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THE LIFE INSURANCE LAW OF NORTH DAKOTA

By JOHN A. ZUGER**

I.

CONSTITUTIONAL AND LEGISLATIVE SOURCES

A. *The Constitution.* By act of March 2, 1861, there was created a temporary government for the territory of Dakota. On February 22, 1889, the enabling act was passed providing for the division of Dakota into two states and to be admitted to the Union. The North Dakota Constitution was adopted October 1, 1889. The office of insurance commissioner is one of the constitutional elective offices.

B. *Legislation.* The legislative power is vested in a Legislative Assembly consisting of a Senate and House of Representatives which meets each odd numbered year for a sixty day session on the first Tuesday after the first Monday in January. The statutes are contained in the North Dakota Century Code, annotated, published by the Legislative Assembly under the supervision of the Legislative Research Committee and the Secretary of State by the Allen Smith Company of Indianapolis, Indiana. The Code consists of thirteen volumes and 65 titles. Title 26, Volume 4 is Insurance, Volume 13 contains the State Constitution, parallel tables and tables of session laws. Volume 4 is a general index. Amendments become effective on July 1 following each session and pocket parts issued biennially become available about that date. A separate bound volume of the laws enacted by each legislative session is available from the Secretary of State.

C. *The Courts.* The Supreme Court has appellate jurisdiction only except where specially provided by law or the Constitution. In exercise of original jurisdiction and supervision of inferior courts it may issue original and remedial writs. Its original jurisdiction exists in habeas corpus and cases of strictly public concern affecting the sovereign rights of the state or its franchises and privileges. It is a five man court. It meets each month except July and August.

* Permission to reprint this article granted by the Association of Life Insurance Counsel.

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District Courts have general jurisdiction in all civil actions, exercising all powers of Courts of both law and equity. District Courts have jurisdiction of appeals from county justices, municipal courts, county courts acting in their probate jurisdiction and from determination of inferior boards, and officers. The state is divided into six judicial districts.

County Courts have original exclusive jurisdiction in probate and guardianship. A Court exists in each county. Some counties by vote have given their courts increased jurisdiction known as County Courts of Increased Jurisdiction. Such courts have additional and concurrent jurisdiction with the district court up to \$1000 and in criminal actions below the grade of felony.

County Justice Courts have jurisdiction of misdemeanors and jurisdiction of the former justices of the peace, i.e., up to \$250 in a civil action, but have no jurisdiction to try title to real property.

Municipal Courts have jurisdiction only to hear, try and determine offenses against ordinances of the city with a limit on penalty of \$100 fine, or three months, or both.

North Dakota has adopted Rules of Civil Procedure, substantially the same as the federal rules, effective April 25, 1957.

North Dakota state reports were published up to and including Volume 79 covering decisions to September, 1953, only and its Supreme Court decisions thereafter are found only in the Northwestern Reporter.

II.

DEFINITIONS

Contract of Insurance. "Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event."¹

Insurer and Insured. "The person who undertakes to indemnify another by a contract of insurance is called the insurer, and the person indemnified is called the insured."²

The insured in a life insurance policy means the person whose life is insured and whose death matures the obligation of the insurer to pay.³

Insurable Interest. "Every person has an insurable interest in the life and health of:

1. Himself;
2. Any person on whom he depends wholly or in part for education or support;

1. N.D. CENT. CODE § 26-02-01 (1970).

2. N.D. CENT. CODE § 26-02-02 (1970).

3. *Sand. v. Merchants Nat'l Bank & Trust Co.*, 81 N.W.2d 748, 749 (N.D. 1957).

3. Any person under a legal obligation to him for the payment of money, or respecting property or services, of which death or illness might delay or prevent the performance; and
4. Any person upon whose life any estate or interest vested in him depends."⁴

Concealment. "A neglect to communicate that which a party knows and ought to communicate is called a concealment."⁵

Policy of Insurance. "The written contract of insurance is called a policy of insurance. It must specify:

1. The parties between whom the contract is made;
2. The rate of premium;
3. The property or life insured;
4. The interest of the insured in the property insured if he is not the absolute owner thereof;
5. The risks insured against; and
6. The period during which the insurance is to continue."⁶

Contract of Reinsurance. "A contract of reinsurance is one by which an insurer procures a third person to insure him against loss or liability by reason of an original insurance contract made by him."⁷

Insurance Company. " 'Insurance company' or 'company' shall include any corporation, association, society, partnership, or individual engaged as principal in the business of insurance."⁸

Domestic. " 'Domestic' designates every company which is incorporated or formed in this state."⁹

Foreign. " 'Foreign,' when used without limitation, includes every company which is formed by the authority of any state or government other than this state."¹⁰

III.

CONFLICT OF LAWS

A contract is to be interpreted according to the law and usage of the place where it is to be performed or if it does not indicate a place of performance, according to law and usage of the place where it is made.¹¹

The interpretation of an insurance contract was controlled by Missouri law where the contract, to be performed in Missouri, was the

4. N.D. CENT. CODE § 26-02-09 (1970).
 5. N.D. CENT. CODE § 26-02-14 (1970).
 6. N.D. CENT. CODE § 26-03-01 (1970).
 7. N.D. CENT. CODE § 26-05-01 (1970).
 8. N.D. CENT. CODE § 26-07-01 (1970).
 9. *Id.*
 10. *Id.*
 11. N.D. CENT. CODE § 9-07-11 (1960).

subject of a diversity of citizenship case tried in federal court of North Dakota.¹²

In absence of contrary pleadings and proofs, an insurance policy was held to be a North Dakota contract and the laws of North Dakota apply thereto.¹³

Where the contract is made in another state, the law of the forum controls unless the law of the other state is specially pleaded and proved.¹⁴

IV.

STATUTORY REGULATION AND SUPERVISION

North Dakota is a code state. There is no common law in any case where the law is declared by the Code.¹⁵ Where there is no express constitutional or statutory declaration on a subject, the common law is applied.¹⁶ The evidence of common law is in the decision of tribunals.¹⁷

A. *General.* The business of life insurance is affected with a public interest and subject to legislative regulation.¹⁸ The Commissioner of Insurance is elected for a four year term. He must be 25 years of age, a United States citizen, and an elector of this state. In his absence his deputy acts for him.¹⁹ He has the duty to execute all laws of the state respecting insurance companies. Articles of incorporation of all insurance companies organized or doing business in the state are filed with him. He maintains permanent records of his proceedings and will furnish certified copies thereof.²⁰ Fees for various filings and services are fixed by statute.²¹ The state has provision for reciprocal penalties and retaliatory charges in regard to deposits of securities, taxes, fines, penalties, certificates of authority, licenses, fees and the performance of any acts or duties.²² The Commissioner has the right to examine company records and subpoena and examine under oath directors, officers and agents.²³

Each certificate of authority to do business expires on April 30th

12. *Wells v. Kansas City Life Ins. Co.*, 46 F. Supp. 754, 756 (1942), aff'd 133 F.2d 224 (1943).

13. *Weber v. Interstate Business Men's Accident Ass'n*, 48 N.D. 307, 184 N.W. 97 (1921).

14. *Kephart v. Continental Cas. Co.*, 17 N.D. 380, 116 N.W. 349 (1908).

15. N.D. CENT. CODE § 1-01-06 (1960).

16. *Brignall v. Hannah*, 34 N.D. 174, 157 N.W. 1042 (1916).

17. N.D. CENT. CODE § 1-01-05 (1960).

18. *Mann v. Policyholders' Nat'l Life Ins. Co.*, 78 N.D. 724, 51 N.W.2d 853, 856 (1952).

19. N.D. CENT. CODE § 26-01-01 (1970).

20. N.D. CENT. CODE § 26-01-02 (1970).

21. N.D. CENT. CODE §§ 26-01-04, 6-05-03 (6) (Supp. 1967).

22. N.D. CENT. CODE § 21-01-05 (1970).

23. N.D. CENT. CODE § 26-01-09 (1970).

after the date of its issue.²⁴ Companies controlled by foreign governments are prohibited.²⁵

Any order or decision of the insurance commissioner is subject to review or appeal in the Courts as provided in Chapter 28-32 titled Judicial Procedure, Civil, of the North Dakota Century Code.

Fees chargeable by the Commissioner are fixed by the Code.²⁶ His granting or revoking a certificate of authority to do business in the state is an act within limits of a granted discretion and is not subject to control or review by mandamus.²⁷

B. As to Companies. Any insurance company doing business in North Dakota must file its annual financial statement of condition and business for the year ending on the preceding December 31st not later than April 1 of each year.²⁸ The annual statement must be signed and verified by the president or vice president and by the secretary, the actuary, if a life insurance company, and the treasurer or person in charge of accounts and finances of the company or a majority of the members of the board of directors.²⁹ Each company must submit with its annual statement an abstract thereof for publication upon the commissioner's form.³⁰ Failure to make and file the statement on time will subject the company to a penalty of \$100 per day, and suspension of its authority to do business. Making a willfully false statement will subject the company to a fine of \$500 to \$1000.³¹

No insurance company shall directly or indirectly pay or use or offer, consent, or agree to pay or use any money or property for political purposes, parties or candidates. Any officer, stockholder, director, attorney or agent involved in such violation is guilty of a criminal offense and liable to the company.³² Revocation of the certificate of authority of an insurance company by the commissioner is mandatory if after examination he believes its annual statement or other report required under the law is false or the company is practicing discrimination in issuance or cancellation of policies.³³ For discrimination the Commissioner cannot act except after a verified complaint of the person interested, and ten day notice to the company of the proposed examination.³⁴

Any company transacting business in the state must not expose itself to a loss on any one risk or hazard in an amount exceeding ten

24. N.D. CENT. CODE § 26-01-06 (1970).

25. N.D. CENT. CODE § 26-01-13 (1970).

26. N.D. CENT. CODE § 26-01-04 (1970).

27. State ex rel Dakota Hall Ass'n of Plankinton v. Carey, 2 N.D. 36, 49 N.W. 164 (1891).

28. N.D. CENT. CODE § 26-07-05 (1970).

29. N.D. CENT. CODE § 26-07-06 (1970).

30. N.D. CENT. CODE § 26-07-08 (1970).

31. N.D. CENT. CODE § 26-07-09 (1970).

32. N.D. CENT. CODE § 26-07-16 (1970).

33. N.D. CENT. CODE § 26-07-11 (1970).

34. N.D. CENT. CODE § 26-07-12 (1970).

per cent of its paid up capital and surplus if a stock company, or ten per cent of its surplus if a mutual company, unless the excess is re-insured.³⁵

North Dakota has an Unfair Trade Practice Act which defines and prohibits unfair methods of competition or unfair or deceptive acts or practices which cover (1) misrepresentation and false advertising of policy contracts; (2) false information and advertising generally; (3) defamation of financial condition of an insurer; (4) boycott, coercion and intimidation; (5) false financial statements; (6) stock operations and advisory board contracts; (7) unfair discrimination; and (8) rebates. The insurance commissioner has the power to examine and investigate to determine violations. Procedure for hearings on ten day notice of charges to compel attendance of witnesses, production of records, is provided. Enforcement is by cease and desist orders, and by injunction in the District Court. Review is provided by the District Court of Burleigh County. Penalty is a fine.³⁶

No person, firm or corporation financing the purchase of property or lending on the security of property shall require as a condition precedent, concurrent or subsequent that the borrower negotiate any policy of insurance covering such property through a particular insurance company or agent. Reasonable financial requirements are not prohibited. Small loan licenses may not require life, health or accident insurance from specific companies.³⁷

Companies doing business in North Dakota are prohibited directly or indirectly from aiding political parties.³⁸

The retaliatory law applies to all companies from a state which requires a greater amount of deposit, taxes, fines, penalties, certificate of authority, license or fees than imposed on similar companies from such other state by North Dakota.³⁹

The Commissioner may revoke or suspend the certificate of authority of a foreign company if it is in an unsound condition, has failed to comply with state law, has refused to submit to examination or its funds are less than its liabilities exclusive of its capital.⁴⁰

A foreign company must, before it transacts business in the state, (1) deposit with the commissioner a certified copy of its Articles of Incorporation; (2) deposit a sworn statement of its financial condition; (3) have satisfied the Commissioner that it is in good standing in its own state; (4) have satisfied the Commission if it is a stock company, that it has fully paid up capital stock and surplus at least equal to a domestic company transacting the same classes of insurance; (5)

35. N.D. CENT. CODE §26-07-03 (1970).

36. N.D. CENT. CODE Ch. 26-30 (1970).

37. N.D. CENT. CODE §§ 26-30-14, 18-03-18 (1970).

38. N.D. CENT. CODE § 26-07-16 (1970).

39. N.D. CENT. CODE § 26-01-05 (1970).

40. N.D. CENT. CODE § 26-07-14 (1970).

have satisfied the commissioner if it is a mutual company, that it has accumulated assets in excess of its liabilities in an amount not less than one hundred thousand dollars; (6) have satisfied the Commissioner that its capital or net assets are well invested and immediately available to pay losses; (7) satisfied the Commissioner that it does not insure any single hazard for more than one-tenth of its net assets; (8) appointed the Commissioner its agent or attorney for service of process; (9) agreed to appoint as its agents in the state only licensed resident agents or non-resident licensed agents if the non-resident state accords the same privileges to a North Dakota citizen; (10) shall have adopted a name which is not so similar to a name already in use by an existing company organized or licensed in North Dakota as to be confusing or misleading.⁴¹ A failure to comply with the provisions of Chapter 26-09-01 of the North Dakota Century Code renders the contract of insurance unenforceable by the company but it may be enforced against the company.⁴²

Each officer, agent, and stockholder of a non-complying foreign insurer is jointly and severally liable on all contracts made in the state.⁴³

When the actual funds of a foreign life insurance company authorized to do business in the state are not of a net value equal to the net value of its policies according to the combined experience or actuaries' rate of mortality, with interest at four per cent per annum, or by such higher standard as the company has adopted, the Commissioner must notify it to stop the issuance of new policies until its funds have become equal to its liabilities when so valued.⁴⁴

Service of process upon an unauthorized insurer can be made on the Commissioner, if such insurer by mail or otherwise (1) issues or delivers contracts of insurance to residents; (2) solicits applications for insurance; (3) collects premiums; (4) or carries on any other transaction of insurance, and such acts are deemed an appointment of the Commissioner as agent for service of process.⁴⁵ Time for answer of an unauthorized insurer is thirty days.⁴⁶ Attorneys fees may be allowed if refusal of payment was vexatious and without reasonable cause, with a maximum of twelve and one-half per cent of amount recovered. Failure to defend is prima facie evidence failure to pay was without reasonable cause.⁴⁷ Further service upon any person in the state who on behalf of the insurer is soliciting insurance, delivering a policy or collecting a premium with service of process on the com-

41. N.D. CENT. CODE § 26-09-01 (1970).

42. N.D. CENT. CODE § 26-09-02 (1970).

43. N.D. CENT. CODE § 26-09-03 (1970).

44. N.D. CENT. CODE § 26-09-04 (1970).

45. N.D. CENT. CODE § 26-09-07 (1970).

46. N.D. CENT. CODE § 26-09-10 (1970).

47. N.D. CENT. CODE § 26-09-15 (1970).

pany by registered mail within ten days is an additional means of service on an unauthorized insurer.⁴⁸ Judgment on default may be taken thirty days from the date an affidavit is filed showing compliance with the statute. The company may not defend until it has filed a deposit or bond to assure payment of any final judgment. The unauthorized insurer provisions do not apply to a contract of reinsurance.

All foreign companies pay a tax of 2½ per cent of the gross amount of premiums, and considerations for annuities received during the calendar year payable at the time when its annual statement of business must be filed, Section 26-01-11 (1), North Dakota Century Code, and are exempt from the state income tax. Section 57-38-09 (15), North Dakota Century Code. Domestic companies pay an income tax.

The insurance department is currently applying the following requirements, in addition to the statutory requirements, ante, to a company seeking a license to transact an insurance business in North Dakota:

1. A company seeking admission to North Dakota must have been in business for at least three (3) years. (This requirement is reduced to two years if the applicant company is a wholly owned subsidiary of another insurance company already licensed in North Dakota or if it is a subsidiary of another corporation operating in this state provided the Commissioner of Insurance feels said insurance company or corporation reflects size and stability which would be adequate enough to protect the interests of policyholders of this state.)
2. The company seeking admission to North Dakota must have a capital and surplus totaling at least one million dollars.
3. The company seeking admission to North Dakota must be licensed in states contiguous to the State of North Dakota and they must establish to the satisfaction of the Commissioner of Insurance that their operations in North Dakota will commence immediately, and that their admission to North Dakota is a part of a normal business expansion.

(3) *Domestic Companies.*

A mutual life insurance company may be organized with temporary capital of not less than \$100,000 in prescribed investments with provision for its retirement and for dividends. No policy shall be issued until at least \$200,000.00 of insurance in not less than 200 separate risks have been subscribed for and entered on its books, and its

48. N.D. CENT. CODE § 26-09-08 (1970).

assets are at least \$25,000.00 and a surplus of \$10,000.00 exists. ⁴⁹Any number of persons, not less than seven, may form a mutual company.

A stock life insurance company must have an authorized capital stock of at least \$150,000.00 and a surplus of at least \$75,000.00. If the Articles of Incorporation permit writing accident and health insurance the capital stock must be at least \$200,000.00. No policy may be issued until 50 per cent of minimum capital stock and all required surplus are paid in and the residue within twelve months.⁵⁰ Any number of persons not less than seven may form a stock company.⁵¹

All domestic companies are governed by the North Dakota Business Corporation Act (Chapter 10-19 of the NDCC) governing profit corporations so far as consistent with the insurance code provisions.⁵²

The articles of incorporation of a domestic insurance company shall set forth in addition to what is required by the general corporation laws of Chapter 10-19 the following:

The kind of insurance proposed to be made, that it will operate on the stock or mutual plan, the period of its existence which may be perpetual, its fiscal year, and the name of the company. The articles are to be filed with the Secretary of State and a copy with the Commissioner of Insurance.⁵³

One third of the directors and a majority of the executive officers of the company must be residents of the state, and each director must own stock of the par value of \$500.00.⁵⁴

After examination of the articles by the attorney general and the commissioner, a certificate of compliance is issued and filed with the register of deeds of the county where the principal officer is located for it to commence business.⁵⁵

Domestic companies must deposit securities equal to the net value of all policies in force within thirty days after notice from the commissioner but not exceeding \$100,000.00. In lieu of a further deposit, the company may file a list of segregated securities.⁵⁶

There are further Code provisions governing the investment of funds of insurance companies in Section 26-08-10, North Dakota Century Code; limitations on the purchase and conveyance of real property in Section 26-08-12; limitations on holding of acquired real property in Section 26-08-13 of the North Dakota Century Code; provisions as to the liabilities of officers and directors in Section 26-08-18; limitations on salaries and expenses of officers and agents in Section

49. N.D. CENT. CODE §§ 26-11-01, 26-11-02 (1970).

50. N.D. CENT. CODE § 26-08-04 (1970).

51. N.D. CENT. CODE § 26-08-02 (1970).

52. N.D. CENT. CODE § 26-08-01 (1970).

53. N.D. CENT. CODE § 26-08-05 (1970).

54. N.D. CENT. CODE § 26-08-06 (1970).

55. N.D. CENT. CODE § 26-08-07 (1970).

56. N.D. CENT. CODE § 26-11-03 (1970).

26-11-10; regulation of the solicitations of proxies in Section 26-08-02.1; voucher requirements for disbursements in Section 26-11-09 of the North Dakota Century Code and provisions regulating insider trading in Sections 26-30-15 through 26-30-22, North Dakota Century Code.

A domestic company may not insure the lives of residents of states where they are not authorized to do business if the laws of such state prohibit a company thereof which is not authorized in North Dakota from insuring lives in North Dakota. The Commissioner shall annually notify domestic insurers as to reciprocal states. This prohibition shall not apply where applicant signs application in state where the company is licensed nor to group policies where the master policy is issued in a state where the company is licensed, nor to otherwise lawful contracts not originally executed in violation of the statute.⁵⁷

C. *Life Insurance Policies.* No policy of life insurance shall be issued or delivered in the state until the form thereof has been filed with the Commissioner and unless the form thereof is authorized by the provisions of Chapter 26-03 of the North Dakota Century Code entitled, "The Insurance Policy."⁵⁸ A life policy need not be written on one of the standard forms provided in the Code.⁵⁹ If the Commissioner disapproves the policy form, its use shall be unlawful. His decision shall be reviewable by the courts.⁶⁰

The policy must specify the parties between whom the contract is made, the rate of premium, the life insured, the risks insured against and the period during which the insurance is to continue.⁶¹ It must contain the entire contract of the parties.⁶² The Code provides standard forms for an ordinary life or limited payment life policy,⁶³ an ordinary or limited payment life policy with fixed survivorship annuity,⁶⁴ an endowment life policy,⁶⁵ and endowment life policy with fixed survivorship annuity,⁶⁶ a term life policy,⁶⁷ a term life with right to renew and change.⁶⁸

The Code requires that certain provisions be contained in every life insurance policy issued on other than the standard form. They are: (1) premiums shall be payable in advance upon delivery of a receipt; (2) a provision that a grace period of one month for payment of every premium after the first, and may provide if the insured dies in the month of grace, the overdue premium will be deducted in any

57. N.D. CENT. CODE § 26-07-19 (1970).

58. N.D. CENT. CODE §§ 26-03-42, 26-03-25 (1970).

59. *Young v. Mutual Trust Life Ins. Co.*, 54 N.D. 600, 210 N.W. 177, 179 (1926).

60. N.D. CENT. CODE § 26-03-43 (1970).

61. N.D. CENT. CODE § 26-03-01 (1970).

62. N.D. CENT. CODE § 26-03-11 (1970).

63. N.D. CENT. CODE § 26-03-26 (1970).

64. N.D. CENT. CODE § 26-03-28 (1970).

65. N.D. CENT. CODE § 26-03-27 (1970).

66. N.D. CENT. CODE § 26-03-29 (1970).

67. N.D. CENT. CODE § 26-03-30 (1970).

68. N.D. CENT. CODE § 26-03-31 (1970).

settlement under a policy; (3) a provision that the policy shall constitute the entire contract between the parties and shall be incontestable after it shall have been in force during the lifetime of the insured for two years from its date except for nonpayment of premiums and except for violations of the policy relating to naval or military service in wartime and at the company's option, provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance for accidental death also may be excepted; (4) a provision that all statements made by the insured in absence of fraud shall be deemed representations and not warranties and no such statement shall avoid the policy unless it is contained in a written application attached; (5) a provision that if the age of the insured has been understated the amount payable under the policy shall be such as the premium would have purchased at the correct age; (6) a provision that the policy shall participate in the surplus of the company and after the third policy year for participating policies, with a right of the owner to receive the dividend in cash and if other dividend options are available, to specify the automatic one; (7) a provision for a policy loan after the policy has been in force three years in the amount of the reserve, less a sum not more than $2\frac{1}{2}$ per cent of the amount insured by the policy, and on any dividend additions thereto with interest collectable by the company in advance, and providing a failure to repay will not void policy until the total debt equals or exceeds the loan value nor until one month after notice (not required in term policy); (8) a provision that on default after three years premiums shall have been paid there shall be provided a stipulated form of insurance the net value of which shall be equal to the reserve at the date of default and on any divided additions thereto computed according to a mortality table, interest rate and method of valuation permitted by Section 26-10-01, less a sum not over $2\frac{1}{2}$ per cent of the amount insured by the policy and of any existing dividend additions thereto and less any debt to the Company; the policy may be surrendered to the company within one month from the date of default for a specified cash value at least equal to the sum which otherwise would be available for the purchase of insurance as aforesaid, and may stipulate the company may defer payment for not more than six months after application is made; the value of any extended term insurance with pure endowment, if any, may be calculated per the CSO 1958 mortality table or not exceeding 130 per cent of a more modern table; (9) a table of loan values and options available upon default in premium payments for the first twenty years or during the term of the policy, whichever is shorter; (10) a provision for reinstatement within three years of defaults in premium payments upon evidence of insurability and payment of arrears of premiums with interest; (11) payment of claims upon re-

ceipt of proof of death or not later than two months after receipt of such proof; (12) a table of amounts of installments in which the policy may provide its proceeds may be payable; (13) title on the face and on the back of the policy correctly describing it.⁶⁹

Provisions which are prohibited in a life insurance policy issued or delivered in North Dakota are: (1) a provision for forfeiture of the policy for failure to repay any loan or interest thereon if the debt on the policy is less than the loan value or any provision for forfeiture of the policy for failure to repay any loan or interest thereon until at least one month after notice to the insured and assignee, if any; (2) a provision limiting the time for commencement of suit to less than five years; (3) a provision that the policy shall take effect before the original application was made if thereby the assured would rate at an age younger than his application date according to his age at his nearest birthday; (4) a provision permitting settlement at maturity of less value than the face amount plus dividend additions, if any, less any debt to the company and less any deductible premiums.⁷⁰

The policies of a domestic company issued or delivered in a foreign state may contain any provision required by the laws of the state in which the same are issued, anything in the Code notwithstanding.⁷¹

There are no statutory provisions in regard to group life insurance, credit life insurance, or industrial life insurance.

There are general rules regarding insurable interest,⁷² mutual disclosure by each party required in the insurance contract,⁷³ concealment,⁷⁴ transfer of the policy,⁷⁵ suicide,⁷⁶ exemption of the surrender value of the policy from the claims of creditors,⁷⁷ the exemption of the avails of a life insurance policy payable to the deceased, his heirs, or his personal representatives or his estate,⁷⁸ and insurance in favor of a corporation on the life of a corporate officer or employee,⁷⁹ express warranties which must be written as part of the policy,⁸⁰ and rescission for violation of a material warranty.⁸¹

D. *As to Agents.* A new agent's licensing and qualification law became effective July 1, 1967. The act, Chapter 26-17 of the North

69. N.D. CENT. CODE § 26-03-35 (1970).

70. N.D. CENT. CODE § 26-03-36 (1970).

71. N.D. CENT. CODE § 26-03-37 (1970).

72. N.D. CENT. CODE § 26-02-09 (1970).

73. N.D. CENT. CODE § 26-02-13 (1970).

74. N.D. CENT. CODE § 26-02-14 (1970).

75. N.D. CENT. CODE § 26-03-12 (1970).

76. N.D. CENT. CODE § 26-03-24 (1970).

77. N.D. CENT. CODE § 26-10-17 (1970).

78. N.D. CENT. CODE § 26-10-18 (1970).

79. N.D. CENT. CODE § 26-10-19 (1970).

80. N.D. CENT. CODE § 26-03-15 (1970).

81. N.D. CENT. CODE § 26-03-19 (1970).

Dakota Century Code, defines an agent and subagent. Such terms do not include a regular salaried officer or employee who does not solicit or accept from the public applications, who devotes substantially all of his time to other activities, and who receives no commission or compensation from the amount of business obtained, and who may assist licensed agents without becoming an "agent." Acting for an unauthorized company is prohibited and the agent is personally liable for any losses sustained.

No person shall act as an insurance agent until he has been licensed, and no commissions shall be paid to unlicensed persons. Application for a license is made on forms furnished by the Commissioner, with a certificate of a company officer or representative requesting the license and representing that the applicant is qualified, and accompanied by a \$3.00 fee. Each applicant must pass a written examination to determine his competence, except those agents who were licensed prior to the effective date of the act. Examinations are given at the Commissioner's office in Bismarck. Study guides are available. Two failures to pass the examination will require a six month wait before another examination can be taken. A non-resident may be licensed if his state of residence accords the same privilege to North Dakota residents. Examination of non-residents may be waived under reciprocal agreements. Agents may be licensed to represent additional insurers. Licenses expire on April 30th following date of issue. Renewals may issue on request of the insurer alone. Temporary licenses without examination may be issued to representatives of the estates of deceased persons or heirs for a 90 day period only. Upon termination of the agent's appointment, the insurer must immediately notify the Commissioner. The licensee shall return the license to the state. Licenses may be refused, suspended or revoked on grounds specified in Chapter 26-17-01.12 of the North Dakota Century Code, which are:

If the Commissioner of Insurance finds that the applicant for or holder of such license:

- a. Has willfully violated any provision of the insurance laws of this state or any lawful rule, regulation, or order of the commissioner; or
- b. Has intentionally made a material misstatement in the application for such license; or
- c. Has obtained or attempted to obtain such license by fraud or misrepresentation; or
- d. Has misappropriated or converted to his own use or illegally withheld money belonging to an insurer or an insured or beneficiary; or
- e. Has otherwise demonstrated lack of trustworthiness or competence to act as an insurance agent; or

- f. Has been convicted by final judgment, of a crime involving moral turpitude; or
- g. Has been refused a license or had his license suspended or revoked in another state; or
- h. Has been guilty of fraudulent or dishonest practices; or
- i. Has materially misrepresented the terms and conditions of insurance policies or contracts; or
- j. Has made or issued, or caused to be made or issued, any statement misrepresenting or making incomplete or misleading comparisons regarding the terms or conditions of any insurance or annuity contract legally issued by any insurer, for the purpose of inducing or attempting to induce the owner of such contract to forfeit or surrender such contract or allow it to lapse for the purpose of replacing such contract with another; or
- k. Has obtained or attempted to obtain such license, not for the purpose of holding himself out to the general public as an insurance agent, but primarily for the purpose of soliciting, negotiating, or procuring insurance or annuity contracts covering himself or members of his family.

and after a hearing on a fifteen days notice to holder of license and his company of the grounds for issuing such proposed order. The Commissioner's order is subject to judicial review within thirty days by the District Court of Burleigh County. Penalty for violation of the provisions of the act is a misdemeanor punishable by a fine of \$500 or jail for six months, or both.

Sale of accidental death insurance through vending machines is permitted only by licensed resident insurance agents.⁸² A life insurance agent is an agent of the company and not of the insured in any controversy.⁸³

V.

AGENTS AND BROKERS

A. Statutory Definitions.

The Code states that a person who:

- (1) solicits insurance on behalf of any insurance corporation;
- (2) transmits an application for a policy of insurance other than for himself to or from any insurance corporation;
- (3) makes any contract for insurance;
- (4) collects any premium for insurance; or
- (5) aids or assists in any manner in doing any of the things mentioned in (1), (2), (3) or (4),

shall be regarded as an agent of the corporation to all intents and

⁸² N.D. CENT. CODE Ch. 26-33 (1970).

⁸³ N.D. CENT. CODE Ch. 26-10-08 (1970) and *Lechler v. Montana Life Ins. Co.*, 48 N.D. 644, 186 N.W. 271, 273 (1921).

purposes unless it can be shown he receives no compensation for such services.⁸⁴ The new agent's licensing and qualification law defines an "insurance agent" as any authorized or acknowledged agent of an insurer or any subagent of such agent who acts as such in the solicitation of, negotiation for, or procurement or making of insurance, except the term will not include a regular salaried officer or employee of a licensed insurer who does not solicit or accept from the public applications for any such contract and that such regular salaried officer or employee shall not be deemed an agent by reason of rendering assistance to or on behalf of a licensed agent, provided that the officer or employee devotes substantially all of his time to activities other than the solicitation of applications for insurance and receives no commission or other compensation directly dependent on the amount of business obtained.⁸⁵ Further, the Code provides that any person who shall solicit an application for insurance upon the life of another shall be regarded as an agent of the company and not as the agent of the insured in any controversy between the insured or his beneficiary and the company issuing any policy on such application.⁸⁶

The term "subagent" means any person except an agent who acts for or on behalf of a licensed insurance agent in the solicitation of, negotiation for, or procurement or making of insurance, whether or not he is designated by such agent as a subagent or a solicitor by any other title. Each subagent shall be deemed to be an insurance agent as agents are defined and each said person must individually file an application for license and be examined.^{85A}

B. Authority.

Generally, the common law rules of agency apply. The North Dakota statute provides that whoever solicits insurance on behalf of an insurance corporation or who makes any contract of insurance or collects a premium for the insurance, shall be held to be the agent of the corporation to all intents and purposes unless it can be shown he receives no compensation.^{86A} The Code provisions have been held to merely fix the relationship of the solicitor to the company or to the insured and it does not define the scope of his authority nor can his act be charged to be the act of the insured.⁸⁷ In line with the usual rules, it has been held that the ostensible authority of the agent is such as the principal intentionally or by want of

84. N.D. CENT. CODE § 26-07-02 (1970).

85. N.D. CENT. CODE § 26-17-01 (1) (2) (1970).

86. N.D. CENT. CODE § 26-10-08 (1970).

85A. N.D. CENT. CODE § 26-17-01 (1) (2) (1970).

86A. N.D. CENT. CODE § 26-10-08 (1970).

87. *Kopald Elec. Co. v. Ocean Accident & Guar. Corp.*, 64 N.D. 213, 251 N.W. 852 (1933).

ordinary care causes or allows a third person to believe the agent possesses. Where the agent never had been held out by the insurance company as its agent with authority to extend the due date of a premium note, and no instance was shown where it had done so, and, where the policy as well as notices of default expressly recited that no agent was authorized to grant an extension, the evidence was held not to sustain a finding the agent had any ostensible authority to grant an extension and thus reinstate the policy.⁸⁸

Instructions to or limitations on the powers of an agent which are not disclosed cannot be permitted to affect apparent powers and although the agent violates his instructions or exceeds his authority he will yet bind his principal to a third person if his acts are within the scope of authority which the principal has caused or permitted him to appear to possess.⁸⁹

C. *Agent of the Company or the Insured.*

A person who solicits insurance, transmits applications, makes contracts of insurance or collects premiums is by statute regarded as the agent of the corporation.⁹⁰ A person who shall solicit an application for insurance on the life of another shall be regarded as the agent of the company and not as the agent of the insured in any controversy between the insured or his beneficiary and the company issuing any policy on the application.⁹¹

An agent authorized to accept applications and receive advance premiums is in the transmission of the application and the premium the agent of the company, not the insured.⁹² An agent of the company with authority to solicit applications for insurance is agent of the company and not the insured for soliciting an application for reinstatement and a clause in the policy to the effect that it cannot be altered by an agent or its provisions waived except by written agreement of the company is for the benefit of the company and may be waived by it.⁹³

D. *Notice to or Knowledge of the Agent.*

A medical examiner's authority is limited to making a physical examination of the applicant, reporting his findings, and filling in the applicant's answers in the application and the examiner's knowledge of the applicant's health previously acquired in treating him

88. *Meyer v. National Fire Ins. Co. of Hartford, Conn.*, 69 N.D. 452, 287 N.W. 813, 815 (1939); *Wehsner v. Kansas City Life Ins. Co.*, 45 N.D. 627, 178 N.W. 970 (1920).

89. *Michigan Idaho Lumber Co. v. Northern Fire & Marine Ins. Co.*, 35 N.D. 244, 160 N.W. 130, 135 (1916).

90. N.D. CENT. CODE § 26-07-02 (1970).

91. N.D. CENT. CODE § 26-10-08 (1970).

92. *Stearns v. Merchants' Life & Casualty Co.*, 38 N.D. 524, 165 N.W. 568 (1917); *Lechler v. Montana Life Ins. Co.*, 48 N.D. 644, 186 N.W. 271 (1921); *Lindlauf v. Northern Founders Ins. Co.*, 130 N.W.2d 86 (N.D. 1964).

93. *Lechler v. Montana Life Insurance Co.*, 48 N.D. 644, 186 N.W. 271 (1921).

as a patient is not notice to or binding on the insurer.⁹⁴ The Code provides as against a principal, both principal and agent are deemed to have notice of whatever either has notice and ought in good faith in the exercise of ordinary care and diligence, to communicate to the other.⁹⁵

In a recent case the applicant told the soliciting agent that he had high blood pressure, that he had been treated for it, and that they were wasting their time because the insurance company would not be interested in having him as a risk. The trouble had occurred in 1956. It was held such information was notice to the company. The applicant did not tell the agent that there had been a reoccurrence and that he had been taking medicine constantly with only partial success. A verdict for the company was sustained on the ground that there was a misrepresentation which increased the risk of loss, in that the applicant concealed material information.⁹⁶

Any person who solicits insurance on behalf of the insurance company, transmits an application for insurance, collects the premium, or aids in doing any of these things, is the agent of the company and can bind the insurer by any acts within the scope of his apparent authority unless the insured has notice of limitation of the agent's authority.⁹⁷

E. Waiver and Estoppel.

A policy may declare that a violation of specified provisions shall avoid it. In the absence of such declaration, the breach of an immaterial provision does not avoid the policy.⁹⁸

"Waiver" is the intentional relinquishment of a known right. Its essential elements are the existence of a right, the knowledge thereof, and intent to relinquish such right, advantage or benefit. Voluntary choice is the essence of waiver.

"Estoppel" refers to an abatement raised by law of rights and privileges of accident insurer where it would be inequitable to permit their assertion and necessarily implies prejudicial reliance of insured upon some act, conduct or non-action of the insurer.⁹⁹

Stipulations in a life policy for forfeiture on default may be waived by the insurer but the burden to prove such waiver is on the insured.¹⁰⁰ Also see *Wehsner v. Kansas City Life Insurance Company*, 45 N.D. 627; 178 N.W. 970, a case in which the policy had

94. *Thomas v. New York Life Ins. Co.*, 65 N.D. 625, 260 N.W. 605 (1935).

95. N.D. CENT. CODE § 3-03-05 (1960).

96. *Lindlauf v. Northern Founders Ins. Co.*, 130 N.W.2d 86 (N.D. 1964).

97. *National Farmers Union Property & Casualty Co. v. Michaelson*, 110 N.W.2d 431 (N.D. 1961).

98. N.D. CENT. CODE § 26-03-21 (1970).

99. *Conklin v. North American Life & Cas. Co.*, 88 N.W.2d 825 (N.D. 1958).

100. *Equitable Life Assurance Society of the U.S. v. Bolsvert*, 66 N.D. 6, 262 N.W. 188 (1935).

lapsed for non-payment of premium and held on the evidence in the particular case that it was insufficient to show a waiver of the policy conditions as to reinstatement. A company neglecting to notify the policyholder of rejection of a reinstatement application for five weeks was held to have waived its contract provisions.¹⁰¹ Custom or an insurer's course of conduct may afford a basis for a reasonable excuse for not paying the premium at the time stated in the policy when such custom or course of action is not within the terms of the contract.¹⁰² Where the company through its activities had clothed the agent with apparent authority to act contrary to policy terms, it waived its terms.¹⁰³ The insured who received a policy with the application attached, retained the same for several months, was held estopped from denying knowledge of fraud practiced on both the insured and the company by the agent, which the insured could have easily detected if he had read the policy.¹⁰⁴ Receipt or acceptance of the premium by the company does not estop it from relying on a breach of condition of the policy unless it had knowledge of the facts constituting the breach at the time.¹⁰⁵ If the insured is shown to have signed the application and there is no proof he did not know what he was signing, he is presumed to know what he signed and the answers contained therein.¹⁰⁶

VI.

CONTRACT AND POLICY

A. *Nature of the Contract.*

The Code provides that a written contract of insurance is called a policy of insurance and must specify the parties between whom the contract is made, the rate of premium, the life insured, the risk insured against, and the period for which the insurance is to continue.¹⁰⁷ Every policy of life insurance issued or delivered within the state by any life insurance corporation doing business within the state shall contain the entire contract of the parties.¹⁰⁸ This statutory requirement does not limit the right of the parties to alter or modify a life policy by mutual agreement.¹⁰⁹ The Code prescribes standard forms of policy for ordinary life, limited payment life, with and without fixed survivorship annuity, endowment with or

101. *Lechler v. Montana Life Ins. Co.*, 48 N.D. 644, 186 N.W. 271 (1921).

102. *Halliday v. Equitable Life Assurance Society*, 54 N.D. 466, 209 N.W. 965 (1926).

103. *Carroll v. N.Y. Life Ins. Co.*, 49 N.D. 798, 193 N.W. 471 (1922).

104. *Johnson v. Dakota Fire & Marine Ins. Co.*, 1 N.D. 167, 45 N.W. 799 (1890).

105. *Thompson v. Travelers Ins. Co.*, 13 N.D. 444, 101 N.W. 900 (1904).

106. *N.Y. Life Ins. Co. v. Hansen*, 71 N.D. 383, 2 N.W.2d 163 (1941).

107. N.D. CENT. CODE § 26-03-01 (1970).

108. N.D. CENT. CODE § 26-03-11 (1970).

109. *Anderson v. Northern Dakota Trust Co.*, 69 N.D. 571, 288 N.W. 562 (1939).

without fixed survivorship annuity and term with or without right to renew and change.¹¹⁰ No companies are known to be writing the standard form policies in North Dakota. There are also prescribed certain required provisions for companies other than standard form policies.¹¹¹ There are certain prohibited provisions for companies writing policies other than standard form policies.¹¹² The state has also adopted the uniform individual accident and sickness policy provisions of the N.A.I.C.¹¹³

After one year, suicide shall be no defense and any provision or stipulation to the contrary is void.¹¹⁴ A life insurance policy in North Dakota does not have to be written on the North Dakota standard form set out in the statute.¹¹⁵

Section 26-03-01 defines an insurance policy and specifies the risks to be insured against. Section 26-06-03 provides that when a peril is expected specially in a contract of insurance, a loss which would not have occurred but for such peril thereby is excepted, although the immediate cause of the loss was a peril which was not excepted. It has been held that both of these provisions are not applicable to life insurance policies, but apply to all other forms of insurance.¹¹⁶ The Legislature in North Dakota has permitted the writing of life insurance policies either in the standard form, has strictly circumscribed the freedom of insurance companies' right to contract as they see fit by specifically requiring certain provisions be contained in every contract and prohibiting certain other provisions from being included therein.¹¹⁷

In the *Jordon* case, the Supreme Court held that the incontestability clause required to be inserted in all non-standard form policies bars all defenses to enforce a policy of life insurance after the contestable period has expired except those expressly excepted from its operation, to wit: non-payment of premiums and violation of the policy's provisions relating to military and naval service in time of war and held that a provision in a life policy that the policy should not be incontestable if death resulted as a result of operating or riding in an aircraft other than as a fare-paying passenger of a commercial airline flying in a regular scheduled route between definitely established airports, was void because it violated the statute. The Court expressly considered *Metropolitan Life v. Conway*, 255 New York 449; 169 N.E. 642, holding that the

110. N.D. CENT. CODE §§ 26-03-26, 26-03-31 (1970).

111. N.D. CENT. CODE § 26-03-35 (1970).

112. N.D. CENT. CODE § 26-03-36 (1970).

113. N.D. CENT. CODE §§ 26-03A-01, 26-03A-11 (1970).

114. N.D. CENT. CODE § 26-03-24 (1970).

115. *Young v. Mutual Trust Life Ins. Co.*, 54 N.D. 600, 210 N.W. 177 (1926).

116. *Jordon v. Western States Life Ins. Co.*, 78 N.D. 902, 53 N.W.2d 860 (1952).

117. *Id.*

incontestability clause is not a mandate as to coverage and rejected such holding, and that the Code required the opposite holding in North Dakota.

An insurance upon life may be made payable upon the death of the person or on his surviving a specified period or periodically so long as he shall live, or otherwise contingently on the continuance or termination of life.¹¹⁸

No policy of life insurance shall be issued or delivered in North Dakota unless the form thereof is authorized by the provisions of Chapter 26-03 relating to insurance policies.¹¹⁹

No policy shall be issued or delivered in the state of North Dakota if it is a life insurance policy of any kind until the form thereof has been filed with the Commissioner of Insurance.¹²⁰

A life insurance policy is not required to be written on the standard form.¹²¹

Policy contracts, including variable or fixed annuity contracts of an insurance company which are subject to supervision by an agency of the State of North Dakota, are exempted from the operation of the Securities Act of 1951, as amended.¹²²

However, variable annuities cannot be written in North Dakota without enabling legislation. Such legislation is being prepared for introduction at the 1969 legislative session.

The Attorney General of North Dakota in a written opinion dated January 15th, 1968, held that Section 26-03-25 of the Code providing, "No policy of life insurance shall be issued or delivered in this state unless the form thereof is authorized by the provisions of this chapter," is a mandate from the Legislature to the Commissioner forbidding the issuance and delivery in North Dakota of life insurance policies unless the form thereof is authorized under specific provisions established by the Legislature and holding that a variable annuity is not within the statutory provision which refers to "a life insurance policy of any kind" within the meaning of Section 26-03-42 of the North Dakota Century Code, since Chapter 26-03 does not authorize variable annuity contracts. The Attorney General then reviewed the standard forms of life policies provided by the Code and the standard provisions required and the prohibited provisions in various life policies and concluded that the Commissioner would be legislating to conclude that they authorize the issuance of variable annuities. The Attorney General stated,

Furthermore, it can hardly be gainsaid that the variable an-

118. N.D. CENT. CODE § 26-03-09 (1970).

119. N.D. CENT. CODE § 26-03-25 (1970).

120. N.D. CENT. CODE § 26-03-42 (1970).

121. *Young v. Mutual Trust Life Ins. Co.*, 54 N.D. 600, 210 N.W. 177 (1926).

122. N.D. CENT. CODE § 10-04-05 (3) (1960).

nuity injects problems which our insurance laws were neither designed, nor are they presently equipped to solve. Prescribed contractual provisions, solvency, adequacy of reserves to meet a company's fixed obligations, permissible categories of investments and periodic examinations characterize our regulatory system. On the other hand, the underlying theory of the variable annuity, investment in a portfolio consisting largely of equities, securities designed to hedge against paying annuitants in depreciated dollars, and renders traditional functions of state regulation meaningless. We deal here with a product which for all practical purposes is the same as ownership in a conventional open end investment company. To this extent, traditional regulatory measures become irrelevant; whereas, full disclosure of investment policy, regulation of changes of that policy, capital structure, conflicts of interest and investment advisors, matters historically under the regulatory control of Blue Sky Law administrators and the Securities and Exchange Commission, loom into prominence. There simply is no adequate substitute for these protections under our insurance laws.

The business of life insurance is affected with the public interest and subject to legislative regulation designed to protect the public.¹²³ Pursuant to this objection, the Legislature has provided the forms of policies.

B. Insurable Interest and Required Consent.

The Code states that every person has an insurable interest in the life and health of himself, in any person on whom he depends wholly or in part for education or support, in any person under a legal obligation to him for the payment of money or respecting property or services of which death or illness might delay or prevent the performance, and of any person upon whose life any estate or interest vested in him depends.¹²⁴ A life insurance contract has been held not void as a wagering contract where the insured was indebted to the bank which paid the premiums and the policy was assigned to secure an existing debt.¹²⁵ An insurer's liability to the assignee of a creditor in a life insurance policy on a debtor's life was limited to the creditor's insurable interest on the date the policy was issued.¹²⁶ The Code further provides that the sole object of insurance is indemnity of the insured and if the insured has no insurable interest, the contract is void.¹²⁷ The Code provides that a policy of insurance upon life or health may pass by transfer, will or succession to any person whether he has an

123. *Mann v. Policyholders National Life Ins. Co.*, 78 N.D. 724, 51 N.W.2d 853 (1953).

124. N.D. CENT. CODE § 26-02-09 (1970).

125. *Midland National Life Ins. Co. v. Mosher*, 60 N.D. 129, 232 N.W. 894 (1930).

126. *Dakota Life Ins. Co. v. Midland National Bank of Mpls.*, 18 F.2d 903 (1927).

127. N.D. CENT. CODE § 26-02-04 (1970).

insurable interest or not and such person may recover upon such policy in accordance with the terms thereof.¹²⁸ This provision of the Code has been held to be in no way inconsistent with the provisions of Section 26-10-18 which provides that a life insurance policy made payable to the estate of a decedent is deemed to be made payable to his heirs and the heirs take the proceeds by contract and not by descent. Where the insured devised and bequeathed "my estate" and "my property" the Court held that since under the provisions of Chapter 26-10-18 the proceeds do not become a part of the estate and are not property of the testator and since they do not pass as a part of his estate but go to the beneficiaries by contract and not by descent, that such a clause was ineffectual to transfer the insurance proceeds and the proceeds were payable to the heirs.¹²⁹ The Code specifically provides that a domestic corporation may take out insurance in favor of the corporation on the life of a corporate officer or employee and the corporation may be named as a beneficiary in or an assignee of any policy of life insurance and that no person shall be disqualified by reason of his interest in the subject matter from acting as a director or member of the executive committee of the corporation on any corporate act touching such insurance.¹³⁰

C. *The Application.*

The Code provides that the policy must not contain a provision by which the policy shall purport to be issued or take effect before the application was made if the assured would rate at an age younger than his age at date when application was made according to his age at nearest birthday.¹³¹

The Code requires each policy shall contain a provision that statements made by the insured in the absence of fraud shall be deemed representations and not warranties and no such statement shall avoid the policy unless it is contained in a written application attached thereto.¹³²

The North Dakota Supreme Court has held that a life insurance company that has solicited and received a completed application for life insurance and collected the first premium thereon is under a legal duty to take prompt action on the application and if it fails in that duty, becomes liable in tort for damages. The application was made April 4 for a life policy in the sum of \$2500 and the first premium was paid. The applicant was examined on April 14 and

128. N.D. CENT. CODE § 26-03-12 (1970).

129. *Talcott v. Bailey*, 54 N.D. 19, 208 N.W. 549 (1926).

130. N.D. CENT. CODE § 26-10-19 (1970).

131. N.D. CENT. CODE § 26-03-34 (1970).

132. N.D. CENT. CODE § 26-03-35 (1970).

found to be all right. The medical report was received on May 2. The Company was engaged in trying to correct an error in the medical report. No policy was issued and four months after the application, on July 4, the applicant died. It was held that the insurance company was liable for the full amount of the policy applied for, \$2500.¹³³

Note: In the *Mann* case the Court also held that the place of wrong under the law of torts is the place where the injury is suffered rather than the place or act which caused the injury that was committed and since she suffered the loss because of the defendant's failure to act on the application for insurance while she was in North Dakota and a resident of North Dakota, the laws of North Dakota would apply.

Where the application for insurance is made the basis of a contract and attached to and made a part of the policy, the application and questions and answers thereto are as material as any other part of the contract. When the application is made the basis of the contract, is attached to and made a part of the policy, the materiality of the questions and answers in the application are questions for the court.¹³⁴

The North Dakota Court has further held that there was a waiver by an insurance company neglecting to notify the policyholder of its rejection of a reinstatement application taken by its agent to reinstate a policy that lapsed for non-payment of the second premium, when it rejected the application five weeks later by returning it to the agent without notifying the policyholder, and six weeks later he died.¹³⁵

Insurance is a contract which, like any other contract, results from an offer and acceptance of the offer. A legal duty may arise from relationships created during the negotiations between the applicant and the insurance company and the company may become liable in tort for negligent delay even though the application for insurance has not in fact been approved by the company and no contract of insurance entered into.¹³⁶

Where the decedent applied for insurance on June 1 in the sum of \$2,000 payable to his wife and the company took his application for a life policy and received the first premium under an agreement that the insurance would take effect as of the date the receipt was given, if a satisfactory report or medical examination was furnished, and if the applicant on the date of receipt, in the opinion of the Company was an insurable risk under its rules, it was held that

133. *Mann v. Policyholders National Life Ins. Co.*, 78 N.D. 724, 51 N.W.2d 853 (1952).

134. *Thomas v. New York Life Ins. Co.*, 65 N.D. 625, 260 N.W. 605 (1935).

135. *Lechler v. Montana Life Ins. Co.*, 48 N.D. 644, 186 N.W. 271 (1921).

136. *National Farmers Union Property & Cas. Co. v. Michaelson*, 110 N.W.2d 431 (N.D. 1961).

the Company had a legal duty to act promptly upon such application and the failure to perform such duty made it liable in damages. The question of negligent delay on the part of the insurance company was properly a fact question for the jury. In this case the applicant had died and the suit was by the beneficiary to whom the Court held that the same duty extended as to the applicant.¹³⁷

An ordinary life policy does not go into effect until the policy is delivered. When the policy provides that if the applicant on making the application pays the full amount of the first premium and receives a specified receipt and if the company is satisfied the applicant was then insurable, the insurance shall take effect from the time of application, the policy merely gives the insured rights which would have been his had the policy been delivered on the day of application.¹³⁸

Where the policy of insurance with a copy of the application was endorsed thereon, was sent by the company to the insured and was in possession of the latter for several months before loss, it was held that the insured was chargeable in law with knowledge of the contents of both the policy and the application and the circumstances that the assured did not actually read or know the contents of the application or know that a copy of the application was endorsed on the policy would make no difference. The paper being his own contract and in his actual custody, he is presumed to know all of its contents and it is his duty on receiving the policy to proceed to have it corrected or rescinded. In this case, the agent had falsified the answers without the applicant's knowledge and the applicant on reading of the copy of the application endorsed on the policy, could have detected the false answers practiced upon both and it was his duty to do so.¹³⁹

Where it is shown that the signatures on the application are those of the insured and there is no proof the insured did not know what he was signing, there is a presumption that the insured did know what he was signing and that the insured knew what answers were made in the application.¹⁴⁰

Insured's answers to question in the application are presumed to be in good faith since a person is presumed to be innocent of wrongdoing.¹⁴¹

D. *Delivery and Acceptance of the Policy.*

An acknowledgment in the policy of the receipt of the premium

137. *Bekken v. Equitable Life Assurance Society of the U. S.*, 70 N.D. 122, 293 N.W. 200 (1940).

138. *N.Y. Life Ins. Co. v. Fleck*, 73 N.D. 143, 12 N.W.2d 530 (1944).

139. *Johnson v. Dakota Fire & Marine Ins. Co.*, 1 N.D. 167, 45 N.W. 799 (1890).

140. *N.Y. Life Ins. Co. v. Hanson*, 71 N.D. 383, 2 N.W.2d 163 (1941).

141. *Id.*

is conclusive evidence of its payment so as to make the policy binding, notwithstanding any stipulation therein that it is not to be binding until the premium is actually paid. The policy having after the date thereof been delivered became effective and binding so far as the payment of premium is concerned, notwithstanding that actual payment of premium was at a later date.¹⁴²

The company will not be permitted to show that the actual date of issuance of the policy of life insurance was a later date than the date recited in the contract where the policy contains an acknowledgment of the receipt of the premium.¹⁴³

The life policy contained a provision it should not take effect unless the first premium was paid while the assured was in good health. It was held that the liability of the company depends upon the actual, and not the mere apparent, good health of the insured.¹⁴⁴

Where the policy provided it should not take effect unless delivered to and received by the insured while in good health and the company issued the policy and sent it to the agent with instructions to deliver only after being satisfied from personal investigation concerning the good health of the insured and it appeared that the policy was issued October 30 and delivered November 8 and there was a showing that the applicant had a headache on November 6th and 7th and began to have a fever on November 8 and 9 and died on the 10th, it was held that the good health of the insured, which was dependent solely upon lay testimony, unaided by medical testimony, was a question of fact for the jury.¹⁴⁵

An ordinary life policy does not go into effect until the policy is delivered. When the policy provides that if the applicant on making the application pays the full amount of the first premium and receives the specified receipt, and if the company is satisfied the applicant was then insurable, insurance would take effect from the time of application, such a provision merely giving the insured rights which would have been his had the policy been delivered on the day of application.¹⁴⁶

E. Validity.

The Code provides that no policy of life insurance shall be issued or delivered in North Dakota unless the form is authorized by the provisions of Chapter 26-03 relating to the policy of insurance, which, as previously noted under "Nature of the Contract," provides that the policy must be in one of the standard forms or must contain

142. *Donahue v. Mutual Life Ins. Co. of N.Y.*, 37 N.D. 203, 164 N.W. 50 (1917).

143. *Harrington v. Mutual Life Ins. Co. of N.Y.*, 131 N.W. 246 (1911).

144. *Thompson v. Travelers' Ins. Co.*, 13 N.D. 444, 101 N.W. 900 (1904).

145. *Fleckenstein v. Provident Ins. Co.*, 48 N.D. 517, 186 N.W. 91 (1921).

146. *New York Life Ins. Co. v. Fleck*, 73 N.D. 143, 12 N.W.2d 530 (1944).

certain required provisions and must not contain certain prohibited provisions or the policy is not valid. Further, the Department by regulation will not approve policy forms containing coupons or misleading phrases or titles labeling dividends or investments as profit sharing.

F. Construction of Policy.

Insurance is a contract which, like any other contract, results from an offer and acceptance of the offer.¹⁴⁷ An insurance contract, like any other contract, is to be construed according to the sense or meaning of the words that are used in the contract. If the language of an insurance contract reasonably raises a doubt as to its meaning the doubt will be resolved against the insurer who wrote the contract.¹⁴⁸ An assignment of a life policy is a contract distinct from the policy.¹⁴⁹ When the language of the insurance contract is clear and unequivocal, it should be construed according to the meaning thereof and the intent of the parties, if that can be ascertained. The contract should be construed as a whole and all of its parts considered together, every clause or sentence and provision given effect consistent with the purpose of the contract.¹⁵⁰

An insurance contract is to be construed according to the sense or meaning of the words that are used in the contract. The language of a contract shall be used to govern its interpretation if the language is clear, explicit and does not involve an absurdity.¹⁵¹ Words are to be understood in their ordinary and popular sense rather than according to their strict legal meaning unless used by the parties in the technical sense or unless special meaning is given them by usage, in which the latter must be followed.¹⁵² If the language used reasonably raises a doubt as to its meaning, the doubt will be resolved against the insurer who wrote the contract but the language should not be strained to impose liability upon an insurer. If the language is ambiguous and will as reasonably support an interpretation to impose liability as one which will not, the former interpretation will be adopted.¹⁵³

Where the policy contained restrictions as to death of the insured if death should occur while engaged in military or naval service in time of war, the Court construed the policy provision to apply to the type of service of the insured and not to his status. The insured was in training at Minneapolis. He contracted influenza there and died in

147. *National Farmers Union Property & Gas. Co. v. Michaelson*, 110 N.W.2d 431 (N.D. 1961).

148. *Tennefos v. Guar. Mut. Life Co.*, 136 N.W.2d 155 (N.D. 1965).

149. *Anderson v. Northern & Dakota Trust Co.*, 69 N.D. 571, 288 N.W. 562 (1939).

150. *Conklin v. North American Life & Casualty Co.*, 88 N.W.2d 825 (N.D. 1958).

151. N.D. CENT. CODE § 9-07-02 (1960).

152. N.D. CENT. CODE § 9-07-09 (1960).

153. *Andersen v. Standard Life & Accident Ins. Co.*, 149 N.W.2d 378 (N.D. 1967).

a hospital. There was no evidence to show the insurance risk was increased. The clause of the policy was held not to apply.¹⁵⁴

G. Reinstatement.

The Code provides as in the standard policy form a provision permitting reinstatement within three years under conditions therein stated.¹⁵⁵

The Code provides for policies written in other than the standard form that they must contain a provision that in the event of default in premium payments, that the value of the policy shall be applied to the purchase of other insurance, if such insurance shall be in force and the original policy shall not have been surrendered to the Company and cancelled. The policy may be reinstated within three years from such default upon evidence of insurability satisfactory to the Company and payment of arrears of premiums, with interest.¹⁵⁶

A reinstated insurance policy is not a new contract, but simply the old contract revitalized.¹⁵⁷ Representations of a nature which under the statute will void an insurance contract will also void a reinstatement thereof.¹⁵⁸ The company may contest the reinstatement of the policy only during the same period of time thereafter as was fixed for contesting the original policy or upon grounds expressly excluded from operation of the incontestability provision.¹⁵⁹

VII.

PREMIUMS AND PREMIUM NOTES

A. Generally.

The standard forms of policy provide that all premiums are payable in advance at the home office or to an agent of the company upon delivery of a receipt signed by one of the company officers.¹⁶⁰ For policies written other than on the standard form, one of the required provisions provides that all premiums shall be payable in advance either at the home office of the company or to an agent of the company upon delivery of a receipt signed by one or more of the officers, who shall be named in the policy.¹⁶¹ The Code further provides an acknowledgment in the policy of the receipt of premium is conclusive evidence of its payment so far as to make the policy binding, notwithstanding any stipulation in the policy that it shall

154. *Myli v. American Life Ins. Co. of Des Moines*, 45 N.D. 631, 175 N.W. 631 (1919.)

155. N.D. CENT. CODE § 26-03-26, 26-03-31 (1970).

156. N.D. CENT. CODE § 26-03-35 (10) (1970).

157. *Rott v. Provident Life Ins. Co.*, 70 N.D. 758, 298 N.W. 17 (1941).

158. *N.Y. Life Ins. Co. v. Hanson*, 71 N.D. 383, 2 N.W.2d 163 (1941).

159. *Johnson v. Great Northern Life Ins. Co.*, 73 N.D. 572, 17 N.W.2d 337 (1945).

160. N.D. CENT. CODE §§ 26-03-26, 26-03-31 (1970).

161. N.D. CENT. CODE § 26-03-35 (1) (1970).

not be binding until the premium actually is paid.¹⁶² Where the policy acknowledges receipt of the premium, an insurance company cannot show that the actual date of issuance of the policy was later than the date recited in the policy.¹⁶³ No life company shall make or permit any distinction or discrimination between insureds of the same class with equal expectation of life in the amount of payment of premiums or rate charges for policies of life or endowment insurance.¹⁶⁴ No promissory note taken in settlement of the first premium on any life, health or accident insurance policy shall be sold or negotiated in any manner prior to the applicant's medical examination where one is required, nor unless a binding receipt for such premium, signed by an authorized agent of such insurance company, has been delivered to the applicant, nor until the insurance company has received such application and medical examination, and violation of the provision is a misdemeanor.¹⁶⁵

Where the applicant took out a policy which contained several optional privileges with respect to future dividends and he selected the option to leave the dividends to accumulate at interest, the company was not obligated or authorized to apply accumulated dividends on unpaid premiums so as to continue the policy in force after forfeiture for non-payment of the premium.¹⁶⁶

In the absence of circumstances showing a waiver of the policy stipulation requiring the payment of premiums in advance, the insurer could not be compelled to accept payment of a less amount than the installment due.¹⁶⁷ Where the company sought to exercise the right of forfeiture for failure to pay the annual premium, it was held that the question of waiver and estoppel concerning the exercise of the right was for the jury.¹⁶⁸ The statutory provision that no policy of insurance shall be forfeited, suspended, or impaired by virtue of any provision for non-payment of any note or obligation taken for the premium or any part thereof unless the insurer not less than thirty days prior to maturity of the premium, note or obligation shall give the insured notice, has been held not to apply to a premium notice before an insurer can declare a forfeiture on a life insurance policy.¹⁶⁹

A person insured is entitled to a return of the premium when the insurance contract is voidable on account of the fraud or misrepre-

162. N.D. CENT. CODE § 26-04-02 (1970).

163. *Harrington v. Mutual Life Ins. Co.*, 21 N.D. 447, 131 N.W. 246 (1911); *Donahue v. Mutual Life Ins. Co. of N.Y.*, 37 N.D. 203, 164 N.W. 50 (1917).

164. N.D. CENT. CODE § 26-10-09 (1970)

165. N.D. CENT. CODE § 26-04-09 (1970).

166. *Rundle v. N.W. Nat'l. Life Ins. Co. of Mpls.*, 65 N.D. 367, 259 N.W. 43 (1935).

167. *Young v. Mutual Trust Life Ins. Co.*, 54 N.D. 600, 210 N.W. 177 (1926); *Halliday v. Equitable Life Society*, 54 N.D. 466, 209 N.W. 965 (1926).

168. *Carroll v. N.Y. Life Ins. Co.*, 49 N.D. 798, 193 N.W. 471 (1922).

169. *Lincoln Nat'l. Life Ins. Co. v. Hammer*, 41 F.2d 12 (8th Cir. 1930). Rehearing 1928.

sentation of the insurer or on account of facts, the existence of which the insured was ignorant without his fault, or when by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy.¹⁷⁰

The policy dates from the date of acknowledgment of payment of the premium in computing the year during which the defense of suicide is available.¹⁷¹

The standard form of policy contains a provision for a grace period of one month, subject to any interest charge, which shall be granted for the payment of every premium after the first, during which month the insurance shall continue in force and if the insured shall die during the month of grace, the overdue premiums will be deducted from any amount payable in settlement.¹⁷² A policy written on the non-standard form shall contain a provision for a grace period of one month for the payment of every premium after the first which may be subject to an interest charge during which month the insurance shall continue in force, which provision may contain a stipulation that if the insured shall die during the month of grace, the overdue premium will be deducted in any settlement under the policy.¹⁷³

VIII.

ASSIGNMENT OR TRANSFER

A policy of insurance upon life or health may pass by transfer, will or succession to any person whether he has an insurable interest or not. Such person may recover upon such policy in accordance with the terms thereof.¹⁷⁴ An assignment is a transfer within the terms of the Code provision. Where a policy payable to the insured, his personal representatives, heirs, or his estate is assigned, it vests in the assignee the right to the proceeds of the policy upon death and takes the policy out of the provision, making such proceeds payable to the heirs of the estate.¹⁷⁵

An insurer's liability to the assignee of a creditor on a life insurance policy on a debtor's life was limited to the creditor's insurable interest on the date the policy was issued.¹⁷⁶

The Code provides that a change of interest in any part of a thing insured unaccompanied by a corresponding change of interest in the insurance suspends the insurance to an equivalent extent until the in-

170. N.D. CENT. CODE § 26-04-03 (2) (1970).

171. *Harrington v. Mutual Life Ins. Co.*, 21 N.D. 447, 131 N.W. 246 (1911).

172. N.D. CENT. CODE §§ 26-03-26, 26-03-31 (1970).

173. N.D. CENT. CODE § 26-03-35 (2) (1970).

174. N.D. CENT. CODE § 26-03-12 (1970).

175. *Sand v. Merchants Nat'l Bank & Trust Co.*, 81 N.W.2d 748 (N.D. 1957).

176. *Dakota Life Ins. Co. v. Midland National Bank of Mpls.*, 18 F.2d 903 (8th Cir. 1927).

terest in the thing insured and the interest in the insurance are vested in the same person, except in the cases of life, accident and health insurance.¹⁷⁷ The Code further provides that notice to an insurer of a transfer or bequest of a policy of insurance upon life or health is not necessary to preserve the validity of the policy unless such notice is required expressly thereby.¹⁷⁸

North Dakota has adopted the Uniform Testamentary Additions to Trust Act, which provides that a devise or bequest may be made by will to a trust established by the testator or some other person, including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts, if the trust is identified in the testator's will and its terms are set forth in a written instrument other than a will executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator, and further, that such devise or bequest shall not be invalid because the trust is amendable or revokable, or both.¹⁷⁹

North Dakota has adopted the Uniform Gifts to Minors Act, which provides that gift may be made of a life insurance or annuity contract, which is defined by the Act to mean a life insurance policy or annuity contract issued by an insurance company authorized to do business in this state on the life of a minor to whom a gift of the policy or contract is made in the manner prescribed in the Code on the life of a member of the minor's family.¹⁸⁰

An assignment of a life policy is a contract distinct from the policy. Where the policy is assigned by the administrator of the beneficiary's estate who had a vested interest in the proceeds, the policy then was not subject to the statute making the avails of the policy when paid payable to the deceased's personal representatives, heirs or estate, distributable to the heirs-at-law. Where the insured devised and bequeathed "my estate" and "my property" the Court held that such a devise and bequest did not cover the policy proceeds of insurance on the life of the testator since the proceeds under the North Dakota statute passed to the beneficiaries by contract and not by descent and such a clause in the will was ineffectual to transfer the insurance proceeds and the insurance proceeds were payable to the heirs.¹⁸¹ In practice, to take the proceeds of a policy made payable to the decedent or to his estate or to the representatives of his estate out of the operation of the statute, the transfer by will should provide specifically "that the proceeds of the policy will not be subject to the provisions of Section 26-10-18 of the North Dakota Century

177. N.D. CENT. CODE § 26-02-12 (1970).

178. N.D. CENT. CODE § 26-03-13 (1970).

179. N.D. CENT. CODE § 56-07-01 (1960).

180. N.D. CENT. CODE § 47-24 (1960).

181. *Talcott v. Bailey*, 54 N.D. 19, 208 N.W. 549 (1926).

Code and that said proceeds shall become a part of the estate of the Testator, and shall become subject to debts, taxes and administration expenses of the estate." If the transfer of the proceeds is to be done by contract, substantially the same language should be used, referring specifically to the statute and taking the payment of the proceeds out of the statute.

Where no right to change the beneficiary of a life policy was reserved, the beneficiary has a vested interest in the policy.¹⁸² Where the insured reserved the right to change the beneficiary in a life policy the beneficiary acquires no vested right in the policy prior to the death of the insured.¹⁸³

Where the insured had reserved the right to change the beneficiary he was not permitted to make the change because of a loan on the policy and an assignment.¹⁸⁴

Where the insured has done substantially all that is required of him to effect a change of beneficiary of a life policy, and nothing remains to be done but ministerial acts of the insurance company, equity will regard as done that which ought to be done and will give effect to the insured's intent though formal details of the change were not completed before the insured's death.¹⁸⁵

IX.

CANCELLATION, SURRENDER AND REFORMATION

A search of the digests does not show any cases on this general subject involving life insurance. There appear to be no provisions relating to surrender or non-forfeiture other than those referred to in the standard form policies and the required and prohibited provisions for non-standard form policies.

X.

AVOIDANCE AND FORFEITURE OF THE POLICY

A. *Misrepresentations and Warranties.*

The Code prohibits any insurance company or any officer, director, agent or solicitor of the company from misrepresenting the terms of a policy or the benefits or advantages promised thereby or to make any estimate with intent to deceive of future dividends, or to use any name or title in a policy misrepresenting the true nature thereof.¹⁸⁶ It also prohibits any agent or solicitor of insurance from making a misrepresentation or an incomplete comparison of policies to any insured

182. *Anderson v. Northern & Dakota Trust Co.*, 69 N.D. 571, 288 N.W. 562 (1939).

183. *Rasmussen v. Mutual Life Ins. Co. of N.Y.*, 17 N.D. 295, 298 N.W. 805 (1940).

184. *Id.*

185. *Id.*

186. N.D. CENT. CODE § 26-10-11 (1970).

person to induce a policyholder of any company to lapse, forfeit or surrender his insurance and take out a policy in another company.¹⁸⁷ The agent or solicitor guilty of misrepresentation may have his license revoked or suspended.¹⁸⁸ Any officer, agent, solicitor or representative of the company who will violate the provisions as to misrepresentation shall also be guilty of a misdemeanor, and the company subject to fine.¹⁸⁹

The Code provides that each party to a contract of insurance must communicate to the other in good faith all facts within his knowledge which are or which he believes to be material to the contract in which the other has not the means of ascertaining and as to which he makes no warranty.¹⁹⁰ A neglect to communicate that which a party knows and ought to communicate is called a concealment.¹⁹¹

A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance. An intentional and fraudulent omission on the part of one who is insured to communicate information of matters proving or tending to prove the falsity of a warranty entitles the insured to rescind.¹⁹²

Neither party to a contract of insurance is bound to communicate information on specified matters except in answer to the inquiries of the other, which are:

- (1) those which the other knows;
- (2) those which in the exercise or ordinary care the other ought to know and which the former has no reason to suppose him ignorant;
- (3) those of which the other waives communication;
- (4) those which prove or tend to prove existence of a risk excluded by a warranty and which are not otherwise material; and
- (5) those which relate to a risk excepted from the policy and which are not otherwise material.¹⁹³

Materiality is to be determined not by the event but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due in forming his estimate of the disadvantages of the proposed contract or making his inquiries.¹⁹⁴

187. N.D. CENT. CODE § 26-10-12 (1970).

188. N.D. CENT. CODE § 26-10-13 (1970).

189. N.D. CENT. CODE § 26-10-14 (1970).

190. N.D. CENT. CODE § 26-02-13 (1970).

191. N.D. CENT. CODE § 26-02-14 (1970).

192. N.D. CENT. CODE § 26-02-15 (1970).

193. N.D. CENT. CODE § 26-02-16 (1970).

194. N.D. CENT. CODE § 26-02-17 (1970).

The fact that the insured under a life insurance policy died from drowning and not from any disease, did not eliminate the effect of the materiality of the concealment by the insured of the condition of his health in the application.¹⁹⁵

The materiality is to be determined by the Court.¹⁹⁶ Neither party to a contract of insurance is bound to communicate even upon inquiry information of his own judgment, i.e., opinion upon the matters in question.¹⁹⁷

A representation may be oral or written, and it may be made at the time of issuing the policy or before the policy is issued.¹⁹⁸

The language of a representation is to be interpreted by the same rules as the language of contracts in general. A representation as to the future is a promise unless it appears it was merely a statement of belief or expectation. It cannot qualify as an express provision in a contract of insurance, but it may qualify as an implied warranty.¹⁹⁹

Where the application for insurance is made the basis of a contract and is attached to and made a part of the policy, the application and questions and answers thereto are as material as any other part of the contract.²⁰⁰

A representation is false when the facts fail to correspond with its assertions or stipulations. If the representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false, and the materiality of a representation is determined by the same rule which determines the materiality of a concealment.²⁰¹

No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the insured or in his behalf shall be deemed material or shall defeat or avoid the policy or prevent its attaching unless such misrepresentation shall have been made with actual intent to deceive or unless the matter misrepresented increased the risk of loss.²⁰² The Code provision applies to a contract for reinstatement of a life policy.²⁰³

To avoid a policy because of misrepresentation of the insured in negotiations for reinstatement, the insurer must show not only that the misrepresentation was made during negotiations, but also that the misrepresentation was made with an actual intent to deceive the insurer or that the matter misrepresented in fact increased the risk.

195. *New York Life Ins. Co. v. Hansen*, 71 N.D. 383, 2 N.W.2d 163 (1941).

196. *Equitable Life Assurance Society of United States v. Bolsvert*, 66 N.D. 6, 262 N.W. 188 (1935).

197. N.D. CENT. CODE § 26-02-21 (1970).

198. N.D. CENT. CODE § 26-02-22 (1970).

199. N.D. CENT. CODE § 26-02-23 (1970).

200. *Thomas v. New York Life Ins. Co.*, 65 N.D. 625, 260 N.W. 605 (1935).

201. N.D. CENT. CODE § 26-02-24 (1970).

202. *New York Life Ins. Co. v. Hansen*, 71 N.D. 383, 2 N.W.2d 163 (1941).

203. N.D. CENT. CODE § 26-02-25 (1970).

The insured in an application for reinstatement had stated he was in good health and had not consulted any doctors but, in fact, he had consulted two doctors for stomach disturbances. The doctors testified he was neurotic, and in fact was in good health. The insured stated he had not read the form over. The Court found he had no intent to deceive, and although he may have been careless, there was no testimony that company practice would have rejected the application ipso facto if it had known he consulted the doctors. That the result was that even if the Company had known he consulted doctors, there was no basis shown for damage or increase of the risk of loss.²⁰⁴

Whether the representation is made and the terms by which it is made are questions of fact for the jury, but when proved, the question of whether or not the representation is material is a question for the Court.

The test of materiality of a fact is found in the answers to the question whether reasonably careful and intelligent men would have regarded the fact communicated at the time of effecting the insurance as substantially increasing the chance of loss insured against. The best evidence of this is found in the usage and practice of insurance companies in regard to raising rates or rejecting the risk on becoming aware of the fact. If the rates are not raised in such case, it may be inferred that reasonably careful men do not regard the fact as material. If the rates are raised or the risk is rejected, then they do. The question whether the matter is misrepresented and increased the risk of loss may be a question of law, and as a defense the insurance experts may testify concerning the usages of insurance companies generally in charging higher rates of premium or in rejecting risks when made aware of the facts claimed to be material. If it is proved that the insured, in answer to questions concerning his health, gave false answers and insurance experts testify that if true answers had been given, insurance companies generally would not have accepted the risk, and it appears from the records that reasonable minds must agree that the matters misrepresented increased the risk of loss, it is then a question of law for the Court.²⁰⁵

Under the Code Section 26-02-14, our Court has held that neglect to communicate that which a party knows and ought to communicate is a concealment and an omission to communicate is at such times as much a concealment as commission would be.²⁰⁶

The insured stated he had not been treated for any disease within the prior five years, and that he had seen one doctor for a cold. He said he had had no laboratory tests within five years other than as a

204. *Equitable Life Assurance Society of United States v. Boisvert*, 66 N.D. 6, 262 N.W. 188 (1935).

205. *Thomas v. New York Life Ins. Co.*, 65 N.D. 625, 260 N.W. 605 (1935).

206. *New York Life Ins. Co. v. Fleck*, 73 N.D. 143, 12 N.W.2d 530 (1944).

blood donor. In fact, he had actually seen another doctor, who had diagnosed Hodgkins disease and treated him for it. He had also had a portion of a gland removed and sent to a laboratory for diagnosis. His statements were held to be a misrepresentation which increased the risk.²⁰⁷

An insured made answer as to whether, to the best of his knowledge and belief, he was in the same condition of health as when the policy was issued, on a reinstatement application. It was held that his answer was merely a matter of opinion, and a wrong answer would not avoid the policy if there was no intentional misstatement. The insured's answers on his application were presumed to be in good faith.²⁰⁸

The burden is on the insurance company to establish that the applicant made the misrepresentation with actual intent to deceive or that it increased the risk of loss. It is not sufficient to show that if the insurance company had known he had consulted a doctor, the company would have investigated, but also it must be shown what it would have found on the investigation or how it would have changed its action upon the application.²⁰⁹

Whether a misrepresentation increases the risk of loss is a question of law if the application is made a basis of the contract and is attached to and made a part thereof and if reasonable minds could not differ as to whether the risk was increased. Insurance companies must determine risks they will assume on the basis of averages actuarially determined from experience, which is at least national in scope. Where the insured's misrepresentations were made in answers to questions which concealed from the company the fact that he had symptoms of possible heart disease and had been undergoing treatment for three years for chronic high blood pressure which might damage his heart, brain, kidneys or other organs, it was held that the risk of loss was increased and the insurer, which showed that it would either have turned down the application or rated up the policy if it had known the true facts, was entitled to rescind.²¹⁰

The life policy had an incontestable clause reading that it was incontestable after one year from date and that all statements made by the insured should, in the absence of fraud, be deemed representations and not warranties, and that no such statement should avoid the policy unless contained in a written application, copy of which was attached when issued. It was held that the policy was incontestable on the ground of fraud after the expiration of the incontestable period, and it does not make any difference

207. *Id.*

208. *New York Life Ins. Co. v. Hansen*, 71 N.D. 383, 2 N.W.2d 163 (1941).

209. *Id.*

210. *Lindlauf v. Northern Founders Ins. Co.*, 130 N.W.2d 86 (N.D. 1964).

so far as the incontestable clause is concerned whether it is incontestable from date or after a fixed period of time. The answers in an application for life insurance must be given a reasonable interpretation.²¹¹

When a person insured has no personal knowledge of a fact, he may repeat information which he has upon the subject and which he believes to be true, with the explanation that he does so on the information of others, or he may submit the information in its whole extent to the insurer. In neither case is he responsible for its truth unless it proceeds from an agent of the insured whose duty it is to give the intelligence.²¹²

The provisions of the Code applying to misrepresentation apply to a modification of the contract of insurance, as well as to its original formation. Whenever a right to rescind the contract of insurance is given the insured by any provision of the Code, such right may be exercised at any time previous to the commencement of an action on the contract.²¹³

Section 26-02-25 of the Code, which provides that misrepresentations are material and will defeat or avoid a policy if made with intent to deceive, or if the matter misrepresented increased the risk of loss, does not change the effect of a false warranty in a contract of insurance as to a fact material to the risk assumed. Where the applicant stated in answer to a question as to pregnancy, "no," and the application also contained the statement that the answers were warranted to be true, the state of pregnancy was held to materially increase the risk of loss, and being material, whether innocent or not, would be ground to set aside the contract.²¹⁴ This section of the Code includes statements and applications called warranties by the law of insurance and such statutes are remedial and to be liberally construed.²¹⁵

Misrepresentations increasing "risk of loss" under 26-02-25 do not include all misrepresentations which would probably have influenced insurer.²¹⁶

A policy must provide that statements of insured in absence of fraud are representations and not warranties in the non-standard form²¹⁷ and in the standard form.²¹⁸

211. *Donahue v. Mutual Life Ins. Co.*, 37 N.D. 203, 164 N.W. 50 (1917); *Plotner v. Northwestern National Life Ins. Co.*, 48 N.D. 295, 183 N.W. 1000 (1921).

212. N.D. CENT. CODE § 26-02-26 (1970).

213. N.D. CENT. CODE § 26-02-29 (1970).

214. *Satterlee v. Modern Brotherhood of America*, 15 N.D. 92, 106 N.W. 561, 563 (1906); *Van Woert v. Modern Woodmen of America*, 29 N.D. 441, 151 N.W. 224, 228 (1915).

215. *Soules v. Brotherhood of America Yeomen*, 19 N.D. 23, 120 N.W. 760, 762 (1909).

216. *O'Keefe v. Zwick General Accident & Libability Ins. Co.*, 43 F.2d 809, 812 (8th Cir. 1930). *cert. denied*, 282 U.S. 898 (1931).

217. N.D. CENT. CODE § 26-03-35 (4) (1970).

218. N.D. CENT. CODE § 26-03-26 (1970).

A policy may be rescinded for violation of a material warranty, or other material provision of a policy on the part of either party by the other.²¹⁹

B. *Incontestable Clause.*

The Code requires every life insurance policy issued on other than the standard form to contain an incontestable clause providing that the policy shall constitute the entire contract between the parties and shall be incontestable after it shall have been in force during the lifetime of the insured for two years from its date, except for non-payment of premiums and except for violations of the policy relating to naval and military service in time of war and at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident also may be excepted.²²⁰

A provision making a life policy incontestable after two years from its date must be read into a policy executed in North Dakota, and if the insured's fraud in procuring the insurance is not discovered and set up within the two year period, the right to contest the policy on that ground is barred.²²¹

A reinstatement of a life insurance policy containing an incontestability provision may be contested only within time after reinstatement as was fixed for contesting the policy, or upon grounds excepted from operation of the incontestability provision. A company may contest the reinstatement of the policy only during the same period of time thereafter as was fixed for contesting the original policy.²²² The incontestability clause in the standard form of insurance policy under the Code provides that the policy constitutes the entire contract between the parties and shall be incontestable from its date except for non-payment of premium and except as otherwise provided in the policy and that all statements made by the insured should, in the absence of fraud, be deemed representations and not warranties, and no such statement should avoid the policy unless it is contained in a written application, a copy of which should be endorsed upon and attached to the policy when issued.²²³ Where the company used an incontestable clause in the same wording as that provision contained in the North Dakota standard form policy, the Court held that the second part of the clause providing that statements of the insured in the absence of fraud should be deemed representations and not

219. N.D. CENT. CODE § 26-03-19 (1970).

220. N.D. CENT. CODE § 26-03-25 (3) (1970).

221. *Dakota Life Ins. Co. v. Midland National Bank of Mpls.*, 18 F.2d 903, 905 (8th Cir. 1927).

222. *Johnson v. Great Northern Life Ins. Co.*, 73 N.D. 572, 17 N.W.2d 337, 339 (1945).

223. Standard Form, N.D. CENT. CODE § 26-03-26 (1970).

warranties, etc., was not an exception to the incontestability provision which did not except an action or a defense based on fraud. The Court stated that the second sentence with reference to statements by the insured was not an exception to the incontestability provision. The incontestability provision does not except an action or a defense based on fraud and that this sentence, while it has a bearing on the question of liability of the insurance company under the policy, has reference to a different matter than that referred to in the incontestability clause.²²⁴

It has also been held that it does not make any difference so far as the effect of the incontestable clause is concerned whether it is incontestable from date or after a fixed period of time.²²⁵

The North Dakota Supreme Court has held that the incontestability clause required to be inserted in all non-standard form policies issued in North Dakota bars all defenses in an action to enforce a policy of life insurance after the contestable period has expired, except such as are expressly excepted from its operation, to-wit: non-payment of premium and violation of the policy's provisions relating to military and naval service in time of war. It held that a provision in a life policy that the policy should not be incontestable if death resulted as a result of operating or riding in an aircraft other than as a fare-paying passenger of a commercial airline flying in a regular scheduled route between definitely established airports, was void because it was in violation of the statute and that the policy will be construed and enforced as if the policy had not contained such a provision. The Court expressly considered *Metropolitan Life v. Conway*, 252 N.Y. 449, 169 N.E. 642 (1930), which held the incontestability clause is not a mandate as to coverage and rejected that view. The Court pointed out that the standard form policies under the Code were incontestable after two years in the sense that the insurer could not raise any defense, including exclusion of coverage, to its payment of the policy except non-payment of the premiums and violation of restrictions relating to military and naval service. The Court reasoned that if the incontestability clause required in the non-standard policy did not prohibit a defense of exclusion of coverage not specifically and permissively excepted from the operation of the clause, they would be holding that the Legislature had set up two standards of incontestability. One, for those writers of insurance using the standard form and the other applying to those who did not use the form, and that the Legislature did not so intend.²²⁶

224. *Johnson v. Great Northern Life Ins. Co.*, 73 N.D. 572, 17 N.W.2d 337 (1945).

225. *Plotner v. Northwestern National Life Ins. Co.*, 48 N.D. 395, 183 N.W. 1000 (1921).

226. *Jordon v. Western States Life Ins. Co.*, 78 N.D. 902, 53 N.W.2d 860 (1952).

XI.

CAUSES OF DEATH

A. *Suicide.*

In all suits on policies of insurance on life, it shall be no defense after the policy has been in force one year that the insured committed suicide and any provision or stipulation to the contrary in the policy shall be void.²²⁷

Where the insured committed suicide while sane after the expiration of one year from the date of the policy, the company was liable for the amount of the policy even though it appeared that the act of the suicide was premeditated before the expiration of the one year and even though the date of the liability of the company is fixed by the voluntary act of the insured.²²⁸

Where the insured in an accident insurance policy commits suicide while so insane as not to comprehend the nature of the act nor the physical result which would flow from it, his death has been held to be caused by accidental means within the meaning of a policy insuring against bodily injury through external violent and accidental means.²²⁹

The policy dates from the date of acknowledgment of payment of premium in computing the year during which the defense of suicide is available.²³⁰ There is a presumption in favor of accidental death which amounts to affirmative evidence. The burden of proof is on the defendant to prove suicide.²³¹

B. *Death Caused by Beneficiary.*

The Code provides a murderer cannot inherit from the victim. No person who has been finally convicted of feloniously causing the death of another shall take or receive any property or benefit by succession, will, or otherwise, directly or indirectly, by reason of the death of such person, but all property of the deceased and all rights conditioned upon his death shall vest and be determined the same as if the person convicted were dead when the testator died.²³² There are no cases in North Dakota under the statute and it is not certain that it intends to apply to life insurance proceeds but it would seem that under the statute and general rule that a beneficiary who has been convicted of causing the death of an insurer forfeits his rights under the policy of life insurance.

227. N.D. CENT. CODE § 26-03-24 (1970).

228. *Harrington v. Mutual Life Ins. Co.*, 21 N.D. 447, 131 N.W. 246 (1911).

229. *Weber v. Interstate Businessmens Assn.*, 48 N.D. 307, 184 N.W. 97 (1921).

230. *Harrington v. Mutual Life Ins. Co.*, 21 N.D. 44, 131 N.W. 246 (1911).

231. *Clemens v. Royal Neighbors of America*, 14 N.D. 116, 103 N.W. 402, 404 (1905); *Svihovec v. Woodmen Accident Co.*, 69 N.D. 259, 285 N.W. 447 (1939).

232. N.D. CENT. CODE § 56-04-23 (1960).

XII.

NOTICE AND PROOF OF LOSS

When preliminary proof of loss is required by the policy, the insured is not bound to give such proof as would be necessary in a court but it is sufficient for him to give the best evidence which he has in his power at the time.²³³ All defects in a notice of loss or in preliminary proof thereof which the insured might remedy and which the insurer omits to specify to him without necessary delay as grounds of objection are waived.²³⁴ When notice of loss is given to the insurer on behalf of the insured or on behalf of a beneficiary in a policy of life insurance, the insurer, within 20 days after receipt of such notice, shall furnish to the insured or beneficiary, as the case may be, a blank form of proof of loss. In the case of life insurance, the beneficiary shall have 90 days after receipt of such blank form in which to make such proof of loss. If the insurer shall fail to furnish such blank form of proof of loss within the time aforesaid, he shall be deemed to have waived such proof. Any agreement to waive the provisions of the Code section are void.²³⁵

Delay in the presentation to an insurer of notice or proof of loss is waived if such delay is caused by any act of the insurer or if he omits to make objections promptly and specifically upon that ground.²³⁶ If a policy requires the certificate or testimony of a person other than the insured by way of preliminary proof of loss, it is sufficient for the insured to use reasonable diligence to procure it and in case of the refusal of such person to give it, to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified.²³⁷

A search has not revealed any cases under this topic of the paper.

XIII.

RIGHT TO PROCEEDS

A. *Change of Beneficiary.*

Where no right to change the beneficiary of a life policy is reserved the beneficiary has a vested interest in the policy.²³⁸

Where an insured has done substantially all that is required of him to effect a change of beneficiary of a life policy and nothing remains to be done but ministerial acts of the insurance company, its office or agents, equity will consider as done that which ought to be

233. N.D. CENT. CODE §26-06-06 (1970).

234. N.D. CENT. CODE § 26-06-07 (1970).

235. N.D. CENT. CODE § 26-06-08 (1970).

236. N.D. CENT. CODE § 26-06-09 (1970).

237. N.D. CENT. CODE § 26-06-10 (1970).

238. *Anderson v. Northern & Dakota Trust Co.*, 69 N.D. 571, 288 N.W. 562, 563 (1939).

done and will give effect to the insured's intent though formal details of the change were not complete before the insured's death. The insurer may waive strict compliance with the life policy provisions relating to the change of beneficiary.²³⁹

Where the insured reserves the right to change the beneficiary in a life policy, the beneficiary acquires no vested right in the policy prior to the death of the insured.²⁴⁰

B. *Simultaneous Death.*

The Code provides where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously, the proceeds of the policy shall be distributed as if the insured had survived the beneficiary.²⁴¹

C. *Rights of Creditors.*

The Code provides that the surrender value of any policy of life insurance which upon the death of the insured would be payable to the wife or children or any relative of the insured dependent or likely to be dependent upon him for support shall be exempt absolutely from the claims of creditors of the insured. No creditor of the insured and no court or officer of a court acting for any such creditor shall have the right under any circumstances to elect for the insured to have such policy of insurance surrendered or in any wise converted into money and no such policy of life insurance or property right therein belonging to the holder and no value thereof shall be subject to seizure under any process of any court under any circumstance.²⁴²

The Code further provides that the avails of a life insurance policy or contract payable to the deceased, the personal representatives of the deceased, his heirs or estate, shall not be subject to debts of the decedent upon the death of the insured except by special contract and that such avails shall be inventoried as a part of the estate of the decedent and distributed without deduction and shall pass to the heirs at law or legatees of the decedent in accord with the laws of succession or of wills as the case may be. The insured may transfer the avails of such life insurance policy or contract either by will or by contract. The statute does not affect a life insurance policy or a beneficiary certificate which is made payable to a designated person, including the spouse of the insured, or to persons or to members of a family designated as a class, such as all children or all

239. *Rasmussen v. Mutual Life Ins. Co. of N.Y.*, 17 N.D. 295, 293 N.W. 805 (1940).

240. *Id.*

241. N.D. CENT. CODE § 31-12-04 (1960).

242. N.D. CENT. CODE § 26-10-17 (1970).

brothers or sisters, even though the members of the class are not designated by name.²⁴³

The statute has had a long history and a good deal of case law under it, which is summarized in *Hill v. Schroeder*, 156 N.W.2d 695, a 1968 case.

The term "avails" is synonymous with proceeds under the statute. The proceeds or avails do not become a part of the estate of the deceased but belong to the heirs personally. The proceeds or avails pass to the heirs of the insured by contract and not by descent, the same as though their names had been written into the insurance policy as beneficiaries. The avails are collected by the representative of the estate or inventoried in the estate of the decedent, but do not become a part of the estate. The beneficiaries have no personal liability for the debts of the insured decedent. The avails pass through the executor or administrator directly to the heirs as through a conduit without becoming involved in the estate in any way.

The executor or administrator, and not the probate court, is concerned with the avails. If there is any expense incurred in connection with the avails, it must be borne by the heirs to whom they are transferred, just as if the heir was named a beneficiary. Distribution is made by the executor and not by the probate court. The statute can be overridden expressly by so stating either in a will or by contract. However, where the insured devised and bequeathed "my estate" and "my property" the court held such a disposition in the will to be ineffective since the policy proceeds did not become a part of the estate and were not property of the testator to pass by descent. As stated by the court in the *Hill* case, the history of the statute goes back to 1895 and "the statute has generated its fair share of litigation".

D. Taxation of Proceeds.

North Dakota levies an estate tax. The net proceeds of all life insurance carried by the decedent at the time of his death in excess of \$25,000, whether made payable to his estate, the widow, heirs, individuals or trusts, is included in the gross estate for tax purposes. For the purpose of determining whether the insurance was carried by the decedent at the time of his death, there shall be included the proceeds of any policy with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person, and the terms "incidents of ownership" and "reversionary interest" have the same meaning as in the Federal statute.²⁴⁴

243. N.D. CENT. CODE § 26-10-18 (1970).

244. N.D. CENT. CODE § 57-37-02 (4) (Supp. 1969).

As to the conditions for transfer or payment of the proceeds of a life insurance policy subject to the estate tax, the Code provides that in the case of an insurer paying proceeds of a life insurance contract in which the decedent had an incident of ownership determined under Section 57-37-02, no notice or order of the county court shall be required. The insurer may pay the proceeds of the life insurance contract to the stated beneficiary in the contract immediately. However, the insurer shall give the tax commissioner notice of the amount paid pursuant to the contract and any other information required by the tax commissioner, regardless of the amount of the contract. Such notice shall be filed with the tax commissioner within 30 days from the date of payment.²⁴⁵

The Code provides as to income tax that the term "gross income" does not include, and there shall be exempt from taxation under the income tax laws, the proceeds of life insurance policies and contracts paid upon the death of the insured to individual beneficiaries or to the estate of the insured.²⁴⁶ There is also exempt and excluded from gross income the amount received by the insured as a return of premium or premiums paid by him under life insurance endowment or annuity contracts other than Federal social security retirement contracts, either during the term or at the maturity of the term mentioned in the contract, or on surrender of the contract.²⁴⁷

E. Facility of Payment

There are no facility of payment provisions under the North Dakota Code and there appears to be no help in this problem other than the provision for summary guardianship and probate proceedings in estates of small value.²⁴⁸

F. Escheat.

The Code provides all property, real and personal, within the limits of this state which does not belong to any person or to the United States, belongs to the state, and that whenever the title to any property fails for want of heirs or next of kin, it reverts to the state. If no heirs can be found to whom the proceeds of a life insurance policy can pass under Section 26-10-18, the proceeds escheat to the state.²⁴⁹ The Code provides that if no one is capable of succeeding to property and it escheats to the state, that an action for the recovery of the property to reduce it to the possession of the state and for its sale and conveyance may be brought by the Attorney General or the States Attorney of the district court of the county in which

245. N.D. CENT. CODE § 57-37-29 (3) (Supp. 1969).

246. N.D. CENT. CODE § 57-38-18 (1) (1960).

247. N.D. CENT. CODE § 57-38-18 (2) (1960).

248. N.D. CENT. CODE § 54-01-02 (1960).

249. *Laplant v. Stearns*, 79 N.D. 62, 54 N.W.2d 748 (1952).

the property is situated.²⁵⁰ It has been held that the statute gives an exclusive remedy to perfect the escheat.²⁵¹

G. *Interpleader.*

North Dakota Rules of Civil Procedure largely follow the Federal Rules. Interpleader is provided by Rule 22 which provides:

"Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical, but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this Rule supplement and do not in any way limit the joinder of parties permitted in Rule 20."

XIV.

REINSURANCE

The Code defines a contract of reinsurance as one in which an insurer procures a third person to insure him against loss or liability by reason of an original insurance contract made by him.²⁵²

When an insurer obtains reinsurance, it must communicate all the representations of the original insured and all the knowledge and information it possesses, whether previously or subsequently acquired, which is material to the risk.²⁵³

The Code further provides that any insurance company organized or admitted to transact business in the state may reinsure in any insurance company or insurer licensed in any state of the United States of America, any part or all of the risks taken by it.²⁵⁴

XV.

ACTIONS ON POLICIES

A. *Limitation of Actions.*

The Code provides that no policy of life insurance shall be issued or delivered in the state if it contains a provision limiting the time within which any action at law or in equity may be commenced to less than five years after the cause of action accrues.

250. N.D. CENT. CODE § 56-01-14 (1960).

251. *Delaney v. States*, 42 N.D. 630, 174 N.W. 290, 292 (1919).

252. N.D. CENT. CODE § 26-05-01 (1970).

253. N.D. CENT. CODE § 26-05-05 (1970).

254. N.D. CENT. CODE § 26-05-03 (1970).

Action under a sickness and accident insurance policy may not be brought after the expiration of three years after the time written proof of loss is required to be furnished and such policies must contain such standard provision.²⁵⁵

B. *Pleadings.*

North Dakota has adopted the Rules of Civil Procedure, following the Federal Rules, and has one form of action known as a civil action. The pleadings are a complaint, an answer, and a reply to a counter-claim denominated as such in answer to a cross-claim if there is a cross-claim, a third party complaint if the party who is not an original party is summoned, and a third party answer if a third party complaint is served, and no other pleadings are allowed.

The action is commenced by the issuance of a summons served with or without the complaint. Rule 8 provides that a pleading setting forth a claim for relief, whether for an original claim, counter-claim, cross-claim, or third party complaint, shall contain only a short and plain statement of the claim showing the pleader entitled to relief and a demand for judgment.

Rule 12 sets forth the presentation of defenses and follows the Federal Rule.

In the absence of contrary pleadings and proof, an insurance policy is deemed a North Dakota contract and laws of the state are applicable thereto.²⁵⁶ Where the contract is made in another state, the law of the forum controls unless the law of the other state be specially pleaded and proved.²⁵⁷

C. *Pre-Trial.*

Rule 16 of the North Dakota Rules of Civil Procedure sets out the pre-trial procedure for formulating issues and follows the Federal Rule. The pre-trial procedure now is in general use throughout the state, and is particularly used by the judges in jury cases.

D. *Evidence.*

Rule 43 provides that all evidence shall be admitted which is admissible under the statutes of this state or under the Rules of Evidence applied before the adoption of the Rules and the trials of actions in the courts of this state. Deposition and discovery are governed by Rules 26 through 37 and follow the Federal Practice and Rules.

The statute provides a privilege covering the relation of attorney-client, clergyman or priest and confessor, physician or surgeon and

255. N.D. CENT. CODE § 26-03A-03 (k) (1970).

256. *Weber v. Businessmen's Accident Ass'n*, 48 N.D. 307, 184 N.W. 97, 99 (1921).

257. *Kephart v. Continental Casualty Co.*, 17 N.D. 380, 116 N.W. 349, 351 (1908).

patient, and public officer in regard to communications made to him in official confidence.²⁵⁸

E. *Certificates.*

A certified copy of a North Dakota death certificate is prima facie evidence in all courts of the facts therein stated.²⁵⁹

F. *Presumptions.*

The Code provides that a person not heard from in seven years is dead.²⁶⁰ This provision is found among those presumptions the Code lists as disputable presumptions. Under this Code provision, in an action on a policy insuring against death by "violent external and accidental means," the insurer has the burden of establishing that the insured's death was due to suicide or the intentional acts of another person within the exception of the policy.²⁶¹

Findings of death under the Federal Missing Persons Act, shall be received in North Dakota courts as prima facie evidence of the death of the person therein found to be dead and the date, circumstances and the place of his disappearance.²⁶²

The Code sets forth in Section 31-11-03 forty disputable presumptions, some of which may apply to life insurance litigation and particular matters in references made to the statute.

G. *Attorneys Fees.*

The Code provides that attorneys fees in civil actions are recoverable only by agreement. Certain nominal sums are allowed to the prevailing party as indemnity for expenses of the action by way of costs. Attorneys fees are not recoverable unless expressly authorized by law.²⁶³ The only provision for recovery of attorneys fees in insurance cases is provided that, in an action against an unauthorized foreign or alien insurer upon a contract of insurance issued or delivered in North Dakota to a North Dakota resident or to a corporation authorized to do business in North Dakota, if the insurer has failed for thirty days after demand prior to the commencement of the action to make payment under the terms of the contract, and if it appears to the court that the refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include the fee in the judgment in the action and that such fee shall not exceed 12½% of the amount which the court or jury finds the plaintiff is entitled to recover against the insurer, but

258. N.D. CENT. CODE § 31-01-06 (1960).

259. N.D. CENT. CODE § 23-02-40 (1960).

260. N.D. CENT. CODE § 31-11-03 (26) (1960).

261. Svihovec v. Woodmen Accident Co., 69 N.D. 259, 285 N.W. 447, 449 (1939).

262. N.D. CENT. CODE § 31-11-04.1 (1960).

263. Kilby v. Movius Land & Loan Co., 55 N.D. 830, 215 N.W. 284 (1927).

in no event should the fee be less than \$25. The Code further provides that failure of the insurer to defend the action shall be deemed prima facie evidence that its failure was vexatious and without reasonable cause. The provision does not apply to a contract by an unauthorized foreign or alien insurer of reinsurance.²⁶⁴

XVI.

INJURY OR DEATH RESULTING FROM EXTERNAL VIOLENT AND ACCIDENTAL MEANS

It has been settled in North Dakota that the term "accidental means" in an insuring clause of health and accident insurance policy which insures against loss of life resulting directly and independently of all other causes from bodily injury sustained through purely accidental means includes such means as produce effects which are not their natural and probable consequences, an effect which does not ordinarily follow, an effect which cannot reasonably be anticipated from the use of those means, and an effect which the actor did not intend to produce and cannot be charged with the design of producing, are effects produced by accidental means. Where the insured overexerted himself in loading a wild horse into a truck and struggled with the horse for a period of two hours, but during the struggle was not knocked down or kicked or received any external injury or blow of any kind, it was held that there could be a recovery under the policy and that bodily injury was not confined to external injury. The court expressly rejected the rule that there would be no liability from the use of intended, planned, or designed means where the result was unanticipated.²⁶⁵

On a re-trial of the *Jacobson* case, the court further defined the meaning of the terms, "wholly disabled" or "total disabled" in an accident policy and held they do not mean a state of complete physical and mental incapacity or other helplessness but mean the inability to do all of the substantial material acts necessary to carry on the business or occupation of the insured or any business or occupation in a customary and usual manner, and which acts the insured would be able to perform in such manner but for such disability. Deceased received a blow which caused a diseased condition which resulted in his death. It was held the beneficiary could recover a double indemnity benefit under a policy providing recovery if death was from bodily injuries caused directly, exclusively and independently of all other causes by external, violent and purely accidental means.²⁶⁶

264. N.D. CENT. CODE § 26-09-15 (1970).

265. *Jacobson v. Mutual Benefit Health & Accident Ass'n*, 69 N.D. 632, 289 N.W. 591 (1940).

266. *Druhl v. Equitable Life Assur. Soc.*, 56 N.D. 517, 218 N.W. 220 (1928).

XVII.

JURISDICTION, PROCESS AND VENUE

A. *Jurisdiction.*

Service on a domestic or foreign insurance company can be made on an officer, director, superintendent, managing agent, or general agent or any other agent authorized by appointment or by law to receive process, and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.²⁶⁷

The statute requires the Commissioner to mail the company a copy to the person it has designated. Service on an unauthorized insurer was discussed under IV. B (2), *supra*. Time for answer is 20 days on a licensed company and 30 days on an unauthorized company. A mortgage broker has been held not to be a managing agent for service of process on a foreign insurance company.²⁶⁸ Licensed foreign companies must appoint the Commissioner for service of process, *supra*.

B. *Process.*

There is only one form of civil action, N.D.R.C.P., Rule 2, which is commenced by service of a summons issued to the plaintiff or his attorney, N.D.R.C.P., Rule 4.

C. *Venue.*

An action against a domestic corporation shall be tried in the county designated in plaintiff's complaint if such corporation transacts business in that county.²⁶⁹ Plaintiff serving a nonresident corporation on an insurance policy may lay the venue in any county and the party interpleaded subsequently is not entitled to a change of venue because he is not a resident of the county in which suit was begun.²⁷⁰

267. N.D. CENT. CODE § 26-09-06 (1970).

268. *Bauer v. Union Central Life Ins. Co.*, 22 N.D. 435, 133 N.W. 988, 990 (1911).

269. N.D. CENT. CODE § 28-04-04 (1960).

270. *Dillage v. Lincoln National Life Ins. Co.*, 54 N.D. 312, 209 N.W. 656 (1926).