

RECENT DEVELOPMENTS IN NORTH DAKOTA CONTRACT LAW

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ABSTRACT

This Article surveys cases involving the application and interpretation of North Dakota contract law from 2013 through 2016. The majority of the cases discussed in this Article involve decisions from the North Dakota Supreme Court, though the Article also includes a handful of relevant decisions from the United States District Court for the District of North Dakota and the United States Court of Appeals for the Eighth Circuit. This Article does not address every ruling from the survey period; rather, it includes only those cases that may be of interest to North Dakota attorneys, with a focus on general and specific issues concerning contract interpretation.

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I. INTRODUCTION

This Article surveys cases involving the application and interpretation of North Dakota contract law from 2013 through 2016 and attempts to provide some concrete guidance to North Dakota attorneys who engage with contract law either in a transactional or litigation posture. Much of the decisional law from the survey period reinforces longstanding contract law, but there are more than a few cases where the courts tread upon new ground.

For example, decisions from the North Dakota Supreme Court on issues of contract formation, promissory estoppel doctrine, and the application of the parol evidence rule largely embrace existing contract law. In these areas, the factual context of the dispute or the court's analysis is more noteworthy than the legal principles themselves.

Attorneys may be more interested in recent decisions that announce new rules and affect future transactional behavior. For example, the North Dakota Supreme Court interpreted a force majeure clause for the first time, setting forth a standard of interpretation for future disputes. In another watershed decision, the Supreme Court declined to enforce a no-waiver clause in a contract based on the conduct of the parties. While the North Dakota Supreme Court has held previously that parties can waive contractual provisions by conduct, it had not yet concluded that parties had waived a no-waiver clause.

Decisional law from the survey period also reveals that interpretation prevails as the most commonly heard and litigated issue. Those rulings encompassed general matters, such as applicability of the parol evidence rule and basic principles of contract interpretation. The courts also announced specific rules about interpreting certain types of contractual clauses such as "no damage for delay" clauses, indemnification clauses, Pugh clauses, and rights of first refusal. Many of these specific ruling affect oil and gas leases and construction contracts.

The remainder of this Article discusses the cases examined from the survey period. The cases are divided into categories by issues. The first category of cases discusses issues relating to the formation of a contract. Second, this Article will address the continued viability of promissory estoppel as an independent basis for relief and foreshadow the possibility of a decision concerning third party promissory estoppel claims in the near future. Third, this Article will discuss general and specific interpretation issues outlined above. The final category of cases examines contract defenses.

II. FORMATION

It is not uncommon for parties to litigate formation issues even though the basic legal principles are well-settled. The context in which such issues arise is equally common: transactions that involve parties unrepresented by counsel on both sides or adhesion contracts.

A. PRICE AS AN ESSENTIAL TERM

Two cases highlight the requirement that the contract price, i.e. the consideration, must be expressly stated without being open-ended.

Lumley v. Kapusta reinforces the longstanding tenet of contract law requiring that the essential terms of a contract be sufficiently definite for a contract to be enforceable.¹ In this case, the plaintiffs were tenant farmers of the defendant's North Dakota property.² The defendant lived in Virginia and wanted to sell her property, so in 2012, the parties had telephone conversations about a potential transaction.³ One of the plaintiffs told the defendant she would get an appraisal for the value of the property.⁴ Instead of an appraisal, she obtained an evaluation from a bank which expressly stated that it was not an appraisal and valued the property at \$525,827.⁵ The plaintiffs sent the defendant a cashier's check based on the bank's evaluation, deeds to be executed by the defendant, and a note.⁶ The defendant endorsed and deposited the check in a bank and signed the deeds, but she did not return the executed deeds to the plaintiffs.⁷ Instead, she telephoned the plaintiffs and asked why there had been no appraisal of the property.⁸ Shortly afterward, the defendant returned the money to the plaintiffs.⁹ The plaintiffs sued for specific performance of their alleged oral contract.¹⁰

Under longstanding North Dakota law, a contract can be enforced only when the parties have agreed on its essential terms, and price is an essential term.¹¹ Further, the contract must fix price with certainty or provide a

1. *Lumley v. Kapusta*, 2016 ND 74, ¶ 7, 878 N.W.2d 65, 67.

2. *Id.* ¶ 2, 878 N.W.2d at 66.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* ¶ 3.

7. *Kapusta*, ¶ 3.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* ¶ 7, 878 N.W.2d at 67.

method by which it can be fixed with certainty.¹² Here, there was no evidence that the parties actually agreed on a purchase price for the property.¹³ No actual appraisal was performed.¹⁴ One of the plaintiffs testified at trial that she came up with the purchase price the day she wrote the check.¹⁵ Without an agreement as to the price to be paid for the property, there was no enforceable contract.¹⁶

Contrast this holding with *Limberg v. Sanford Medical Center Fargo*, where the plaintiff, an emergency room patient, challenged an alleged open price term in the contract that all patients sign before receiving treatment, but lost because the contract unambiguously provided a method by which price can be fixed with sufficient certainty.¹⁷

In *Limberg*, the plaintiff challenged a hospital's contract as ambiguous, unfair, unconscionable, and unreasonable because the contract contained an open price term.¹⁸ The contract at issue required all patients to pay "all charges related to services provided by" the hospital and to adhere to the provider's payment guidelines.¹⁹ These payment guidelines were made available to all patients.²⁰ The contract did not list the exact price of the services; nonetheless, specific contract language controlled the price terms by referring to the payment guidelines.²¹ The payment guidelines, in turn, enumerated the full, undiscounted prices of the hospital's services, which were higher than the prices paid by insured patients or those covered by Medicare or Medicaid.²² The North Dakota Supreme Court held that even though the price of each hospital service was not listed in the contract itself, the contract reference to the "rates" or the "charges" of a hospital was a sufficiently definite price term.²³ The Supreme Court's ruling followed the

12. *Id.* (citations omitted) ("[t]o be specifically enforceable, '[a] contract must fix the price or consideration clearly, definitely, certainly, and unambiguously, or provide a way by which it can be fixed with certainty.'").

13. *Kapusta*, ¶ 8, 878 N.W.2d at 67.

14. *Id.* ¶ 2, 878 N.W.2d at 66.

15. *Id.* ¶ 8, 878 N.W.2d at 67.

16. *Id.* ¶ 9, 878 N.W.2d at 68.

17. *Limberg v. Sanford Med. Ctr. Fargo*, 2016 ND 140, 881 N.W.2d 658.

18. *Id.* ¶¶ 4, 6, 881 N.W.2d 658, 659-60.

19. *Id.* ¶ 10, 881 N.W.2d at 661.

20. *Id.*

21. *Id.* ¶ 12.

22. *Id.* ¶ 9.

23. *Limberg*, ¶¶ 11-13, 881 N.W.2d 658, 661-62.

majority approach to this issue; other jurisdictions across the nation have entertained substantially similar allegations with comparable outcomes.²⁴

This type of formation issue, namely failure to state an essential term, such as price, is not likely to present in an arm's length transaction negotiated between parties of relatively equal sophistication who are represented by counsel. These cases are noteworthy because of the context in which the issue arose. In the first instance, the parties bargained and attempted to reach an agreement without advice of counsel, and in the second, the contract is one of adhesion, wherein one party lacked opportunity to bargain. These types of cases will likely continue to arise, and their outcomes merit monitoring by counsel, particularly where the client is a company that interacts with consumers in an adhesion context.

B. ENFORCEABLE MODIFICATION

There were a few rulings during the survey period which reveal that parties, as a litigation strategy, occasionally characterize certain performance conduct as an enforceable modification to an existing contract. Cloaking contracting behavior in this way is rarely successful, perhaps because in North Dakota, statutory law controls how to effectively modify a written contract unless the parties agree otherwise.²⁵ The statute provides a clear starting point for a court's analysis and affords little flexibility to maneuver around it.

The North Dakota statute provides that a written agreement may be altered by a writing "or by an executed oral agreement *and not otherwise.*"²⁶ It further provides that "[a]n oral agreement is executed within the meaning of this section whenever the party performing has incurred a detriment which that party was not obligated by the original contract to incur."²⁷ Put otherwise, an oral agreement is executed when the performing party has furnished some consideration independent from the original agreement for the change. The statute's execution requirement appears to codify the common law preexisting legal duty rule for oral modifications.²⁸ That rule requires independent consideration to support a

24. See, e.g., *DiCarlo v. St. Mary Hosp.*, 530 F.3d 255, 260 (3d Cir. 2008); *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 SD 34, ¶ 16, 731 N.W.2d 184, 192; *Shelton v. Duke Univ. Health Sys., Inc.*, 633 S.E.2d 113, 115-16 (N.C. Ct. App. 2006).

25. N.D. CENT. CODE § 9-09-06 (2015).

26. *Id.* (emphasis added).

27. *Id.*

28. RESTATEMENT (SECOND) OF CONTRACTS § 73 (Amer. Law Inst. 1981) ("Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is

modification to avoid the risk that assent to a change is coerced or given gratuitously.²⁹ Per the statute, an unexecuted oral modification of a written contract—one that remains entirely promissory on both sides³⁰—is invalid.³¹

Valentina Williston, LLC v. Gadeco, LLC, involves a party asserting a modification argument as an unsuccessful litigation strategy.³² There, the Seatons entered into an oil and gas lease with Gadeco covering property in Williams County.³³ The lease had a five-year term and contained a continuing operations clause.³⁴ This clause enabled Gadeco to extend the initial term of the lease if no more than ninety days elapsed between completing or abandoning one well and beginning to drill a subsequent one.³⁵

Before the five-year initial term on the Gadeco lease expired, the Seatons entered into an oil and gas top lease with Valentina Exploration, LLC (“Valentina”).³⁶ In March 2012, a Gadeco land manager mailed a letter to the Seatons invoking the continuing operations clause for some sections of the leased land, while also acknowledging that the lease, per its express terms, would expire as to sections where no wells had been drilled.³⁷ In litigation, Valentina claimed that this letter constituted an enforceable modification of the existing lease.³⁸

As stated, in North Dakota, parties may modify a written contract by another written contract, but for Gadeco’s letter to constitute an effective modification, all of the elements for a valid contract must be present, including an offer, an acceptance of the offer, and sufficient consideration.³⁹ The letter did not satisfy the first requirement, namely that it contain an

not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.”).

29. *See id.*, cmt. a.

30. *Foster v. Furlong*, 8 ND 282, 78 N.W. 986, 987 (1899).

31. N.D. CENT. CODE § 9–09–06 (2015). *See also* N.D. CENT. CODE § 9–09–05 (2015) (providing that oral agreements may be modified “by consent of the parties in writing without independent consideration” to support the modification).

32. *Valentina Williston, LLC v. Gadeco, LLC*, 2016 ND 84, ¶ 26, 878 N.W.2d 397, 404-05.

33. *Id.* ¶ 2, 878 N.W.2d at 399.

34. *Id.*

35. *Id.*

36. *Id.* ¶ 3 (quoting *Sandwick v. LaCrosse*, 2008 ND 77, ¶ 4, 747 N.W.2d 519, 521). A top lease is “a lease granted by a landowner during the existence of a recorded mineral lease which is to become effective if and when the existing lease expires or is terminated.” *Id.*

37. *Id.* ¶ 4.

38. *Valentina Williston, LLC*, ¶ 15, 878 N.W.2d at 402.

39. N.D. CENT. CODE § 9-09-06 (2015).

offer to modify Gadeco's rights under the lease.⁴⁰ The letter only incorrectly summarized the lease terms; nothing indicated an objective offer to modify the lease's terms in any respect, including concerning Gadeco's drilling rights under the continuing operations clause.⁴¹ Accordingly, Valentina's modification argument failed.⁴²

This case represents a trend in the decisional law that shows parties trying to cloak contracting behavior as a modification to the original terms of the contract. In this case, Valentina likely had a good faith basis for asserting that an enforceable modification required a particular result, but that argument relied on an extremely weak premise. Similarly, in *Constellation Development, LLC v. Western Trust Company*, one party tried unsuccessfully to enforce a purported oral modification to the payment terms in a written agreement for the purchase of land.⁴³ In that case, the North Dakota Supreme Court declined to enforce the purported modification because it was *unexecuted*⁴⁴—neither party had “incurred a detriment which that party was not obligated by the original contract to incur.”⁴⁵

Counsel should keep in mind that contract law emphasizes mutual assent with regard to contract modifications.⁴⁶ North Dakota, in particular, unequivocally requires bilateral consent to contract modifications, without regard to whether the original contract is in writing or oral.⁴⁷ Its decisional law—as witnessed in the *Gadeco* ruling—requires an offer and an acceptance to effectively change a written agreement via a writing.⁴⁸ Its statute concerning modification of an oral agreement likewise emphasizes mutual assent.⁴⁹ It permits contract modifications to oral agreements either in writing without independent consideration to support the alteration or

40. *Valentina Williston, LLC*, ¶ 28, 878 N.W.2d at 405.

41. *Id.*

42. *Id.*

43. *Constellation Dev., LLC v. W. Tr. Co.*, 2016 ND 141, 882 N.W.2d 238. *See also infra* Section III.B.

44. *Id.* ¶ 21, 882 N.W.2d at 246.

45. *See* N.D. CENT. CODE § 9-09-06 (2015).

46. *See, e.g.*, Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203, 203-04 (1997) (“Contract law permits parties to modify contractual terms by mutual agreement. . . . [T]he prerogative of contractors to modify their original contract by mutual agreement is an article of faith for contract law.”).

47. *See* N.D. CENT. CODE §§ 9-09-05, 9-09-06 (2015).

48. *Valentina Williston, LLC v. Gadeco*, 2016 ND 84, ¶ 28, 878 N.W.2d 397, 405.

49. N.D. CENT. CODE § 9-09-05 (2015) provides that “[a] contract not in writing may be altered in any respect by consent of the parties in writing without a new consideration, or by oral consent of the parties with a new consideration, and is extinguished thereby to the extent of the alteration.”

orally with independent consideration.⁵⁰ North Dakota statute also ensures mutual assent for oral modifications to written agreements, by requiring they be *executed*, meaning that one party at least has performed the promise that constitutes consideration for the modification.⁵¹ That requirement of independent consideration developed at common law to ensure one party did not obtain contract modifications through coercion.⁵²

From a transactional perspective, counsel and contracting parties in North Dakota should adhere to mutuality as a touchstone for creating enforceable contract modifications. Likewise, in litigation, counsel should ensure they have a good faith basis for making a modification argument and look for the existence of bilateral consent as a guiding principle.

III. PROMISSORY ESTOPPEL

North Dakota courts continue to embrace promissory estoppel as an independent basis for relief.⁵³ In North Dakota, as in other states, a party must establish four elements to successfully invoke promissory estoppel as a claim: “1) a promise which the promisor should reasonably expect will cause the promisee to change his position; 2) a substantial change of the promisee’s position through action, or forbearance; 3) justifiable reliance on the promise; and 4) injustice which can only be avoided by enforcing the promise.”⁵⁴ As explained below, the tension points in these cases mostly turn on whether a clear, definite promise has been made and whether there has been substantial and justifiable reliance.⁵⁵

The North Dakota Supreme Court recently reaffirmed the ability of a party to invoke promissory estoppel to preclude the other party from successfully asserting the statute of frauds as a defense to enforcement of an oral agreement.⁵⁶ It declined, however, to decide whether to permit third-party promissory estoppel despite having two opportunities to do so in the last decade.⁵⁷

50. *Id.*

51. N.D. CENT. CODE § 9-09-06 (2015).

52. See *Alaska Packers Ass’n v. Domenico*, 117 F. 99, 102 (9th Cir. 1902); RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. a (Am. Law Inst. 1981).

53. For an extensive discussion and analysis of promissory estoppel case decisions in North Dakota through 1990, see Thomas C. Folsom, *Reconsidering the Reliance Rules: The Restatement of Contracts and Promissory Estoppel in North Dakota*, 66 N.D. L. REV. 317 (1990).

54. *Valentina Williston, LLC v. Gadeco, LLC*, 2016 ND 84, ¶ 25, 878 N.W.2d 397, 404.

55. See *Valentina Williston, LLC v. Gadeco, LLC*, 2016 ND 84, 878 N.W.2d 397; *Thimjon Farms P’ship v. First Int’l Bank & Tr.*, 2013 ND 160, 837 N.W.2d 327.

56. See *infra* Section III.B.

57. See *infra* Section III.C.

A. REQUIREMENT OF A CLEAR, DEFINITE PROMISE

Any party asserting promissory estoppel in North Dakota must satisfy the first requirement of a clear and definite promise before a court will consider a party's ability to successfully invoke the doctrine.⁵⁸ In *Valentina Williston, LLC v. Gadeco, LLC*, the plaintiff, in a suit to quiet title subject to an oil and gas lease, unsuccessfully argued that promissory estoppel barred the defendant from extending the lease's primary term under a continuing operations clause.⁵⁹ Specifically, the plaintiff tried to argue that a written statement by the defendant's representative in a letter to the lessors was a promise to terminate the lease if no wells had been drilled by a specified date.⁶⁰ The North Dakota Supreme Court held that the letter from the defendant's land manager to the lessors did not contain a clear, definite, and unambiguous promise to terminate its rights under the lease agreement if no wells had been drilled.⁶¹ Rather, the letter merely contained an incorrect summary of the lease terms, which did nothing to negate the defendant's drilling rights under the continuing operations clause in the lease.⁶² Similar to its modification argument, Valentina's premise for the argument that a promise was made was relatively thin.⁶³ This case is a cautionary tale: counsel should avoid resting a promissory estoppel claim on a weak assertion that a promise exists.

B. EXCEPTION TO THE STATUTE OF FRAUDS

The North Dakota Supreme Court continues to embrace promissory estoppel as an exception to North Dakota's statute of frauds.⁶⁴ Recent decisions reinforce the difficulty of successfully asserting promissory estoppel as a shield to a statute of frauds defense. The two cases highlighted here are noteworthy for counsel: the first, *Knorr v. Norberg*, demonstrates the extraordinary degree of reliance a plaintiff must show to

58. *Thimjon Farms P'ship*, ¶ 17, 837 N.W.2d at 335; *Lohse v. Atl. Richfield Co.*, 389 N.W.2d 352, 357 (N.D. 1986) ("We agree with those courts which require that the promise or agreement be clear, definite, and unambiguous as to essential terms before the doctrine of promissory estoppel may be invoked to enforce an agreement or to award damages for the breach thereof.").

59. *Valentina Williston, LLC*, ¶¶ 24-27, 878 N.W.2d at 403-04. For case facts, see *supra* Part II.B.

60. *Valentina Williston, LLC*, ¶¶ 4, 9, 878 N.W.2d at 399, 400.

61. *Id.* ¶ 26, 878 N.W.2d at 404.

62. *Id.*

63. See *supra* Section II.B.

64. North Dakota recognized promissory estoppel as an exception to the statute of frauds as early as 1976. See *Jamestown Terminal Elevator, Inc. v. Hieb*, 246 N.W.2d 736, 740 (N.D. 1976).

defeat a statute of frauds defense;⁶⁵ the second, *Constellation Development, LLC v. Western Trust Company*, underscores the interconnection between oral modifications and the statute of frauds.⁶⁶

1. *Knorr v. Norberg*

In *Knorr v. Norberg*, promissory estoppel took an oral lease agreement out of the statute of frauds.⁶⁷ Under North Dakota's statute of frauds, a lease agreement for a period longer than one year must be in writing to be enforceable.⁶⁸ Parties in North Dakota may overcome the statute of frauds as a bar to enforcement of a contract where there is an enforceable oral agreement between the parties.⁶⁹

Here, the tenants sued their son-in-law landlord seeking to enforce a buy-back option contained in a lease.⁷⁰ Tenants, Robert and Cheri Knorr, owned a lake home.⁷¹ They fell behind on their mortgage payments and reached out to family members for help.⁷² They sold their house to their daughter and son-in-law, Alonna and Jon Norberg, then leased it back with an option to purchase.⁷³ The Knorrs apparently executed the lease with the option and sent it to the Norbergs, and Alonna testified that she signed it and saw Jon sign it, but that written lease was never found.⁷⁴ Less than a year later, the Knorrs notified the Norbergs that they intended to exercise the buy-back option.⁷⁵ By this time, Alonna and Jon had separated, and Jon denied that there was any repurchase option.⁷⁶

The Knorrs sued to recover the home, and the district court held that there was an oral option to repurchase the home which was enforceable under the promissory estoppel exception to the statute of frauds.⁷⁷ The North Dakota Supreme Court affirmed this ruling after engaging in a

65. *Knorr v. Norberg*, 2015 ND 284, 872 N.W.2d 323.

66. *Constellation Dev., LLC v. W. Tr. Co.*, 2016 ND 141, 882 N.W.2d 238.

67. *Knorr*, ¶ 9, 872 N.W.2d at 326.

68. *Id.* ¶ 8 (citing N.D. CENT. CODE § 9-06-04(3) (2015)).

69. *Id.* ¶ 9 (quoting *Cooke v. Blood Systems, Inc.*, 320 N.W.2d 124, 127 (N.D. 1982)).

70. *Id.* ¶ 1, 872 N.W.2d at 324.

71. *Id.* ¶ 2, 872 N.W.2d at 325.

72. *Id.*

73. *Knorr*, ¶ 2, 872 N.W.2d at 325.

74. *Id.*

75. *Id.* ¶ 3.

76. *Id.*

77. *Id.*

lengthy and thorough analysis of the extraordinary degree of reliance present in the factual record.⁷⁸

Counsel should heed the type of factual record present here that justified invoking promissory estoppel to take an oral option agreement out of the statute of frauds. Factors critical to the Knorrs' success are their substantial and justifiable reliance and the injustice that would result absent enforcement of the promise.

The district court found, and the North Dakota Supreme Court agreed, that the Knorrs had substantially changed their position by transferring the house to the Norbergs in reliance on the Norbergs' promise to sell back the home.⁷⁹ Testimony indicated that the Knorrs had discussed their financial situation with their children and their children's spouses in reliance on a relationship of trust.⁸⁰ Robert Knorr also testified he would not have transferred the house without a buy-back option.⁸¹

The Supreme Court also found both parties justifiably relied on that promise because the parties' behavior at all times was consistent with an intent to return the house to the Knorrs.⁸² As with the Knorrs' change in position, the relevant testimony was clear that the Knorrs would not have transferred the house to the Norbergs without the buy-back option.⁸³ Further, Jon Norberg testified that he agreed to buy the house only to financially help the Knorrs without any intent to buy it for business or investment purposes.⁸⁴ The Supreme Court also noted from the record that the Norbergs had never received any keys to the home, which is consistent with an intent not to keep it.⁸⁵

Finally, the Supreme Court's review found that evidence from the trial record substantially supported the conclusion that enforcement of the promise was required to prevent injustice.⁸⁶ For example, Jon Norberg never paid for the mortgage even though it was in his name.⁸⁷ The Knorrs made all necessary payments and paid all costs associated with the property.⁸⁸ Thus, to decline to enforce the Norbergs' promise to sell the

78. *Id.* ¶ 20, 872 N.W.2d at 329.

79. *Knorr*, ¶ 15, 872 N.W.2d at 327-28.

80. *Id.*

81. *Id.* at 328.

82. *Id.* ¶ 16.

83. *Id.*

84. *Id.*

85. *Knorr*, ¶ 16, 872 N.W.2d 323, 328.

86. *Id.* ¶ 18.

87. *Id.* ¶ 17.

88. *Id.*

home back to the Knorrs in the face of those facts would have been an injustice.

This case isolates two of the crucial elements of promissory estoppel—reliance and injustice—and leverages a factual record replete with evidence demonstrating the plaintiff’s substantial reliance on the Norberg’s oral promise to reconvey the property to overcome a misplaced writing. Further, the degree of reliance is, as is typical in these cases, in direct proportion to the injustice that would result absent enforcement of the promise. Real property—home ownership—is at stake. That, combined with the intra-family nature of the promise and the potential bad faith of Jon Norberg lurking in the background, made this case well-suited to the use of promissory estoppel to take the agreement out of the statute of frauds.

2. *Constellation Development, LLC v. Western Trust Co.*

The North Dakota Supreme Court declined to enforce an unexecuted (i.e. entirely promissory) oral agreement to modify a written agreement involving the transfer of real property based on estoppel principles in *Constellation Development, LLC v. Western Trust Company*.⁸⁹ On September 30, 2013, Constellation agreed, in writing, to purchase about twenty-four acres of land from Western.⁹⁰ The agreement also included a three-year option to purchase additional acreage.⁹¹ Constellation notified Western in writing of its intent to exercise this option.⁹² The parties agreed in writing on September 5, 2014, to the purchase of the additional property.⁹³ Constellation gave Western two checks to pay for the purchase, but each was returned for insufficient funds.⁹⁴ As a result of the bad checks, Western notified Constellation in writing that Western was terminating the purchase agreement.⁹⁵ Constellation sued Western to enforce the purchase agreement under theories of equitable and promissory estoppel and alleged that the parties had orally extended the payment terms provided in that agreement.⁹⁶

Constellation effectively sought to enforce an unexecuted oral extension of the purchase agreement by promissory estoppel as an

89. *Constellation Dev., LLC v. W. Tr. Co.*, 2016 ND 141, ¶ 21, 882 N.W.2d 238, 246.

90. *Id.* ¶ 2.

91. *Id.*

92. *Id.* ¶ 3.

93. *Id.*

94. *Id.*

95. *Constellation Dev., LLC*, ¶ 5, 882 N.W.2d at 240-41.

96. *Id.*

exception to the statute of frauds.⁹⁷ The purchase agreement did not specify how the parties could change its terms, so Section 9–09–06 of the North Dakota Century Code (“the Code”) dictated the enforceability of any modifications.⁹⁸ It provides:

A contract in writing may be altered by a contract in writing or by an executed oral agreement *and not otherwise*. An oral agreement is executed within the meaning of this section whenever the party performing has incurred a detriment which that party was not obligated by the original contract to incur.⁹⁹

The purchase agreement here was in writing and complied with North Dakota’s statute of frauds.¹⁰⁰ And the Supreme Court has previously allowed promissory estoppel to prevent the assertion of the statute of frauds as a defense where there is an *executed* oral agreement between the parties per the Code.¹⁰¹ But in this case, the Court held that a party may not invoke promissory estoppel to take an *unexecuted* oral agreement (or, in this case, an unexecuted oral modification) out of the statute of frauds.¹⁰²

This case illustrates at least one limit to a party’s ability to use promissory estoppel to escape the statute of frauds. According to the Supreme Court, an oral modification of a written contract concerning the lease or sale of real property must be executed to take it out of the statute of frauds based on estoppel grounds.¹⁰³ Executed means that one party must have incurred a legal detriment not provided for in the original agreement.¹⁰⁴ Constellation, however, alleged an unexecuted oral modification of the written purchase agreement concerning payment terms and was therefore unsuccessful in taking the purported extension out of the statute of frauds.¹⁰⁵ Counsel should view this decision as part of a broader context in which the Supreme Court appears reluctant to agree with counsel who characterize certain contracting behavior as contract modifications that must be enforced.¹⁰⁶

97. *Id.*

98. *Id.*

99. N.D. CENT. CODE § 9-09-06 (2015) (emphasis added).

100. *Constellation Dev., LLC*, ¶ 19, 882 N.W.2d at 245; *see* N.D. CENT. CODE § 9-09-04(3) (2015).

101. *Constellation Dev., LLC*, ¶ 19, 882 N.W.2d at 245.

102. *Id.* ¶ 21, 882 N.W.2d at 246.

103. *Id.* ¶ 19, 882 N.W.2d at 245. *See also supra* Section II.B for a discussion about creating enforceable contract modifications in North Dakota in non-Article 2 transactions.

104. N.D. CENT. CODE § 9-09-06 (2015).

105. *Constellation Dev., LLC*, ¶ 19, 882 N.W.2d at 245.

106. *See supra* Section II.B.

C. THIRD PARTY PROMISSORY ESTOPPEL CLAIMS

The North Dakota Supreme Court declined two relatively recent opportunities to address whether a third party may enforce a promise under the promissory estoppel doctrine: *Thimjon Farms Partnership v. First International Bank & Trust*¹⁰⁷ and *University Hotel Development, L.L.C. v. Dusterhoft Oil, Inc.*¹⁰⁸

Under the theory of third party promissory estoppel, a third party to an unfulfilled promise may sue for damages suffered as a result of reasonable reliance on that promise.¹⁰⁹ Section 90 of the Restatement (Second) of Contracts contemplates third party promissory estoppel claims.¹¹⁰ It provides:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee *or a third person* and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.¹¹¹

The majority of promissory estoppel rulings does not involve third party claims, but there is enough decisional law from other jurisdictions to inform North Dakota courts and counsel about the availability and limits to these types of claims.¹¹² A tension point among the existing decisions turns on whether to limit recovery to those persons who would be considered third party beneficiaries under contract law or to permit a broader range of third party plaintiffs to obtain promissory estoppel relief.¹¹³ The Restatement favors the broader view: it refers to third parties who are the intended beneficiaries of a promise *as well as* others who may foreseeably rely on a promise and act (or refrain from acting) accordingly.¹¹⁴ It reports that courts have allowed this type of promissory estoppel claim where the third party was a beneficiary of the promise at issue.¹¹⁵ And it states that, in

107. *Thimjon Farms P'ship v. First Int'l Bank & Tr.*, 2013 ND 160, 837 N.W.2d 327.

108. *Univ. Hotel Dev., LLC v. Dusterhoft Oil, Inc.*, 2006 ND 121, 715 N.W.2d 153.

109. RESTATEMENT (SECOND) OF CONTRACTS § 90 (Am. Law Inst. 1981).

110. *Id.*

111. *Id.* (emphasis added).

112. *See Henneberry v. Sumitomo Corp. of Am.*, No. 04 Civ. 2128(PKL), 2005 WL 991772 (S.D.N.Y. Apr. 27, 2005).

113. *See* Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Third Parties*, 42 SW. L.J. 931, 966-67 (1988); Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 61 (1981).

114. *Id.* cmt. c.

115. *Id.*

rare cases, promissory estoppel might be permitted for third parties that were not beneficiaries of the promise.¹¹⁶ A few courts have agreed.¹¹⁷

The North Dakota Supreme Court declined to entertain this issue of first impression, namely the availability of third party promissory estoppel as a basis for relief, in *Thimjon Farms*¹¹⁸ and in *Dusterhoft*.¹¹⁹ It was unnecessary to resolve the issue because in both instances an essential element of the promissory estoppel claim was missing. There was no justifiable reliance in *Thimjon Farms*,¹²⁰ and the allegations in *Dusterhoft* failed to satisfy the requirement of a clear, definite promise.¹²¹ Nonetheless, the issue is likely to present itself again, particularly as promissory estoppel continues to thrive as an independent basis of relief.¹²² Any counsel contemplating a third party promissory estoppel claim should be prepared to address the extent to which North Dakota courts should protect third party reliance, using decisional law from other jurisdictions as guideposts.

IV. INTERPRETATION: GENERAL ISSUES

Contract interpretation remains the most commonly litigated matter in contract disputes. Decisional law from the survey period encompasses general issues of contract interpretation under North Dakota law. General issues addressed by relevant courts concern the applicability of the parol evidence rules and general rules of interpretation.

116. *Id.*

117. *See, e.g.,* von Kaulbach v. Keoseian, 783 F.Supp. 170 (S.D.N.Y. 1992); Silberman v. Roethe, 218 N.W.2d 723, 731-32 (Wisc. 1974) (“We can see no reason to limit recovery to those persons who would be considered third party beneficiaries under contract law if this is what the proposed comment suggests. If the plaintiff can prove the essential facts he should not be precluded from recovery as a third party reasonably relying on promises made to others.”). *Cf.* C.R. Fedrick, Inc. v. Sterling-Salem Corp., 507 F.2d 319, 322 n.9 (9th Cir. 1974) (suggesting that reliance protection should be accorded only to a third party having complete privity with promisor).

118. *Thimjon Farms P’ship v. First Int’l Bank & Tr.*, 2013 ND 160, 837 N.W.2d 327.

119. *Univ. Hotel Dev., LLC v. Dusterhoft Oil, Inc.*, 2006 ND 121, 715 N.W.2d 153.

120. *Thimjon Farms P’ship*, ¶19, 837 N.W.2d at 335-36.

121. *Dusterhoft Oil, Inc.*, ¶16, 715 N.W.2d at 157.

122. *See* Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or Is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531 (2002) (concluding, through an empirical study, that promissory estoppel continues to be a vital aspect of contract law).

A. ADMISSIBILITY OF PAROL EVIDENCE

The following decisions reflect confusion concerning the admissibility of extrinsic evidence with regard to written agreements. Under North Dakota law, the parol evidence rule is a statutory rule of law that precludes a party from using evidence of prior oral negotiations and agreements to vary the terms of a written agreement.¹²³ The law permits a party to introduce such extrinsic evidence, notwithstanding the rule, for many reasons including without limitation to demonstrate fraud, mutual mistake, failure of consideration, and grounds for rescission or reformation.¹²⁴ Cases from the survey period encompassed all of these exceptions to the parol evidence rule.

1. *Golden Eye Resources, LLC v. Ganske*

In *Golden Eye Resources, LLC v. Ganske*, the North Dakota Supreme Court reversed the decision of the lower court, which failed to acknowledge that extrinsic evidence is admissible to prove fraud even where the evidence contradicts the written agreement.¹²⁵ In this case, an oil and gas lessee sued to quiet title to leased mineral interests while the lessors counterclaimed for rescission of the leases based on the lessee's fraudulent misrepresentations.¹²⁶ The district court had entered summary judgment for the lessee, but the North Dakota Supreme Court reversed and remanded for consideration of the lessors' allegations that they were induced to lease based on the lessee's misrepresentations.¹²⁷

The parties extensively negotiated the leases.¹²⁸ The lessors' claimed that during negotiations the lessee made numerous material misrepresentations to induce them to lease their interests to the lessee rather than to another company that had offered leases on more favorable financial terms.¹²⁹ The district court held that evidence of some of the lessee's alleged misrepresentations—namely those indicating that it “intended to

123. Section 9-06-07 provides that “[t]he execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.” N.D. CENT. CODE § 9-06-07 (2015).

124. Parol evidence, however, may not be used to supply a missing essential term of the agreement and take the agreement outside of the statute of frauds. *See Trosen v. Trosen*, 2014 ND 7, ¶14, 841 N.W.2d 687, 691.

125. *Golden Eye Res., LLC v. Ganske*, 2014 ND 179, ¶¶ 1, 19, 853 N.W.2d 544, 547, 552.

126. *Id.* ¶ 6, 853 N.W.2d at 548.

127. *Id.* ¶¶ 6, 9, 853 N.W.2d at 548-49.

128. *Id.* ¶ 3, 853 N.W.2d at 547.

129. *Id.*

drill and operate the wells itself” and “suggesting the [lessors’] property would be drilled first”—contradicted the leases’ express terms and were inadmissible parol evidence.¹³⁰

The North Dakota Supreme Court reversed because the district court erroneously applied the parol evidence rule.¹³¹ It explained that oral statements *are* permitted to show fraudulent inducement even though the proffered evidence contradicts the written agreement.¹³² The lessors sought to introduce the extrinsic evidence to show that the lessee fraudulently induced them to enter into the leases. The district court’s misapplication of the rule suggests that parol evidence best practices for counsel should encompass a checklist of circumstances in which the rule does *not* apply.

2. *Brash v. Gulleston*

The North Dakota Supreme Court recently affirmed the admissibility of parol evidence to prove a failure of consideration as well. In *Brash v. Gulleston*, Brash’s widow sued Gulleston for breach of contract, alleging that Gulleston breached a cow/calf production lease agreement when he returned only seven cows of what she believed to be a herd of 130.¹³³ The deceased Brash and Gulleston executed a written lease in 2000 pursuant to which Brash agreed to provide 130 cows to be cared for on Gulleston’s farm; in return, Gulleston agreed to pay Brash forty percent of the calf crop each year.¹³⁴ Gulleston asserted failure of consideration based on extrinsic evidence that the actual number of cows in the Brash herd fell well below the 130 cows required by the contract.¹³⁵ The district court permitted the extrinsic evidence to demonstrate failure of consideration, and the Supreme Court affirmed.¹³⁶

130. *Id.* ¶ 15, 853 N.W.2d at 550.

131. *Ganske*, ¶ 19, 853 N.W.2d at 552.

132. *Id.*

133. *Brash v. Gulleston*, 2014 ND 156, ¶¶ 1, 4, 24, 835 N.W.2d 798, 800, 805-06.

134. *Id.* ¶ 4, 835 N.W.2d at 800.

135. *Id.* ¶ 5, 835 N.W.2d at 801.

136. *Id.* ¶¶ 16, 25, 835 N.W.2d at 803, 806; *see also* Four Season’s Healthcare Ctr., Inc. v. Linderkamp, 2013 ND 159, ¶ 13, 837 N.W.2d 147, 153 (“The rule is also well settled that the acknowledgment of the receipt of a consideration in a deed or other written contract is not conclusive, but it may be shown by parol that the consideration agreed upon has not been paid; or that a consideration greater or lesser than, or different from, that expressed in the deed was in fact agreed upon.”).

3. *Friedig v. Weed*

Likewise, in *Friedig v. Weed*, the North Dakota Supreme Court affirmed the admissibility of parol evidence to prove mutual mistake and obtain reformation of a deed.¹³⁷ In this case, the parties disagreed about whether the sale of a lakefront lot included the tract of land just below the water's edge.¹³⁸ Circumstantial extrinsic evidence of the parties' intent was found to support a finding that the grantor intended to convey land below the water's edge to the grantee.¹³⁹

The Supreme Court's sanctioning of the use of circumstantial parol evidence to prove mutual mistake is noteworthy here.¹⁴⁰ Initially, the Court acknowledged a high standard for use of parol evidence to prove mutual mistake: such evidence "must be clear, satisfactory, specific, and convincing, and a court of equity will not grant reformation upon a mere preponderance of evidence, but only upon certainty of error."¹⁴¹ Then, relying on decisional law from other jurisdictions, it permitted use of circumstantial evidence of the parties' intent to dictate its holding.¹⁴² Acknowledging that circumstantial evidence can satisfy the clear and convincing standard for purposes of mutual mistake is new, but not necessarily a departure from the Supreme Court's past practice.¹⁴³ It simply appears to be adopting a rule that already exists in other jurisdictions.¹⁴⁴

B. CONDUCT NEGATED NO-WAIVER CLAUSE

In *Savre v. Santoyo*, the North Dakota Supreme Court held that a party waived his rights under a contract by failing to exercise them even though the contract contained an express no-waiver clause.¹⁴⁵ A no-waiver clause attempts to preserve a party's rights and remedies under a contract if that

137. *Freidig v. Weed*, 2015 ND 215, ¶ 11, 868 N.W.2d 546, 559.

138. *Id.* ¶¶ 6-7, 868 N.W.2d at 548.

139. *Id.* ¶ 8.

140. *Id.*

141. *Id.* ¶ 12, 868 N.W.2d at 549.

142. *Id.* at 549-50 ("Some courts have said circumstantial evidence alone may be sufficient to clearly and convincingly establish grounds for reformation. *Lister v. Sorge*, 260 Cal.App.2d 333, 67 Cal. Rptr. 63, 66-67 (1968) (grounds for reformation must be established by clear and convincing evidence and reformation may be based solely on circumstantial evidence); *Lunceford v. Houghtlin*, 326 S.W.3d 53, 64 (Mo.Ct.App.2010) (circumstantial evidence may establish mutual mistake provided the natural and reasonable inferences clearly and decidedly prove the mistake).").

143. *Freidig*, ¶ 12, 868 N.W.2d at 549-50.

144. *Id.*

145. *Savre v. Santoyo*, 2015 ND 170, ¶ 15, 865 N.W.2d 419, 425.

party fails to take action in response to a breach of contract.¹⁴⁶ Such clauses are generally considered boilerplate and are included in many different types of contracts.

In this case, Savre owned and operated an auto repair business, and leased property from Santoyo to operate the business starting in June 2008.¹⁴⁷ About two years into the lease, the parties executed a lease-to-purchase option agreement with respect to the property.¹⁴⁸ Savre could exercise the option to purchase the property, provided he satisfied certain terms and conditions in the agreement.¹⁴⁹ The contract also contained a no-waiver clause that provided: “No modification of or amendment to this Option to Purchase Agreement, nor any waiver of any rights under this Option to Purchase Agreement, will be effective unless in writing signed by the party to be charged.”¹⁵⁰

Savre satisfied many, but not all, of the terms and conditions required to exercise the option.¹⁵¹ For example, he was often late in his rent payments, an event of default under the option agreement entitling Santoyo to terminate it.¹⁵² Santoyo, however, failed to exercise this right.¹⁵³ He also failed to respond to Savre’s properly provided notice of his intent to exercise the option and evicted Savre.¹⁵⁴ Following eviction, Savre sued for breach of the option agreement.¹⁵⁵

Key to the decision here is the applicability of a no-waiver clause in the option agreement. This clause declared any waiver of rights under the contract ineffective unless in writing and signed by the party against whom waiver is sought to be enforced.¹⁵⁶ Nonetheless, the Court concluded that Santoyo, by his conduct, waived his rights under the option agreement, including the no-waiver clause, when he failed to terminate the lease

146. See *Sayre*, ¶ 3, 865 N.W.2d at 422-23 (quoting a contract provision that stated that waiver of any contract terms had to be in writing, not oral or by conduct); *Kessel v. W. Sav. Credit Union*, 463 N.W.2d 629, 631 (N.D. 1990) (explaining the effect of a no-waiver clause where enforced); BANKS, NEW YORK CONTRACT LAW § 28:7 (2015) (“Parties may limit the effect of a course of conduct inconsistent with the contract’s terms by employing a no-waiver provision stating that the failure of either party to enforce any provision of the agreement shall not be deemed a waiver of such party’s right to enforce such provision in the future.”).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* ¶¶ 4-6, 865 N.W.2d at 423.

152. *Sayre*, ¶ 4, 865 N.W.2d at 423.

153. *Id.*

154. *Id.* ¶ 5.

155. *Id.* ¶ 6.

156. *Id.* ¶ 3, 865 N.W.2d at 422-23.

agreement based on Savre's repeated late rent payments, which were events of default under the contract.¹⁵⁷

Relevant to the court's ruling was evidence showing that Santoyo accepted late monthly payments, and that Savre attempted to exercise the purchase option believing he had made sufficient payments under the agreement.¹⁵⁸ The evidence also showed that Santoyo did nothing to exercise his remedies with respect to Savre's repeated defaults before Savre attempted to exercise the option.¹⁵⁹ Accordingly, the Supreme Court upheld the district court's finding that Santoyo, by his conduct, had waived strict compliance with the option agreement terms.¹⁶⁰

Here, the Supreme Court elevated performance over express terms. Arguably, where the clause is unambiguous, the parties are of relatively equal sophistication, and have mutually assented to the term, a no-waiver clause should be enforced. That said, the Supreme Court has acknowledged previously that parties, by their conduct, may waive contractual rights.¹⁶¹ The distinctive feature of *Savre* is that the Supreme Court concluded that a party waived a no-waiver clause.¹⁶² It found that Santoyo engaged in a pattern of conduct that potentially altered Savre's reasonable expectations about the agreement's terms, thereby justifying non-enforcement of the no-waiver clause.¹⁶³

It is not unusual for courts to ignore no-waiver clauses and enforce the contract according to how the parties have performed rather than the dictates of standard boilerplate. Counsel should be aware that North Dakota courts appear willing to alter the effect of written contract terms, including no-waiver clauses, based on the parties' conduct and should advise parties to behave accordingly. For example, if the landlord becomes aware of a default or accepts late payment, it should notify the tenant in

157. *Id.* ¶ 7, 865 N.W.2d at 423.

158. *Savre*, ¶¶ 4, 18, 865 N.W.2d at 423, 425.

159. *Id.* ¶¶ 5, 18, 865 N.W.2d at 423, 425.

160. *Id.* ¶ 25, 865 N.W.2d at 427; *see also id.* ¶ 21, 865 N.W.2d at 426 (quoting *Pfeifle v. Tanabe*, 2000 ND 219, ¶ 18, 620 N.W.2d 167, 172 (emphasis added)) (explaining that “[w]aiver may be established either by an express agreement or by inference from acts or conduct.”); *id.* (quoting *Pfeifle*, ¶ 18, 620 N.W.2d at 172) (explaining that “[w]aiver may be found from an unexplained delay in enforcing contractual rights or accepting performance different than called for by the contract” though ultimately concluding that the tenant had not waived the right to terminate the contract); *Dangerfield v. Markel*, 252 N.W.2d 184, 191 (N.D. 1977).

161. *See Pfeifle*, ¶ 18, 620 N.W.2d at 172.

162. *See Kessel v. W. Sav. Credit Union*, 463 N.W.2d 629, 631 (N.D. 1990) (declining to decide whether a no-waiver clause may be waived because the record did not contain factual evidence which could constitute a waiver).

163. *See generally Savre*, 2015 ND 170, 865 N.W.2d 419.

writing that it is not waiving the default and reserves all of its rights and remedies under the contract. The notice should include a specific reference to any no-waiver clause in the contract in order to bolster, if not inoculate, a party against an argument in a later dispute that conduct led to waiver. This strategy may have led to a different result for Santoyo.

V. INTERPRETATION: SPECIFIC ISSUES

The courts' rulings from the survey period concerning specific types of contracts clauses yield perhaps the most practical considerations for counsel. The types of clauses reviewed include no damage for delay clauses, indemnification and hold harmless clauses, force majeure clauses, Pugh clauses, and right of first offer and first refusal clauses.

A. LIMITING NO DAMAGE FOR DELAY CLAUSES

In 2014, North Dakota joined a number of other states that limit the negative effect of no damages for delay clauses where an owner's active interference is the cause of the delay.¹⁶⁴ A no damages for delay clause exculpates an owner for liability for damages resulting from delays in the performance of a contractor's work.¹⁶⁵ A typical clause, found in both private and public contracts, may state:

No payment or compensation shall be made for damages resulting from hindrances or delays in the progress of the work, whether such hindrances or delays are avoidable or unavoidable. A delay caused either wholly or in part by the actions of someone other than the contractor shall only entitle the contractor to an extension of time.¹⁶⁶

Parties include these clauses to shift the risk of delay costs from owners (or their agents) to contractors.¹⁶⁷ It provides an owner a contractual defense against claims by contractors and subcontractors for delay damages.¹⁶⁸ The plain language of a typical clause appears to prohibit contractors from recovering extra costs caused by a delay, even where the

164. C & C Plumbing and Heating, LLP v. Williams County, 2014 ND 128, 848 N.W.2d 709.

165. *No Damage for Delay: A Work of Contractual Fiction*, WELLE LAW (June 20, 2014), <http://wellelaw.com/2014/06/>.

166. *Id.*

167. *Id.*

168. *Id.*

owner causes the delay.¹⁶⁹ Some states, such as Minnesota, have prohibited such clauses by statute, at least in public contracts, on the basis that they are unfair and against public policy.¹⁷⁰ Most states, however, will enforce a no damage for delay clause unless the delay results from active interference by the owner.¹⁷¹

In *C&C Plumbing and Heating, LLP v. Williams County*, the prime contractor sued the county project owner for additional costs incurred as a result of delays in the construction of a law enforcement center.¹⁷² The contract contained a no damages for delay clause.¹⁷³ In this case, the North Dakota Supreme Court adopted the active interference exception to the enforceability of a no damages for delay clause.¹⁷⁴ The active interference exception acknowledges that a contract contains an implied duty by the owner (or his agent) to refrain from doing anything which would unreasonably interfere with the contractor's ability to timely and effectively complete the work.¹⁷⁵ Here, the *property owner's* agent (the construction manager) caused additional delays in the project when he ordered steelworkers to erect steel anywhere to create the illusion of progress on the project rather than use the conventional "inside-out" method.¹⁷⁶ Despite the presence of a no damages for delay clause in the contract, the Supreme Court awarded the contractor extra costs because the owner's representative actively interfered with the work.¹⁷⁷

The Supreme Court adopted the active interference exception in *C&C Plumbing* about two years after it affirmed the enforceability of a no damages for delay clause in *Markwed Excavating, Inc. v. City of Mandan*.¹⁷⁸ In that case, the city and its project manager failed to obtain timely easements for the contractor to access land needed in connection with a storm sewer improvement contract, resulting in costly delays to the contractor.¹⁷⁹ This contract also contained a no damages for delay

169. *Id.*

170. *Id.*; see MINN. STAT. § 15.411 (2016).

171. *No Damage for Delay: A Work of Contractual Fiction*, *supra* note 165.

172. *C & C Plumbing and Heating, LLP v. Williams County*, 2014 ND 128, ¶¶ 2-3, 848 N.W.2d 709, 712.

173. *Id.* ¶ 8, 848 N.W.2d at 713-14.

174. *Id.* ¶ 15, 848 N.W.2d at 716.

175. *Id.* (citing *United States Steel Corp. v. Missouri Pac. R.R. Co.*, 668 F.2d 435, 438 (8th Cir. 1982)).

176. *Id.* ¶ 16, 848 N.W.2d at 717.

177. *Id.* ¶ 13, 848 N.W.2d at 716.

178. *Markwed Excavating, Inc. v. City of Mandan*, 2010 ND 220, ¶ 20, 791 N.W.2d 22, 30.

179. *Id.* ¶ 6, 791 N.W.2d at 25.

clause.¹⁸⁰ In this case, the Supreme Court declined to adopt a wholesale exception for delays not contemplated by the parties as some jurisdictions have.¹⁸¹ Instead, it concluded that the plain language of the provision in this case was broad and unambiguous such that it encompassed work delays by “any act or neglect” of the city or any other contractors employed by the city, regardless of foreseeability.¹⁸² To hold otherwise would render the clause—the purpose of which is to allocate the risk of unforeseeable delays—meaningless.¹⁸³ The contractor, thus, had to absorb the costs associated with the delay of the project.¹⁸⁴

These two cases suggest that North Dakota courts will continue to enforce no damages for delay clauses except where there has been active interference by the owner. Accordingly, such clauses will remain common in construction contracts where North Dakota law applies.

No damages for delay clauses are not drafted uniformly; they take many forms and sometimes are not even titled as such. Counsel for contractors and subcontractors may struggle to develop strategies to limit these risk-shifting provisions at the drafting stage. One drafting strategy is to articulate the types of damages (e.g., additional time, additional money) that constitute permissible delay damages versus those that are precluded. When drafting one, the clause should provide clearly for additional time without penalty, but no additional money, in the event of delay. If the clause allows extra time as the sole remedy for delay, then counsel and contracting parties should heed case law indicating that the benefitted party must actually grant the extra time to the delayed party.¹⁸⁵

Contractors and their counsel may have more litigation than transactional tools to combat these clauses. As a threshold matter, counsel should know that the application and enforceability of these clauses is state-specific. Accordingly, a choice of law clause in an agreement will affect the scope and enforceability of any no damages for delay clause. Some state statutes preclude enforcement of no damages for delay clauses in

180. *Id.* ¶ 4, 791 N.W.2d at 24.

181. *Id.* ¶¶ 13, 19, 791 N.W.2d at 27, 29.

182. *Id.* ¶ 20.

183. *Id.* ¶ 23.

184. *See generally Markwed Excavating, Inc.*, ¶ 23, 791 N.W.2d at 23.

185. *See, e.g., Cent. Ceilings, Inc. v. Suffolk Constr. Co. Inc.*, No. SUCV200604129A, 2013 WL 8721044 (Mass. Sup. Ct. Dec. 19, 2013).

public contracts.¹⁸⁶ In other states, these clauses are void and invalid in all construction contracts—public and private.¹⁸⁷

Further, as the cases above illustrate, other factors affect the application and enforceability of a no damages for delay clause, including the contract language, the actions of the parties, as well as state statutes and decisional law that address defenses to enforcement of these clauses. Defenses to enforcement of these clauses is a matter of case law development in North Dakota but is governed by statute in other states. Counsel may be able to raise any number of defenses to enforcement of these clauses, including, but not limited to, the active interference exception, fraud, and unreasonable delay, as well as traditional contract arguments such as waiver, duress, rescission, mistake, unconscionable terms, and ambiguity.¹⁸⁸ Finally, other jurisdictions may recognize a broader list of exceptions than those available under North Dakota law. In short, attorneys should draft a no damages for delay clause against the backdrop of what the relevant jurisdiction’s law permits and requires.

B. INDEMNIFICATION & HOLD HARMLESS CLAUSES

Recent case law has also addressed the scope of a company’s contractual indemnity obligations and the limitations North Dakota law imposes on such contractual obligations.¹⁸⁹

An indemnity clause is a contractual term that requires one party to reimburse another for its liability and damages arising out of the contract.¹⁹⁰ Construction companies utilize indemnity clauses to allocate the risk associated with damage to property or persons in connection with a

186. See MINN. STAT. § 15.411 (2016); CAL. PUB. CONT. CODE § 7203 (2016) (“A public works contract entered into on or after January 1, 2016, that contains a clause that expressly requires a contractor to be responsible for delay damages is not enforceable unless the delay damages have been liquidated to a set amount and identified in the public works contract.”).

187. WASH. REV. CODE § 4.24.360 (2016).

188. See generally Carl S. Beattie, *Apportioning the Risk of Delay in Construction Projects: A Proposed Alternative to the Inadequate “No Damages for Delay” Clause*, 46 WM. & MARY L. REV. 1857, 1860-70 (2005).

189. See e.g., *Chapman v. Hiland Partners GP Holdings, LLC*, 49 F.Supp.3d 649 (D.N.D. 2014); *Specialized Contracting, Inc. v. St. Paul Fire & Marine Ins. Co.*, 2012 ND 259, 825 N.W.2d 872.

190. “Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person.” N.D. CENT. CODE § 22-02-01 (2015). “Indemnification is a remedy which allows a party to recover reimbursement from another for the discharge of a liability which, as between them, should have been discharged by the other.” *Specialized Contracting, Inc.*, ¶ 14, 825 N.W.2d at 877 (quoting *Olander Contracting Co. v. Gail Wachter Inv.*, 2002 ND 65, ¶ 15, 643 N.W.2d 29, 36).

project.¹⁹¹ Often, the company with more bargaining power leverages that influence to obtain agreement to a clause that shifts substantial liability to the other party, sometimes even for that company's own negligence.¹⁹²

In North Dakota, indemnity clauses are interpreted using ordinary principles of contract interpretation¹⁹³ as well as a set of statutory rules.¹⁹⁴ Pursuant to statute, indemnity provisions that protect parties from responsibility for their own willful or negligent injury to some other person or property are invalid.¹⁹⁵ North Dakota also invalidates indemnity provisions in construction contracts, which hold contractors liable for erroneous acts or omissions of owners (or their agents) in both design plans and specifications.¹⁹⁶

In addition to the indemnity provisions typically included in contractual agreements, "additional insured" provisions, in conjunction with "hold harmless" language, may also be included by companies as a supplementary layer of protection from liability.¹⁹⁷ By adding these provisions, the indemnitee (typically an owner or general contractor) is protected from liability by the insurer of the indemnitor.¹⁹⁸

In *Chapman v. Hiland Partners GP Holdings, LLC*, Chapman sued Hiland, the owner/operator of a natural gas processing facility, for injuries sustained in an explosion that occurred while Chapman was removing water from tanks at the gas plant to haul away.¹⁹⁹ Prior to the injury, Hiland had contracted with Missouri Basin Well Service, Inc. ("Missouri Basin") for certain plant operation services.²⁰⁰ Missouri Basin, in turn, subcontracted certain water hauling services to B&B Heavy Haul, LLC ("B&B"), in

191. See *Specialized Contracting, Inc.*, ¶ 14, 825 N.W.2d at 877 (explaining the purpose and effect of indemnity clauses).

192. Roger W. Stone & Jeffrey A. Stone, *Indemnity in Iowa Construction Law*, 54 DRAKE L. REV. 125, 130 (2005) (citing *Bethlehem Steel Corp. v. Chicago Eastern Corp.*, 863 F.2d 508, 523 (7th Cir. 1988)); see also Dean B. Thompson & Colin Bruns, *Indemnity Wars: Anti-Indemnity Legislation Across the Fifty States*, 8 J. AM. C. CONSTRUCTION LAWS. 1 (2014), <http://www.fwhtlaw.com/wp-content/uploads/2014/09/Anti-Indemnity-Legislation-Across-the-Fifty-States.pdf>.

193. *Chapman*, 49 F. Supp. 3d at 653.

194. See N.D. CENT. CODE § 22-02-07 (2015) (explaining the "[r]ules applied in interpretation of a contract of indemnity").

195. N.D. CENT. CODE § 9-08-02 (2015).

196. N.D. CENT. CODE § 9-08-02.1 (2015).

197. *Chapman*, 49 F. Supp. 3d at 654; see *Specialized Contracting, Inc.*, ¶ 29, 825 N.W.2d at 882.

198. See *Chapman*, 49 F. Supp. 3d at 654.

199. *Id.* at 651-52.

200. *Id.* at 651.

which B&B agreed to indemnify Missouri Basin from certain liability.²⁰¹ Hiland filed a third-party complaint against Missouri Basin and B&B, Chapman's employer, arguing that Hiland was entitled to indemnification and defense from Missouri Basin and B&B even if the harm was a result of Hiland's own negligence.²⁰² B&B moved for summary judgment on claims asserted against it, by both Hiland and Missouri Basin.²⁰³

The issue in Hiland's third-party complaint was whether B&B had to indemnify Hiland for Hiland's own negligence based on an indemnity provision in the unsigned subcontract Missouri Basin entered into with B&B.²⁰⁴ The court ultimately concluded that there was no legal basis for such a result.²⁰⁵ North Dakota case law previously permitted the indemnification of a party's own negligence if the intent was explicitly provided for in the contract.²⁰⁶ Here, there was no such intent.²⁰⁷

In North Dakota, when a contract contains both the hold harmless and additional insured insurance provision language, there is little question the parties intended that the indemnitee be indemnified against the consequences of its own negligence. Specifically, the Supreme Court has held that *standard* hold harmless provisions which agree to indemnify a party against "any and all claims" are construed to include a "promise to protect and defend" the indemnified party against all third-party claims.²⁰⁸ Pursuant to the contract between Hiland and Missouri Basin, Hiland was named as an additional insured on the Missouri Basin liability insurance policy.²⁰⁹ In other words, unmistakable intent of broad indemnification obligations is evidenced by the inclusion of both hold harmless and additional insured insurance provisions in a contract.

Here, the unsigned contract between Missouri Basin and B&B provides that B&B will "save harmless" Missouri Basin and the Customer from "any and all claims" including those that arise from Missouri Basin's negligence.²¹⁰ As well, the subcontract required Missouri Basin to be listed

201. *Id.*

202. *Id.* at 651-52.

203. *Id.* at 652.

204. *Chapman*, 49 F. Supp. 3d at 652.

205. *Id.*

206. *Rupp v. Am. Crystal Sugar Co.*, 465 N.W.2d 614, 616 (N.D. 1991); *Bridston v. Dover Corp.*, 352 N.W.2d 194, 196-97 (N.D. 1984).

207. *Chapman*, 49 F.Supp.3d at 655-56.

208. *Bridston*, 352 N.W.2d at 197.

209. *Chapman*, 49 F.Supp.3d at 654.

210. *Id.* at 655.

as an additional insured on B&B's liability insurance policy.²¹¹ On that basis, the court found that the unsigned contract between Missouri Basin and B&B expressed an intent that B&B indemnify Missouri Basin for B&B's negligence and Missouri Basin's own negligence.²¹² There was no mention, however, of B&B indemnifying Missouri Basin or Hiland for Hiland's negligence, nor was Hiland specifically granted additional insured status under the B&B contract.²¹³ The court concluded, there was no clear intent concerning B&B's obligation to Hiland because, while the "save harmless" language was present, the additional insured insurance requirement as applicable to Hiland was clearly absent.²¹⁴ Construing the ambiguity against Hiland, the party seeking indemnification, the court held that B&B did not have to indemnify Hiland for Hiland's own negligence.²¹⁵

The court also ruled the indemnity clause was void and unenforceable under statute.²¹⁶ In 2009, the North Dakota legislature enacted an anti-indemnification statute, which prohibits a motor carrier transportation agreement containing any indemnity, duty to defend, or hold harmless provision, or an agreement that "has the effect of indemnifying, defending, or holding harmless" an indemnitee for their own negligence.²¹⁷ The court ruled that the indemnity clause in the Missouri Basin-B&B agreement was void and unenforceable under that statute.²¹⁸

In addition, Missouri Basin filed a cross-claim against B&B, claiming that under the subcontract, Missouri Basin was entitled to indemnification for any liability that flowed from Hiland to Missouri Basin regarding Chapman's injuries pursuant to the prime agreement.²¹⁹ Specifically, Missouri Basin posited that its contract with Hiland and its subcontract with B&B should be read together as a single transaction, in effect, allowing Missouri Basin's indemnification obligations to Hiland to pass-through to B&B.²²⁰ The court rejected this argument noting that the two contracts involved different parties and were separately negotiated years apart.²²¹ In particular, the court found it relevant that the subcontract between Missouri

211. *Id.*

212. *Id.*

213. *Id.* at 655-56.

214. *Id.*

215. *Chapman*, 49 F. Supp. 3d at 656.

216. *Id.*

217. N.D. CENT. CODE § 22-02-10(2) (2015).

218. *Chapman*, 49 F. Supp. 3d at 656.

219. *Id.* at 657.

220. *Id.*

221. *Id.*

Basin and B&B made no reference to the contract between Hiland and Missouri Basin nor any liability Missouri Basin may have assumed in the prime contract.²²² Accordingly, the court found that B&B had taken on no contractual responsibility for Hiland's negligence that Missouri Basin had assumed in the prime contract.²²³

This case highlights how North Dakota courts strictly construe an ambiguity in an indemnity provision against the indemnitee.²²⁴ But its implications are much broader. Parties must carefully craft provisions that reflect the parties' intent regarding indemnification risk allocation. Specifically, subcontracts should reference prime contracts, include flowdown provisions, and incorporate indemnification obligations from the prime contract that the parties want the subcontractor to assume. Finally, indemnification provisions, standing alone, do not settle indemnification liability questions. Hold harmless provisions along with certain insurance requirements can have a determinative effect on indemnification obligations.

C. FORCE MAJEURE CLAUSE

The North Dakota Supreme Court examined the enforceability of a force majeure clause for the first time in *Entzel v. Moritz Sport & Marine*.²²⁵ A "force majeure" clause is a contract provision that relieves the parties from performing their contractual obligations when certain defined circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible.²²⁶

In this case, Entzel entered into a Boat Space Rental Agreement with Moritz and pre-paid for use of a marina boat slip on the Missouri River in Mandan, for the period of May 15, 2011, through October 1, 2011.²²⁷ That agreement included a force majeure clause.²²⁸ Entzel did not use the slip at

222. *Id.* at 658.

223. *Id.*

224. *Chapman*, 49 F. Supp. 3d at 656.

225. *Entzel v. Moritz Sport and Marine*, 2014 ND 12, ¶ 7, 841 N.W.2d 774, 778 ("Generally, this Court's cases have examined force majeure, also called 'acts of God,' in the context of liability for negligence and liability in cases where no clause was present in a contract. However, in this case, the force majeure clause was specifically written into the contract.")

226. *Force-Majeure Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a force-majeure clause as "[a] contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially] as a result of an event or effect that the parties could not have anticipated or controlled").

227. *Entzel*, ¶ 2, 841 N.W.2d at 776-77.

228. *Id.* ¶ 3, 841 N.W.2d at 777. Paragraph 10 of the agreement provided: "The LANDLORD will not be responsible for delays in hauling, launching, winter lay-up or

the beginning of the leasing period.²²⁹ Due to the threat of a flood, the city of Mandan instructed Moritz to take precautionary action concerning the boats stored there.²³⁰ As a result, on May 26, Moritz notified Entzel that owners had to remove their boats from the slips due to imminent flooding.²³¹ Moritz failed to tell Entzel when her boat could be returned to the marina, and Entzel did not use the slip during the lease term.²³² Other Moritz customers, however, used their slips from mid-June through the end of the season.²³³ Entzel sued Moritz in small claims court alleging breach of contract and sought to recover the slip rental fee.²³⁴ Moritz removed the action to district court and defended that the force majeure clause in the contract relieved it from liability.²³⁵

The Supreme Court held that the force majeure clause in the contract relieved Moritz of liability and allocated the risk of loss to Entzel.²³⁶ The clause, by its plain language, applied to delays in use of the slip that were beyond the control of the Moritz, namely the imminent flood.²³⁷

The Supreme Court's first foray into interpreting force majeure clauses is rather straightforward. It does not offer much guidance for attorneys who draft or litigate the clauses beyond two well-known principles: (1) the specific language of the clause is most important; and (2) the party asserting a force majeure clause to excuse performance may have to prove that the triggering event was beyond its control.²³⁸

Counsel in North Dakota should be aware of some general considerations relevant to drafting an effective force majeure clause. First, in the absence of a negotiated force majeure clause, contracting parties are left to invoke common law doctrines of impracticability and frustration of purpose, which rarely excuse performance. Accordingly, parties may deem it prudent to employ a force majeure clause as a tool to allocate the risk of nonperformance in certain defined circumstances.

commissioning, occasioned by inclement weather or any other circumstances beyond its control.”
Id.

229. *Id.* ¶ 2.

230. *Id.*

231. *Id.*

232. *Entzel*, ¶ 2, 841 N.W.2d at 777.

233. *Id.*

234. *Id.* ¶ 3.

235. *Id.*

236. *Id.* ¶ 11, 841 N.W.2d at 779.

237. *Id.* ¶ 10.

238. *Entzel*, ¶ 7, 841 N.W.2d at 778 (explaining “[w]hat types of events constitute *force majeure* depend on the specific language included in the clause itself”).

Having decided to include a force majeure clause, parties must determine the types of events and circumstances it will cover. Parties have the freedom to define the events that will trigger the clause.²³⁹ The typical clause encompasses natural disasters like hurricanes, floods, earthquakes, and weather disturbances sometimes referred to as “acts of God.”²⁴⁰ Courts tend to interpret force majeure clauses narrowly—only the enumerated events, or sufficiently similar events, will be covered.²⁴¹

Counsel should also recognize the need for careful drafting of the language that comes before and after the list of covered events. For example, courts have recognized limits to the use of a catch-all provision in these clauses, such as “causes beyond the parties’ control.”²⁴² Courts generally construe such broad language as limited to unforeseeable rather than foreseeable events.²⁴³

In *Entzel*, however, the Supreme Court potentially departed from this majority approach when it noted that “[n]ot every force majeure event need be beyond the parties’ reasonable control to still qualify as an excuse” for nonperformance even though this force majeure clause contained express language to the contrary.²⁴⁴ This dicta creates some ambiguity for transacting parties, counsel, and courts because it suggests that North Dakota courts embrace a broader view of the types of events that will excuse nonperformance based on the force majeure clause.

Additionally, the language that follows the list of triggering events can alter the scope of the force majeure clause. For example, where parties add the words “or any other emergency beyond the parties’ control” to the end of a list of triggering events, they unintentionally may narrow the clause to events that, in a court’s view, qualify as emergencies.²⁴⁵

239. *See id.*

240. *See* *Beardslee v. Inflection Energy, LLC*, 31 N.E.3d 80, 81-82 (N.Y. 2015) (“Generally, a force majeure event is an event beyond the control of the parties that prevents performance under a contract and may excuse nonperformance.”).

241. *See, e.g.*, *In re Cablevision Consumer Litig.*, 864 F.Supp.2d 258, 264 (E.D.N.Y. 2012); *see also* 30 WILLISTON ON CONTRACTS § 77:31 (4th ed. 2014).

242. *See, e.g.*, *Clean Uniform Co. St. Louis v. Magic Touch Cleaning, Inc.*, 300 S.W.3d 602, 608, 610 (Mo. Ct. App. 2009).

243. *Id.* at 610.

244. *Entzel*, ¶ 7, 841 N.W.2d at 778.

245. *See, e.g.*, *Sun Operating Ltd. P’ship v. Holt*, 984 S.W.2d 277 (Tex. App. 1998). The disputed force majeure clause in this oil and gas lease litigation contained a list of triggering events followed by the catch-all phrase, “any cause whatsoever beyond the control of the Lessee.” *Id.* at 280. The court held that because the catch-all phrase followed the list of triggering events, it qualified each of those events with the result that an event could be a force majeure one for purposes of the lease only if it was “outside of [a party’s] “reasonable control.” *Id.* at 288.

Finally, as with any contractual provision, counsel should examine and assess whether the specific type of transaction demands certain language to protect one or both of the contracting parties. For example, there is some evidence that force majeure clauses are increasingly important in oil and gas leases.²⁴⁶ In at least one case, a mineral lessee unsuccessfully invoked a force majeure clause as a result of government regulation in an attempt to extend its lease term.²⁴⁷ Counsel to mineral lessors and lessees should examine and assess whether the nature of the transaction presents special drafting considerations for force majeure provisions, such as expressly negating its applicability to acts of government regulation that might interfere with leasing rights.

D. PRINCIPLES OF INTERPRETATION & PUGH CLAUSES

There has also been an increase in actions seeking to enforce the validity of oil and gas leases. In North Dakota, the rules governing interpretation of contracts apply to oil and gas leases.²⁴⁸ Accordingly, all contracts are interpreted to give effect to the parties' mutual intent at the time of contracting.²⁴⁹ Two recent cases invited courts to construe Pugh clauses in oil and gas leases using ordinary principles of contract interpretation.²⁵⁰

A Pugh clause is a term in an oil and gas lease that severs the lease as to areas of the subject property that do not contain a producing unit after the initial term of the lease has expired.²⁵¹ It is designed to protect a lessor from having all of her lands held captive by the lease based on production from a small portion of the property.²⁵² "North Dakota law generally

246. See Joshua A. Swanson, *The Hand of God: Limiting the Impact of the Force Majeure Clause in an Oil and Gas Lease*, 89 N.D. L. REV. 225, 225 (2013) ("This Article focuses on the growing importance of the force majeure clause in oil and gas leases and discusses what mineral owners can do to protect themselves against the unintended consequences of allowing the force majeure clause to turn every event into an 'Act of God' that extends their lease indefinitely without production or drilling operations."). See also Jay D. Kelley, *So What's Your Excuse? An Analysis of Force Majeure Claims*, 2 TEX. J. OIL GAS & ENERGY L. 91 (2007).

247. See *Aukema v Chesapeake Appalachia, LLC*, 904 F. Supp. 2d 199, 210-11 (N.D.N.Y. 2012) (holding that executive action suspending fracking, pending the completion of environmental impact assessments, did not qualify as a force majeure event under the leases).

248. *Tank v. Citation Oil & Gas Corp.*, 2014 ND 123, ¶ 9, 848 N.W.2d 691, 695 *reh'g denied* (Jul. 17, 2014); *Egeland v. Cont'l Res., Inc.*, 2000 ND 169, ¶ 10, 616 N.W.2d 861, 864.

249. N.D. CENT. CODE § 9-07-03 (2015).

250. See *Tank*, ¶¶ 6-7, 848 N.W.2d at 694-95; *N. Oil and Gas, Inc. v. Moen*, 808 F.3d 373, 377 (8th Cir. 2015).

251. *Moen*, 808 F.3d at 377 (citing *Tank*, ¶ 14, 848 N.W.2d at 697).

252. *Id.* at 375 (citing *Sandefur Oil & Gas, Inc. v. Duhon*, 961 F.2d 1207, 1209 (5th Cir. 1992)).

presumes that oil and gas leases are indivisible,” meaning that production on any part of the leased lands will maintain the lease beyond its initial term for all land covered by the lease.²⁵³ A Pugh clause must “clearly and explicitly” divide the land in order to defeat this presumption.²⁵⁴

In *Northern Oil and Gas, Inc. v. Moen*, the parties disputed the continued validity of an oil and gas lease based on conflicting interpretations of the Pugh clause.²⁵⁵ The lease provided for an initial term of five years and extended beyond that term as long as the lessee was operating on the land.²⁵⁶ However, the lease also contained a Pugh clause.²⁵⁷ That clause terminated the lease at the end of the initial term as to all land except for land located “within the *same section of a production unit or spacing unit*” on which there was “a well producing or capable of producing” commercial quantities of oil or gas.²⁵⁸ The disputed issue was whether the language in the Pugh clause of the contract severed the lease at section boundaries or spacing unit boundaries.²⁵⁹ The Moens claimed that the Pugh clause divided the lease at spacing-unit boundaries, while Northern Oil claimed that the Pugh clause divided the lease at section boundaries.²⁶⁰

The Eighth Circuit applied ordinary principles of contract interpretation and held that the Pugh clause divided the lease at section boundaries rather than spacing boundaries.²⁶¹ The court invoked the canon that requires that words in a contract be construed according to their “ordinary and popular” meaning, unless the parties defined the words according to their technical meaning.²⁶² Looking to the ordinary meaning of the term “section” as it is defined in the real estate context in *Black’s Law Dictionary* and in *Williams & Meyers Oil and Gas Law Manual of Terms*—a one-square-mile tract of land (640 acres)—as well as the parties use of the term “section” in other parts of the lease to refer to Public Land System Survey (PLSS) sections,

253. *Id.* at 376 (citing *Tank*, ¶ 12, 848 N.W.2d at 696).

254. *Id.* at 377 (quoting *Egeland*, ¶ 17, 616 N.W.2d at 867).

255. *Id.* at 374-75.

256. *Id.* at 375.

257. *Moen*, 808 F.3d at 375.

258. *Id.* at 375-76.

259. *Id.* at 376.

260. *Id.*

261. *Id.* at 376-77 (citing *Grynberg v. Dome Petroleum Corp.*, 599 N.W.2d 261, 265 (N.D. 1999)) (“North Dakota courts construe words in their ordinary and popular sense unless the parties use them in a technical sense.”); *see also Grynberg*, 599 N.W.2d at 265 (explaining that “[a] contract must be construed as a whole to give effect to each provision, if reasonably possible”).

262. *Moen*, 808 F.3d at 376.

the court concluded that the parties intended to divide the lease at section boundaries.²⁶³ The result is that the lease remained valid as to the disputed area because production from other areas in the same section maintained the lease as to the entire section.²⁶⁴

The North Dakota Supreme Court entertained the interpretation of a Pugh clause in *Tank v. Citation Oil & Gas Corporation* about a year earlier.²⁶⁵ The lease at issue in *Tank* contained a continuous drilling operations clause that conflicted with a Pugh clause.²⁶⁶ The drilling clause, if construed broadly, would have rendered the Pugh clause inoperative.²⁶⁷ The Supreme Court interpreted the lease to give effect to both clauses, relying primarily on two rules of contract interpretation.²⁶⁸ First, it applied the general principle that words in a contract—including an oil and gas lease—must be construed according to their “ordinary and popular” meaning, unless the parties defined the words according to their technical meaning.²⁶⁹ It also applied the rule that a contract must be interpreted as a whole and in a manner that gives effect to every provision, if possible.²⁷⁰ Applying these contract interpretation principles, the Supreme Court upheld the Pugh clause in *Tank* in favor of the landowners.²⁷¹

These decisions have implications for drafting oil and gas leases in North Dakota, some of which are outside the scope of this Article and require subject matter expertise beyond general contracting principles.²⁷² That said, it is worth noting counsel should be mindful that these rulings call attention to foundational drafting principles that are relevant to any transaction. It is important with any draft written agreement to anticipate all the ways the transaction might unfold and contemplate how that sequence of events will play out under the provisions as written. Such an exercise will demonstrate for counsel and their clients how the various provisions of the contract interact with one another.

263. *Id.* at 377-78.

264. *Id.* at 379-80.

265. *Tank v. Citation Oil & Gas, Corp.*, 2014 ND 123, 848 N.W.2d 691. For a lengthier discussion of this case, see Jesse Liebe, Case Comment, *Contracts — Mines and Minerals: North Dakota Rejects Extension of Oil Production Contracts on Unused Land: Tank v. Citation Oil & Gas Corp.*, 2014 ND 123, 848 N.W.2d 691, 90 N.D. L. REV. 427 (2014).

266. *Tank*, ¶ 27, 848 N.W.2d at 699-700.

267. *Id.* ¶ 28.

268. *Id.*

269. *Id.* ¶ 41, 858 N.W.2d at 702 (Sandstrom, J., dissenting).

270. *Id.* ¶¶ 17, 28, 858 N.W.2d at 696, 700; *see also* N.D. CENT. CODE § 9-07-06 (2015).

271. *Tank*, ¶ 25, 858 N.W.2d at 699.

272. *See* Liebe, *supra* note 265.

E. RIGHT OF FIRST OFFER V. RIGHT OF FIRST REFUSAL

In *Constellation Development, LLC v. Western Trust Company*, the North Dakota Supreme Court held that a clause in the contract was a right of first offer, rather than a right of first refusal, despite conflicting language in the contract.²⁷³ The contract included a purported right of first refusal, as it was titled.²⁷⁴ It also included a handwritten sentence above the printed “First Right of Refusal” clause, providing for a fixed-price option to purchase.²⁷⁵ That clause provided: “This has changed to a three-year purchase option to run concurrently.”²⁷⁶ Constellation tried to exercise the option to purchase, but ultimately failed to furnish the required consideration.²⁷⁷

The parties disagreed about whether the contract provided for an option to purchase or a right of first refusal.²⁷⁸ The Supreme Court declined to decide whether the addition of the handwritten option created an ambiguity, because the right of first refusal (“ROFR”), though titled as such, was actually a right of first offer (“ROFO”).²⁷⁹ Looking to the substance of the clause rather than the title or label attached to it, the Supreme Court concluded that the text of the clause more closely resembled a right of first offer because it spoke in terms of the seller’s decision to sell, *and* it did not require Western to inform Constellation of any third-party offers for the property before it could sell to a third party, which is a feature consistent with a right of first refusal.²⁸⁰ Further, Western’s notice triggered the right of first offer, but Constellation did nothing to accept the offer.²⁸¹

A right of first offer requires an owner to give the holder the first opportunity to buy the subject property after the owner decides to sell it.²⁸² A right of first refusal grants the holder the right to match the terms of any

273. *Constellation Dev., LLC v. W. Tr. Co.*, 2016 ND 141, ¶ 15, 882 N.W.2d 238, 243.

274. *Id.* ¶ 2, 882 N.W.2d at 240 (The contract provided: “FIRST RIGHT OF REFUSAL: The Seller will grant and give to the Buyer the First Right of Refusal for 5 years on the additional 62 acres as shown on Exhibit “B” attached to this Agreement should the Seller decide to sell any more land. The purchase price in reference to the additional land will be at \$18,000.00 per acre if the Seller decides to sell additional land. If Seller decides to sell more land the Buyer will have 14 days to enter into a Purchase Agreement and 30 days to close the transaction or he will lose his First Right of Refusal.”).

275. *Id.* ¶ 10, 882 N.W.2d at 242.

276. *Id.*

277. *Id.* ¶ 9, 882 N.W.2d at 241-42.

278. *Id.* ¶ 10, 882 N.W.2d at 242.

279. *Constellation Dev., LLC*, ¶ 10, 882 N.W.2d at 242.

280. *Id.* ¶ 15, 882 N.W.2d at 244.

281. *Id.*

282. *Id.* ¶ 14, 882 N.W.2d at 243.

third party offers the owner has received on the subject property and then purchase the property or pass on the deal.²⁸³ The main difference between a right of first refusal and a right of first offer is the triggering event. A right of first refusal is triggered when the owner receives an offer from a third party and decides to sell. In contrast, a right of first offer is triggered when the owner decides to offer the property for sale, period, without first receiving an offer from a third party.²⁸⁴ The provision here, though titled a right of first refusal, made no mention of a sale to a third party.²⁸⁵

This decision highlights for counsel the imperative of identifying a client's business objectives in connection with a transaction and then translating those objectives into carefully drafted provisions.²⁸⁶ For example, counsel for property owners should be aware that ROFRs raise a concern that third parties may be less inclined to consider a purchase because the holder of the ROFR can exercise its right to buy the property under terms the third party assembled.

Counsel for holders, on the other hand, should note that a ROFO puts a greater burden on the holder to carefully consider when and how to draft the offer terms. A ROFO does not know how the owner values the property. Accordingly, the holder and its counsel have to decide whether to have the owner set price and other terms in advance, at the time of the granting of the right, or later when the holder exercises the right. Typically, the transactional documents will provide that the owner shall provide a notice to the holder of its decision to sell. That notice triggers the ROFO and specifies the price and terms the owner is willing to accept. This eliminates the risk for the holder that its offer will undervalue the property.

Some foundational drafting considerations include the following: (1) identify what triggers the right, and consider identifying what does not trigger the right; (2) accurately describe the property (or asset) that is the subject of the right; (3) state the price and other essential terms, or alternatively, indicate that the owner's notice will provide such terms; and (4) stipulate what constitutes acceptance of the notice, including how long the holder has to accept and the consequences of a failure to respond.

283. *Id.*

284. *Id.*

285. *Constellation Dev., LLC*, ¶¶ 13-15, 882 N.W.2d at 243-44.

286. Arguably, there *is* ambiguity concerning what the parties' intended—a right of first offer or a right of first refusal. The ruling does not indicate whether the parties had any extrinsic evidence to proffer which would have revealed the parties' actual intent. Further, the Supreme Court's decision appears to foreclose consideration of any extrinsic evidence on this point, when it concludes that the substance of the provision is clearly a right of first offer despite the titling of the provision as a right of first refusal.

Counsel for all parties should also keep in mind that common law contract doctrines may apply in the absence of the parties' agreement as to specific issues. There are many other considerations concerning the drafting of rights of first refusal and first offer, but these are merely the most basic ones.

VI. DEFENSES OF FORMATION OR ENFORCEMENT

A party to contract litigation may assert any number of doctrines as an affirmative defense to avoid enforcement of an otherwise valid contract. Noteworthy decisions from the survey period involve failure of consideration, statute of frauds, and fraud.

A. FAILURE OF CONSIDERATION

Recent case law has addressed the failure of consideration as opposed to the lack of sufficient or adequate consideration. Failure of consideration is an affirmative defense to enforcement of an otherwise valid contract, typically asserted where the other party has failed to perform its side of the bargain.²⁸⁷ When asserted successfully, rescission is ordinarily the remedy.²⁸⁸

In North Dakota, substantial performance constitutes sufficient consideration.²⁸⁹ In *Pegg v. Kohn*, the North Dakota Supreme Court held that a party's assertion of failure of consideration to avoid enforcement must fail where the other party substantially performed his contractual obligations.²⁹⁰ Pegg, an electrician, was dissatisfied with his job because the company refused to pay him a percentage of revenue from one of his significant clients.²⁹¹ Pegg proposed a partnership with Kohn in Kohn's company, with Pegg contributing his client account and the attendant revenue, as well as \$10,000 of capital.²⁹² Under the partnership, Pegg would receive an hourly wage, ten percent of the partnership's net revenue, and ten percent of the gross revenue generated by his client's business.²⁹³ No written agreement existed, but Pegg began working and contributed significantly to the business including paying about \$9000 for a truck titled

287. *Brash v. Gulleeson*, 2013 ND 156, ¶ 13, 835 N.W.2d 798, 802–03.

288. N.D. CENT. CODE § 9-09-02 (2015).

289. *Pegg v. Kohn*, 2015 ND 79, 861 N.W.2d 764.

290. *Id.* ¶ 12, 861 N.W.2d at 767.

291. *Id.* ¶ 3, 861 N.W.2d at 765.

292. *Id.*

293. *Id.*

in the partnership's name plus the costs of tools and equipment.²⁹⁴ Later, Kohn denied existence of the partnership, so Pegg sued for breach of the oral partnership agreement.²⁹⁵

Kohn argued a failure of consideration because Pegg did not pay the entire \$10,000 due under the oral agreement.²⁹⁶ The Supreme Court reaffirmed the longstanding rule that a party's substantial performance constitutes sufficient consideration to make the contract binding and permit that party to recover for breach of contract.²⁹⁷

In contrast, in *Brash v. Gulleston*, the defendant successfully asserted failure of consideration to avoid enforcement of a contract.²⁹⁸ In that case, the parties entered into a lease agreement which directed Brash to provide 130 cows to Gulleston's farm as well as replacement cows to maintain the herd at that number.²⁹⁹ The record amply demonstrated that Brash failed to furnish or maintain 130 cows during subsequent years, despite the contractual language to the contrary.³⁰⁰ Gulleston raised failure of consideration to avoid enforcement of the contract.³⁰¹ The district court concluded, and the Supreme Court affirmed, that there was a failure of consideration, which rendered the contract unenforceable.³⁰²

These two cases illustrate the extreme ends of the spectrum with regard to furnishing consideration: substantial—indeed ninety percent—performance in *Pegg* contrasts with the *Brash* plaintiffs' near total failure of consideration. These cases reiterate longstanding law in the state concerning substantial performance and failure of consideration while offering some benchmark standards for counsel to use in a litigation posture. First, *Brash* reaffirms that failure of consideration means “the failure to perform a substantial part of its obligation.”³⁰³ A less clear

294. *Id.*

295. *Pegg*, 2015 ND 79, ¶ 3, 861 N.W.2d at 765. The parties did not raise any statute of frauds issue. *Id.*

296. *Id.* ¶ 11, 861 N.W.2d at 767.

297. *Id.* ¶ 12; *see also* *Curtis Constr. Co., Inc. v. American Steel Span, Inc.*, 2005 ND 218, ¶ 19, 707 N.W.2d 68, 74; *Bismarck Realty Co. v. Folden*, 354 N.W.2d 636, 641 (N.D. 1984); *Kruger v. Soreide*, 246 N.W.2d 764, 773 (N.D. 1976); *United States v. Dura-Lux Int'l Corp.*, 529 F.2d 659, 662–63 (8th Cir. 1976) (explaining that if “substantial performance was rendered . . . the defense of failure of consideration cannot succeed”).

298. *Brash v. Gulleston*, 2013 ND 156, ¶ 25, 835 N.W.2d 798, 806.

299. *Id.* ¶ 15, 835 N.W.2d at 798.

300. *Id.* ¶ 24, 835 N.W.2d at 805-06.

301. *Id.* ¶ 25, 835 N.W.2d at 806.

302. *Id.*

303. *Irish Oil & Gas, Inc. v. Riemer*, 2011 ND 22, ¶ 20, 794 N.W.2d 715, 720.

standard governs substantial performance:³⁰⁴ a “good faith attempt to perform” constitutes substantial performance as long as the “essential purpose” of the contract is achieved, even where the performance is not exactly according to the agreement’s terms.³⁰⁵

B. STATUTE OF FRAUDS

Like failure of consideration, a party may assert failure to comply with the statute of frauds to avoid enforcement of an otherwise valid contract. During the survey period, the North Dakota Supreme Court heard and ruled on a handful of disputes that involved the statute of frauds and how it interacts with promissory estoppel doctrine.³⁰⁶ Arguably, the more interesting statute of frauds case is *Trosen v. Trosen*, described below, where the Supreme Court did not invoke *sua sponte* a rule which would have permitted the contract to satisfy the statute of frauds.

In *Trosen v. Trosen*, Shirley Trosen owned farmland and leased tracts separately to her sons, Jeff and Brent.³⁰⁷ She entered into a three-year written lease agreement with Jeff on January 1, 2011.³⁰⁸ The agreement, however, failed to specify the amount of rent, i.e., the consideration.³⁰⁹ The week that the parties signed the lease, Jeff also tendered to Shirley a check dated “Jan. 2011” for \$28,522 with “2011 farm land” indicated in the memo line.³¹⁰ Shirley did not cash the check and eventually returned it.³¹¹ Shirley then allowed her other son, Brent, to farm the land.³¹² As a consequence, Jeff sued for breach of contract and damages, as well as equitable relief.³¹³

In North Dakota, a sufficient memorandum for purposes of satisfying the statute of frauds must state the parties’ identity, the agreement’s subject matter, and the consideration, and it must be signed by the party attempting to escape enforcement of the contract.³¹⁴ The Supreme Court concluded

304. “There is no fixed formula by which [substantial performance] can be determined because the word ‘substantial’, the meat of the doctrine, in this context, is a relative term.” Pegg v. Kohn, 2015 ND 79, ¶ 12, 861 N.W.2d 764, 767 (quoting *Dittmer v. Nokleberg*, 219 N.W.2d 201, 208 (N.D.1974)).

305. *Pegg* ¶ 12, 861 N.W.2d at 767 (quoting BLACK’S LAW DICTIONARY (10th ed. 2014)).

306. *See supra* Section III.B.

307. *Trosen v. Trosen*, 2014 ND 7, ¶ 2, 841 N.W.2d 687, 690.

308. *Id.* ¶ 4.

309. *Id.* ¶ 12, 841 N.W.2d at 692.

310. *Id.* ¶ 3, 841 N.W.2d at 690.

311. *Id.* ¶ 6, 841 N.W.2d at 691.

312. *Id.*

313. *Trosen*, ¶¶ 6-7, 841 N.W.2d at 691.

314. *Id.* ¶ 12, 841 N.W.2d at 692.

that this lease agreement was clearly within the statute of frauds but was invalid because it failed to comply with the legal requirements for a sufficient memorandum.³¹⁵ It failed because the written lease did not state the consideration—the rent.³¹⁶

The Supreme Court does not appear to address longstanding doctrine that permits a party to combine writings to satisfy the statute of frauds memorandum requirement.³¹⁷ A memorandum need not be a single document in order to satisfy the statute of frauds.³¹⁸ Rather, an agreement may satisfy the statute of frauds through a combination of separate writings “as long as they refer to each other and to the same persons and things, and manifestly relate to the same contract and transaction.”³¹⁹ North Dakota decisional law embraces this approach:

[The] memorandum need not be a complete contract in itself, but may consist of several documents, letters or telegrams, provided these documents show who are the contracting parties, intelligently identify the subject matter involved, express the consideration and disclose the terms and conditions upon which the contract is entered into.³²⁰

The Supreme Court’s decision is silent as to the ability of a party to combine writings to satisfy the statute of frauds. Arguably, the written lease combined with the check satisfies the memorandum requirements. The written lease fails to state the rent, but the check *does* indicate the rent, the parties’ identities, *and* refers to the lease in a notation on the check’s memo line.³²¹ Accordingly, as long as Shirley has signed the written lease, she should not be able to escape enforcement of it based on a statute of frauds defense.³²² Perhaps counsel failed to raise this issue, or perhaps there is some other reason combining the documents would be infeasible here. Regardless, the decision provides counsel an opportunity to review the myriad ways to satisfy the statute of frauds memorandum requirements for litigation and client counseling purposes.

315. *Id.* ¶ 15, 841 N.W.2d at 693.

316. *Id.* ¶¶ 12, 15, 841 N.W.2d at 692.

317. *See id.*

318. *Johnson v. Auran*, 214 N.W.2d 641, 650 (N.D. 1974).

319. *Thomas J. Baird Inv. Co. v. Harris*, 209 F. 291, 295 (8th Cir. 1913).

320. *Id.* (quoting *Hoth v. Kahler*, 74 N.W.2d 440, 441 (N.D. 1956)); *see also Hoth*, 74 N.W.2d at 447 (quoting *Goetz v. Hubbell*, 266 N.W. 836, 838 (1936)) (explaining that “[a]ny kind of document or documents, taken singly or together, may constitute the required memorandum”).

321. *Trosen v. Trosen*, 2014 ND 7, ¶ 4, 841 N.W.2d 687, 690.

322. *See Thomas J. Baird Inv. Co.*, 209 F. at 295.

C. FRAUD

Fraud is another defense to enforcement of a contract that was before the North Dakota Supreme Court during the survey period. In two different cases, the Supreme Court had the opportunity to distinguish the types of statements that constitute actual fraud from statements of opinion, which do not constitute fraud.

In both cases, the Supreme Court's starting point was a North Dakota statute that defines actual fraud as affirmatively stating a fact, known to be untrue, with intent to induce another to enter into a contract.³²³ Fraud also includes making factual statements that the party does not believe to be true, suppressing material facts known or believed to be true, and making a promise without any intention of performing it.³²⁴ Statements of opinion, or statements which amount to mere puffery or sales talk, do not constitute fraud.³²⁵

In *Ganske*, the Supreme Court reversed the decision of the district court, which had concluded that alleged misrepresentations were mere sales talk, puffery, or opinion and were not material to the lessors' fraudulent inducement claims.³²⁶ In this case, the lessee asserted numerous facts about its company's success in past drilling operations as well as its readiness to drill on the lessors' property.³²⁷ The Supreme Court held that the alleged misrepresentations in *Ganske* were well beyond mere puffery, sales talk, or statements of opinion in that the statements asserted specific, concrete facts which Golden Eye knew to be untrue and allegedly made to induce the lessors to enter into the disputed leases.³²⁸ In contrast, in *Ward Farms Partnership v. Enerbase Cooperative Resources*, the alleged fraud involved statements that a tractor for sale was "field ready" or "in good shape."³²⁹ The Supreme Court held that such statements were sales talk or puffery that did not rise to the level of fraud.³³⁰

The juxtaposition of these two cases highlights the need to train field representatives about the outer limits of sales talk so that a business can protect itself against fraud actions.

323. N.D. CENT. CODE. § 9-03-08 (2015).

324. *Golden Eye Res., LLC v. Ganske*, 2014 ND 179, ¶ 23, 853 N.W.2d 544, 552.

325. *Id.* ¶ 23, 853 N.W.2d at 552-53.

326. *Id.* ¶ 24, 853 N.W.2d at 553.

327. *Id.* ¶ 25.

328. *Id.*

329. *Ward Farms P'ship v. Enerbase Coop. Res.*, 2015 ND 136, ¶ 4, 863 N.W.2d 868, 871.

330. *Id.* ¶ 16, 863 N.W.2d at 873-74.

VII. CONCLUSION

There was an array of cases involving North Dakota contract law during the survey period from which one can extrapolate at least three themes concerning contracts law in North Dakota. First, courts applying North Dakota contract law continue to embrace, rather than depart from, longstanding contract doctrine. The number of instances in which the court reaffirms existing principles of contract law suggests that there are no watershed departures from existing norms on the horizon. Second, courts applying North Dakota contract law look for practical, common sense approaches to interpreting clauses in ways that reflect contracting behavior and preserve the enforceability of the contract. Lastly, there is a foreshadowing perhaps of issues to watch, particularly with respect to estoppel claims, preemptive rights—such as rights of first refusal and first offer—and interpretation issues arising under oil and gas leases and in construction contracts.