitable principles." *Id.* The remedy is not an absolute right but is discretionary with the court. Heinsohn v. William Clairmont, Inc., 364 N.W.2d 511, 513 (N.D. 1985). "Cancellation of a contract for deed by action is an action in equity." Adolph Rub Trust v. Rub, 474 N.W.2d 73, 75 (N.D. 1991), *cert. denied*, 112 S. Ct. 1276, (1992), *reh'g denied*, 112 S. Ct. 1713 (1992).

33. First Nat'l Bank and Trust v. Brakken, 468 N.W.2d 633, 635 (N.D. 1991) (finding that foreclosure of a mortgage is an equitable proceeding).

34. Martian v. Martian, 328 N.W.2d 844, 846 (N.D. 1983). However, "actions for divorce are not equitable actions in the normal sense" because "[t]he jurisdiction of the courts . . . to grant divorces and to order alimony and property division is entirely statutory." Becker v. Becker, 262 N.W.2d 478, 482 (N.D. 1978).

35. Alfson v. Anderson, 78 N.W.2d 693, 701 (N.D. 1956) (recognizing that action to quiet title is essentially an action of equity).

36. *Alfson*, 78 N.W.2d at 701 (opining that "[s]pecific performance is an equitable remedy governed by equitable principles").

37. N.D. CENT. CODE § 32-06-02 (1976 & Supp. 1991).

38. N.D. CENT. CODE § 32-33-01 (1976 & Supp. 1991). A writ of certiorari shall be granted by the supreme court or district court when an inferior court or government agency or officer has exceeded its jurisdiction. *Id.*

39. N.D. CENT. CODE § 32-34-01 (1976 & Supp. 1991). "The writ of mandamus may be issued by the supreme and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act" pursuant to duty. *Id.*

40. N.D. CENT. CODE § 32-35-01 (1976 & Supp. 1991). "The writ of prohibition is the counterpart to the writ of mandamus." *Id.* It may be issued by the supreme or district court to an inferior tribunal, corporation, board, or person to prohibit actions taken outside of their jurisdiction. N.D. CENT. CODE § 32-35-02 (1976 & Supp. 1991).

41. N.D. CENT. CODE § 32-22-01 (1976 & Supp. 1991). "Every person imprisoned or

Also, applications to establish the date and place of a person's birth,[42] a person's residency and citizenship,[43] or a petition to change the name of a person[44] or city,[45] are made to the court pursuant to statute.

Actions at law in which the right to a jury trial exists include actions for the recovery of money only,[46] damages in eminent domain actions,[47] and damages in claim and delivery actions.[48] The Rules of Civil Procedure also recognize the right to a jury trial when a state or federal statute grants that right.[49] Additionally, issues of fact in declaratory judgment actions may be determined by a judge or jury as they would be in the underlying civil action.[50]

IV. THE PLAINTIFF'S CASE

The plaintiff has the first opportunity to shape the case by drafting the complaint to allege either legal or equitable issues. Although the major issue in drafting a complaint is finding which remedy or remedies best suit the client's needs,[51] other issues may be important to the lawyer, if not to the law, such as the complex-

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restrained . . . may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment" and seek relief if it is unlawful. *Id.* The writ of habeas corpus may be granted by the supreme court or the district court. N.D. CENT. CODE § 32-22-04 (1976 & Supp. 1991).

42. N.D. CENT. CODE § 32-37-04 (1976). If, after a hearing, the court is satisfied that the petitioner has proven his or her citizenship and the date and place of birth, the court "shall make appropriate findings of fact and conclusions of law and shall order a judgment to that effect[.]" *Id. See also* N.D. CENT. CODE § 32-27-02(3) (1976).

43. N.D. CENT. CODE § 32-27-05 (1976). "If, after the hearing, the court is satisfied that the petitioner is a bona fide citizen of . . . North Dakota, it shall make appropriate findings of fact and conclusions of law and shall order a judgment to that effect[.]" *Id.*

44. N.D. CENT. CODE § 32-28-02 (1976 & Supp. 1991). The judge of the district court, upon satisfactory proof, shall order the change of the petitioner's name. *Id.*

45. N.D. CENT. CODE § 32-28-03 (1976 & Supp. 1991). Upon satisfactory proof, the district court of the county in which the petitioning city is located may order the change of the city's name. *Id.*

46. First Nat'l Bank and Trust v. Brakken, 468 N.W.2d 633, 635 (N.D. 1991) (finding that "[a]n action at law for recovery of money only is triable to a jury as a matter of right").

47. N.D. CENT. CODE § 32-15-01 (1976 & Supp. 1991). Unless a jury is waived, compensation for the taking of private property for public use shall in all cases be ascertained by jury. *Id.*

48. N.D. CENT. CODE § 32-07-12 (1976). *See also* Cook v. Hansen, 499 N.W.2d 94, 97 (N.D. 1993) (holding that "[a]n action for possession of personal property or the recovery of money for that property is triable to a jury upon proper demand") (citation omitted)).

49. N.D. R. CIV. P. 38(a). "The right of trial by jury as declared by the constitution of the United States or by the constitution of the state of North Dakota or as given by a statute of the United States or of the state of North Dakota shall be preserved to the parties inviolate." *Id.*

50. N.D. CENT. CODE § 32-23-09 (1976). "When a [declaratory judgment] proceeding . . . involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." *Id.*

51. "[A] party may obtain an equitable remedy even if he has a remedy at law if the equitable remedy is better adjusted to rendering complete justice." A & A Metal Buildings v. I-S, Inc., 274 N.W.2d 183, 189 n.2 (N.D. 1978).

ity of a case,[52] or how the factfinder may react if basic moral principles differ from the law.[53] These decisions are matters better decided by the individual lawyer's beliefs and personality or by the client's position rather than through the analysis of statutes and caselaw.

A. THE PLAINTIFF MUST PLEAD FACTS SHOWING A CLAIM FOR EQUITABLE OR LEGAL RELIEF

In determining whether a complaint sets forth facts entitling the plaintiff to a jury trial, courts will examine the pleadings to determine whether the issues are legal or equitable, including both the prayer for relief and the allegations of fact.[54] When a claim seeking legal relief is "merely incidental to and dependent upon the right to equitable relief," there is no right to have a jury determine the legal issue.[55] Thus, in *Lithun v. Grand Forks Pub. Sch. Dist. No. 1*,[56] a plaintiff sought an equitable injunction reinstating his employment as a schoolteacher and also asked for legal money damages.[57] The damage claims that could have been awarded by the trial court were incidental to the injunction, and the existence of factual issues relating to those claims did not enti-

52. Landers v. Goetz, 264 N.W.2d 459, 463 (N.D. 1978) (stating that complexity of the case is not sufficient reason to deny a jury trial to a person entitled to one). However, in one case in which a party moved for a jury trial after having waived that right, the supreme court agreed with the trial judge that the complexity of the case was one of the reasons weighing against granting a jury trial. Hanson v. Williams County, 452 N.W.2d 313, 314-15 (N.D. 1990). I am personally aware of one case involving complex issues of causation and damages, which is pending in the trial court as this is being written, where one of the attorneys told me that the parties agreed to a bench trial because they believed that the issues were too difficult for a jury. The author has not yet formed a personal opinion on this matter.

53. Basic moral principles may come into a case and either affect the outcome despite the law, or, more subtly, how the factfinder views the truthfulness of a witness. In a recent decision reversing a foreclosure action and remanding for a new trial because the trial judge had been represented by the plaintiff's counsel, Surrogate Justice Pederson concurred, stating:

> I start with the basic premise that "when you borrow, you have to repay." Psalms, Chapter 37—Verse 21; Proverbs, Chapter 3—Verses 27 and 28; and Proverbs, Chapter 22—Verse 7, all seem to tell me that. Does a lender have to proceed with exactitude and be somehow "otherwise qualified" to collect when payments are overdue? What kinds of errors by the court will hereafter be held to be alterations of the basic premise?

Sargent County Bank v. Wentworth, 500 N.W.2d 862, 880 (N.D. 1993) (Pederson, S.J., concurring specially). The trial court's decision was reversed, despite the fact that "the record show[ed] beyond question that [the trial judge] fairly tried this case." *Id.* Although I do not have any empirical data in support of this proposition, Surrogate Justice Pederson's opinion probably speaks for a majority of potential North Dakota jurors. A nonlawyer may not have agreed to reverse and remand this particular case for a new trial.

54. General Elec. Credit Corp. v. Richman, 338 N.W.2d 814, 817 (N.D. 1983).

55. Lithun v. Grand Forks Pub. Sch. Dist. No. 1, 307 N.W.2d 545, 548-49 (N.D. 1981).

56. 307 N.W.2d 545 (N.D. 1981).

57. Lithun v. Grand Forks Pub. Sch. Dist. No. 1, 307 N.W.2d 545 (N.D. 1981).

tle the plaintiff to a trial by jury.[58] The same rule also has been applied in reverse. In a minority shareholders' action against the majority shareholder of a closely held corporation, the court found that the plaintiffs' request for incidental equitable relief could not be used to deprive them of their right to a jury trial on their legal claims for money damages.[59]

B. PLAINTIFFS SEEKING TO AVOID A JURY MUST SHOW THAT ONLY EQUITABLE RELIEF IS BEING SOUGHT

A plaintiff seeking to avoid a jury trial must "clearly and unambiguously" show in the complaint that only equitable relief is being sought.[60] In *Moses v. Burleigh County*,[61] a plaintiff brought a case in which he originally sought an injunction, but later amended the complaint to only include money damages.[62] Based on the amended complaint, and over the plaintiff's objection, the defendant was entitled to a jury trial.[63] Therefore, the form of the complaint is not the determining factor. For example, the plaintiff in *Kilgore v. Farmers Union Oil Co.*[64] sought to avoid a jury trial in an action for a money judgment by seeking an equitable accounting.[65] The complaint only alleged facts showing legal breach of contract and the facts pled failed to show grounds necessary for an accounting.[66] It was error, therefore, for the trial court to deny the defendant's demand for a jury trial.[67] Thus, a defendant who wants a jury trial should carefully analyze and contest the complaint on both the legal and factual issues.

C. INCIDENTAL RELIEF WILL NOT OVERCOME THE PRINCIPLE CLAIM

When a complaint seeks both legal and equitable relief, the analysis should be taken a step further by examining which remedy sought is the primary claim and which remedy is incidental to

58. *Id.* at 548-49.
59. Schumacher v. Schumacher, 469 N.W.2d 793, 800 (N.D. 1991).
60. General Elec. Credit Corp. v. Richman, 338 N.W.2d 814, 818 (N.D. 1983). In *Richman*, the supreme court found that the complaint could reasonably have been construed as seeking either equitable or legal relief and held that "the trial court erred in denying the [defendants'] demand for a trial by jury." *Id.* at 818-19.
61. 438 N.W.2d 186 (N.D. 1989).
62. Moses v. Burleigh County, 438 N.W.2d 186, 194 (N.D. 1989).
63. *Id.*
64. 24 N.W.2d 26 (1946).
65. Kilgore v. Farmers Union Oil Co., 24 N.W.2d 26, 27 (N.D. 1946).
66. *Id.* at 30.
67. *Id.* at 30-31.

or dependent upon that primary claim.[68] For instance, the plaintiff in *C.I.T. Corp. v. Hetland*,[69] sought both the foreclosure of a mortgage and a money judgment for the amount of the note, and the supreme court found that the case was properly tried to the court because the money judgment was an inherent part of the foreclosure.[70] However, in *Schumacher v. Schumacher*,[71] the plaintiffs sought a money judgment for damages and an equitable implied trust on the defendants' real estate.[72] The *Schumacher* court found that the implied trust was "incidental to and dependent upon [the] legal claims for damages."[73]

V. THE DEFENDANT'S CASE

A defendant who wants a jury trial when the plaintiff's claim initially appears to be one of equity should first examine the complaint to see if it truly is an equitable claim.[74] If the complaint truly is in equity, then it may still be possible to allege as a counterclaim a legal issue entitling the defendant to a jury trial as to those issues.[75] However,

> [w]henever the issues are so interrelated that a decision in the nonjury portion might affect the decision of the jury portion, the jury portion is to be tried first, since otherwise the party entitled to the jury trial would be deprived of part or all or his right to a jury trial.[76]

By doing this, it may be possible to have the important fact issues decided by a jury. However, there is a risk with this procedure that the court might hold that the counterclaim is a defense or incidental to a defense, which would not entitle the defendant to a jury trial on any of the issues raised.[77]

A. DEFENSE OR COUNTERCLAIM

The distinction between a defense and a counterclaim is nec-

68. Production Credit Ass'n v. Rub, 475 N.W.2d 532, 537 (N.D. 1991); Lithun v. Grand Forks Pub. Sch. Dist. No. 1, 307 N.W.2d 545, 549 (N.D. 1981).
69. 143 N.W.2d 94 (N.D. 1966).
70. C.I.T. Corp. v. Hetland, 143 N.W.2d 94, 101 (N.D. 1966).
71. 469 N.W.2d 793 (N.D. 1991).
72. Schumacher v. Schumacher, 469 N.W.2d 793, 796 (N.D. 1991).
73. *Id.* at 800.
74. *See* Kilgore v. Farmers Union Oil Co., 24 N.W.2d 26, 30-31 (N.D. 1946).
75. *See* Landers v. Goetz, 264 N.W.2d 459, 462 (N.D. 1978) (citing Lehman v. Coulter, 168 N.W.2d 724 (N.D. 1918)).
76. *Id.* at 463.
77. *See* Sargent County State Bank v. Wentworth, 500 N.W.2d 862, 868 (N.D. 1993); First Nat'l Bank and Trust v. Brakken, 468 N.W.2d 633, 635 (N.D. 1991).

essarily fact specific to each case. The defendant's designation of an issue as a defense or counterclaim in the pleadings is not determinative by itself because the trial court has the authority to properly designate the issues if the party's label is shown to be incorrect.[78] The test used by the supreme court is whether the allegations negate the claim being made, which has been labeled a defense, or whether the allegations present an independent cause of action, which has been labeled a counterclaim.[79] If an issue is one of the affirmative defenses listed in Rule 8(c) of the North Dakota Rules of Civil Procedure,[80] the issue would probably be designated as a defense to the plaintiff's claim whether or not the defense is legal or equitable.[81] This is also true with compulsory counterclaims under the Rules.[82]

1. *A Defense is Defined as the Negation of the Plaintiff's Claim*

The negation of the other party's claim has been the primary factor in determining whether a legal issue raised in opposition is a defense or is incidental to a defense. In *First Nat'l Bank and Trust v. Brakken*,[83] the defendant's allegations of "failure of consideration and fraudulent inducement," if proven, would have negated the plaintiff's claims based upon a note and a mortgage.[84] These allegations were found to be defenses because they controverted the opposing party's claims.[85] Likewise, a claim of unjust enrichment raised as a counterclaim against a trustee who was suing to cancel a contract for deed was incidental to a defense because it

78. N.D. R. CIV. P. 8(c). "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." *Id. See also* Great Plains Supply Co. v. Erickson, 398 N.W.2d 732, 735 (N.D. 1986).

79. *See* First Nat'l Bank and Trust v. Brakken, 468 N.W.2d 633, 636 (N.D. 1991).

80. N.D. R. CIV. P. 8(c). The listed affirmative defenses are "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." *Id.*

81. *See* Ask, Inc. v. Wegerle, 286 N.W.2d 290, 295 (N.D. 1979) (stating that "the raising of affirmative legal defenses in equitable actions, such as the ones listed in N.D. R. CIV. P. 8(c), does not change an action from one triable before the court to one triable before a jury").

82. A compulsory counterclaim is "any claim the pleader has against any opposing party when the pleading is served, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require [additional parties] of whom the court cannot acquire jurisdiction." N.D. R. CIV. P. 13(a).

83. 468 N.W.2d 633 (N.D. 1991).

84. First Nat'l Bank and Trust v. Brakken, 468 N.W.2d 633, 636 (N.D. 1991).

85. *Id.*

was "incidental to and dependent upon one of [the] defenses . . . ."[86] It appears that whether a defendant's claim against the plaintiff is a permissive or compulsory counterclaim as defined in Rule 13(a) of the North Dakota Rules of Civil Procedure is less important than whether the defendant's claim negates the plaintiff's claim.

2. *A Legal Claim for Damages by the Defendant is Not Sufficient to Obtain a Jury Trial if it is Incidental to and Dependent Upon the Defense to an Equitable Action*

Even when a defendant raises an issue denominated as a counterclaim for money damages, the defendant "is not entitled to a jury trial if the damage claim is incidental to and dependent upon a primary claim for which a jury trial is not allowed."[87] For example, in *Sargent County Bank v. Wentworth*,[88] a farmer made damage claims relating to the allegedly wrongful seizure of livestock and equipment by a foreclosing lender.[89] The court found those claims incidental to and dependent upon the success of the farmer's defenses against the debt because the seizures were not wrongful unless the farmer was successful in defending against the foreclosure action.[90] Similarly, a defendant seeking money damages at law for breach of a mortgage agreement was not entitled to a jury trial because those damages were dependent upon the defendant's success against the plaintiff's equitable foreclosure claim.[91] Even when a defendant alleged mental or emotional distress resulting from the plaintiff's actions in a foreclosure case as a counterclaim, that claim was found to be incidental to and dependent upon her success in defending against the plaintiff's claims because the allegedly wrongful actions taken by the plaintiff would only be wrongful under these circumstances if the plaintiff could prove her defenses of failure of consideration and fraudulent inducement in the mortgage contract.[92]

86. Adolph Rub Trust v. Rub, 474 N.W.2d 73, 75-76 (N.D. 1991), *cert. denied*, 112 S. Ct. 1276 (1992), *reh'g denied*, 112 S. Ct. 1713 (1992).
87. Sargent County Bank v. Wentworth, 500 N.W.2d 862, 873 (N.D. 1993).
88. 500 N.W.2d 862 (N.D. 1993).
89. Sargent County Bank v. Wentworth, 500 N.W.2d 862, 873 (N.D. 1993).
90. *Id.*
91. Farm Credit Bank v. Rub, 481 N.W.2d 451, 458 (N.D. 1992).
92. First Nat'l Bank and Trust v. Brakken, 468 N.W.2d 633, 635-36 (N.D. 1991).

3. *Procedural Rules Defining Compulsory Counterclaims Are Not Reliable Guides to Whether an Issue is a Defense or Counterclaim*

The definition of a counterclaim under the Rules of Civil Procedure is not a reliable determining factor in regard to whether an issue is a defense or an independent cause of action. A compulsory counterclaim under the Rules is a claim which arises out of the same transaction or occurrence that is the subject of the suit.[93] For example, in *Graven v. Backus*,[94] the plaintiff alleged that the defendant's building encroached upon his land and sought an injunction requiring its removal.[95] The defendant countered by denying the encroachment and seeking either dismissal or, in the alternative, a forced sale of the encroached land from the plaintiff to the defendant.[96] The alternative remedy was found to be a compulsory counterclaim because it was auxiliary to the original action and dependent upon the original claim.[97] This holding was made despite the fact that had the original suit not been brought, it may still have been possible for the defendant to have brought this claim as an original action.[98] Therefore, it is not sufficient simply to determine whether a defendant's counterclaim would be able to stand as a cause of action in a theoretical vacuum without reference to the plaintiff's complaint.[99]

However, when a counterclaim presented only legal issues against an equitable claim, the fact that it was found to be a compulsory counterclaim did not affect the defendant's right to a jury trial on the counterclaim.[100] Further, in another case, the plaintiff alleged an equitable mechanics' lien against the defendants' house, while the counterclaim sought money damages for

93. N.D. R. CIV. P. 13(a). Such a claim need not be stated if, "at the time the action was commenced the claim was the subject of another pending action," or if the court "did not acquire jurisdiction to render a personal judgment on the claim . . . ." *Id.*

94. 163 N.W.2d 320 (N.D. 1968).

95. Graven v. Backus, 163 N.W.2d 321, 323 (N.D. 1968).

96. *Id.*

97. *Id.* at 323-24. Although the alternative remedy sought by the defendant was also equitable, the case is cited here for the definition of the remedy as a compulsory counterclaim.

98. *See* Ward v. Shipp, 340 N.W.2d 14 (N.D. 1983).

99. The party who chooses to sue first as plaintiff may have an advantage in positioning itself regarding the jury issue because that party gets to draft the complaint to seek either legal or equitable relief. The party who becomes the defendant is left to respond to the complaint and may have to show that the complaint mischaracterized the underlying facts or that the defendant has an independent counterclaim.

100. Landers v. Goetz, 264 N.W.2d 459, 463 (N.D. 1978).

improper workmanship.[101] The supreme court did not determine whether the legal counterclaim was compulsory or permissive, but because the allegedly improper workmanship was the same workmanship secured by the mechanics' liens it would appear to be compulsory because it arose out of the same transaction or occurrence as the complaint.[102] The counterclaim for money damages for faulty workmanship did not necessarily negate the mechanics' liens because the right to money damages for faulty performance does not always negate the workers' right to payment for the value of their work.[103] Therefore, the defendants' legal claim for damages was not a defense or incidental to a defense against the mechanics' lien.

B. PERMISSIVE COUNTERCLAIMS ARE ALWAYS INDEPENDENT FROM THE PLAINTIFF'S CASE BY DEFINITION

A permissive counterclaim is a "claim . . . not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."[104] The test for whether a counterclaim is permissive or compulsory is whether the defendant's claim is logically related to the plaintiff's claim that is the subject of the action.[105] Therefore, a permissive counterclaim, not being logically related to the claim, would always be an independent cause of action.[106] If the permissive counterclaim is legal in nature, then a jury trial may be had as a matter of right on the counterclaim, regardless of the equitable nature of the complaint.[107]

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101. Ask, Inc., v. Wegerle, 286 N.W.2d 290, 291 (N.D. 1979).

102. *See* N.D. R. CIV. P. 13(a).

103. *See* Dittmer v. Nokleberg, 219 N.W.2d 201, 210 (N.D. 1974) (finding that the contractor could claim the amount due under the contract, but would have to respond in damages for the defects in the performance when the contractor did not willfully default and when there was substantial performance).

104. N.D. R. CIV. P. 13(b).

105. Dangerud v. Dobesh, 353 N.W.2d 328, 330 (N.D. 1984) (citing Leo Lumber Co. v. Williams, 191 N.W.2d 573, 577 (N.D.1971)).

106. Under Rule 38 of the North Dakota Rules of Civil Procedure, a party waives the right to a jury trial unless a demand for one was made no later than ten days after service of the last pleading directed to that issue. *See* Land Office Co. v. Clapp-Thomssen Co., 442 N.W.2d 401, 403 (N.D. 1989). Once waived, "the right to trial by jury on that issue cannot be revived by amending or supplementing a pleading." *Id.* However, "[i]f new issues are raised by amended or supplemental pleadings, a previously waived right to a jury trial is revived only to the new issues." *Id.* A permissive counterclaim would contain such new issues, allowing a previous waiver of the right to a jury trial to be revived as to the new issues which are raised.

107. *See* Ask, Inc. v. Wegerle, 286 N.W.2d 290, 296 (N.D. 1979).

C. THE RISK OF SEPARATE TRIALS OR SEVERANCE

The trial court may order the separate trial within a case of "any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue . . . or issues" in order to avoid inconvenience or prejudice.[108] The trial court also could sever any claim against a party and proceed with it in a separate case.[109] In either instance, the decision is subject to the abuse of discretion standard.[110] Questions involved in separating issues for trial could include a consideration of whether separate, distinct issues could be tried apart to avoid delay on some of the issues.[111] Severance of a single case is appropriate when the claims are unrelated.[112]

A counterclaim is subject to possible severance if it does not negate the plaintiff's claims as a defense. If the defendant's legal counterclaim is severed as a separate case, the defendant would not be able to have the jury's determination govern the equitable issues.[113] However, if the defendant's legal counterclaim is merely separated for trial, it would still be possible for the legal claims to be first determined by a jury and the equitable claims decided in light of the jury's verdict.

VI. TRIALS INVOLVING BOTH LEGAL AND EQUITABLE ISSUES

When there are legal and equitable issues in the same case, there must be a determination of to what extent the issues are tried to a jury or to the court. Generally, when there are legal issues which entitle a party to a jury trial, they should be tried to

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108. N.D. R. CIV. P. 42(b).

109. *See* N.D. R. CIV. P. 21.

110. Giese v. Engelhardt, 175 N.W.2d 578, 583 (N.D. 1970). The supreme court has cautioned that care should be taken to distinguish between Rule 21 of the North Dakota Rules of Civil Procedure, which provides for severing claims, and Rule 42(b) of the Rules, which provides for separate trials within the same case. Federal Land Bank v. Wallace, 366 N.W.2d 444, 448 n. 1 (N.D. 1985); Schell v. Schumacher, 298 N.W.2d 474, 477 n.5 (N.D. 1980).

111. *See* Schell v. Schumacher, 298 N.W.2d 474, 477 (N.D. 1980).

112. *See* Federal Land Bank v. Wallace, 366 N.W.2d 444, 448-49 (N.D. 1985).

113. However, if the severed legal counterclaim is tried first, the equitable case remaining may be subject to issue preclusion or claim preclusion under the doctrine of res judicata. Claim preclusion prevents the "relitigation of claims or issues that were raised or could have been raised in a prior action between the same parties or their privies and which was resolved by final judgment in a court of competent jurisdiction." Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 383 (N.D. 1992). Issue preclusion prevents the "relitigation, in a second action based on a different claim, of particular issues of either fact or law which were, or by logical . . . implication must have been, litigated and determined in the prior suit." *Id.* Thus, there is also the danger that if the equitable case is tried first, the legal case may be bound by those determinations as well.

the jury before the equitable issues are tried to the court.[114] If the legal and equitable issues "are so interrelated that a decision in the nonjury portion might affect the decision of the jury portion, the jury portion is to be tried first" in order not to deprive the party entitled to the jury trial of that right.[115] In the context of such a case, the legal and equitable claims cannot be decided simultaneously, but the equitable decision must be made after the jury has decided the legal issues.

A. ONE FORM OF ACTION

In North Dakota, only one type of action exists: a civil action.[116] This combination of legal and equitable powers into one general court was intended to eliminate the distinction between law and equity by combining both in the same action.[117] Under the federal rules,[118] a party may seek both legal and equitable remedies at the same time in order to avoid delay.[119] The same court can try both legal and equitable issues in the same case with the jury rendering a verdict on the legal claims and the court rendering a decision on the equitable issues.[120]

B. THE TRIAL COURT SHOULD ALWAYS MAKE FINDINGS ON EQUITABLE ISSUES EVEN IF A LEGAL REMEDY IS GRANTED

In cases where there are concurrent legal and equitable claims, all of the claims are a part of the same civil action. Accordingly, the court should make the necessary findings on the equitable claims while the jury has made its findings on the legal claims.[121] Whether the equitable claims will result in equitable remedies as a part of the judgment depends upon whether they

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114. Landers v. Goetz, 264 N.W.2d 459, 463 (N.D. 1978).

115. *Id.*

116. N.D. R. CIV. P. 2. Law and equity have been fused in North Dakota since statehood, and the law in the Territory of Dakota gave courts of general jurisdiction the power to grant legal or equitable relief from the first territorial legislative session in 1862. *See* Ziebarth v. Kalenze, 238 N.W.2d 261, 267 (N.D. 1976) (recognizing the benefit of legal remedy when equity fails).

117. N.D. R. CIV. P. 2. explanatory comment.

118. The Federal Rules of Civil Procedure are identical to the North Dakota Rules. *See* N.D. R. CIV. P. 2. explanatory comment.

119. *See* United States v. 93.970 Acres of Land, 360 U.S. 328, 332 (1959).

120. DePinto v. Provident Sec. Life Ins. Co., 323 F.2d 826, 835 (9th Cir. 1963).

121. In a case in which the equitable remedy failed because it was impossible to perform, and the trial court granted legal damages instead, the supreme court noted that it would involve a "needless waste of time and money" for the case to be repled and retried. Ziebarth v. Kalenze, 238 N.W.2d 261, 267 (N.D. 1976). The supreme court also found that the defendant had waived the right to a jury trial and so the trial court did not err by determining the facts in the legal issue. This implies that even though a legal remedy has

duplicate the legal remedies. A party is not entitled to equitable relief if there is an adequate remedy at law.[122] However, "a party may obtain an equitable relief even if [that party] has a remedy at law if the equitable remedy is better adjusted to rendering complete justice."[123] The determination that a party is not entitled to equitable relief because of the existence of an adequate remedy at law cannot logically be made until after one is able to compare the two remedies.

C. AN ELECTION OF REMEDIES IS NOT REQUIRED BEFORE TRIAL

An election of remedies between legal and equitable claims is not necessarily required under the Rules of Civil Procedure.[124] Applying the federal rules, a federal court rejected Illinois precedent requiring such an election before trial because Illinois had separate courts of law and equity, which had been combined for the federal courts under Rule 2.[125] That court concluded that even when a legal remedy had been granted under a contract for past damages for fraud, an equitable remedy could still be applied, if appropriate, for the equitable rescission of the contract as related to future actions.[126] Therefore, the legal and equitable remedies sought were not inconsistent, and the plaintiff's legal remedy did not preclude the application of an equitable remedy which was better suited to rendering complete justice.

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been granted, the necessary findings on the equitable claims should still be made in case the legal remedy fails on appeal.

Under Rule 49(a) of the North Dakota Rules of Civil Procedure, when the court directs the jury to return a verdict "in the form of a special written finding upon each issue of fact[,]" the court must "give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." N.D. R. CIV. P. 49(a). The Rule further provides, in pertinent part:

> If . . . the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without a demand the court may make a finding; or, if it fails to do so, it is deemed to have made a finding in accord with the judgment on the special verdict.

N.D. R. CIV. P. 49(a). *See also* Williams County Social Serv. Bd. v. Falcon, 367 N.W.2d 170, 174-75 (N.D. 1985). By following this procedure, it would be reasonable for a trial court to make findings on equitable issues in accord with the facts as found by a jury's special verdict form.

122. D.C. Trautman Co. v. Fargo Excavating Co., Inc., 380 N.W.2d 644, 645 (N.D. 1986).

123. A & A Metal Buildings v. I-S, Inc., 274 N.W.2d 183, 189 n.2 (N.D. 1978). *See also* Ziebarth v. Kalenze, 238 N.W.2d 261, 267 (N.D. 1976).

124. *See* Roberts v. Sears, Roebuck and Co., 573 F.2d 976, 985 (7th Cir. 1978).

125. *Id.*

126. *Id.* at 985-86.

VII. CONCLUSION

A party who has decided that a jury trial is or is not desirable will have to examine the facts and issues in light of the distinction between equity and law. The choice of remedies, when there is a choice, should be carefully considered if the party believes it important to try the case before a jury or before a judge. The underlying facts of a case will be much more important to the ultimate decision than a party's labels or characterizations of the issues.