20190301
FILED FEBRUARY 14, 2020
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20190301
McKenzie County Case No. 27-2018-CV-00032

In the Supreme Court for the
State of North Dakota

Jesse Dellinger,

Plaintiff,

v.

Jeremy Young Wolf d/b/a Young Wolf Trenching,
QEP Energy Company, and Trevor Grandchamp,

Defendants,

and

QEP Energy Company,

Appellee/Third Party Plaintiff,

v.

Kinsale Insurance Company and
Legendary Field Services, LLC,

Appellant/Third Party Defendants.

KINSALE INSURANCE COMPANY'S RESPONSE TO QEP ENERGY COMPANY'S MOTION TO DISMISS

Pearce Durick PLLC

By: _____

LARRY L. BOSCHEE (#04293)
llb@pearce-durick.com
JACK E. ZUGER (# 06987)
jez@pearce-durick.com
314 E. Thayer Avenue
P.O. Box 400
Bismarck, North Dakota 58502-0400
T: (701) 223-2890

- and -

EBELTOFT, SICKLER, LAWYERS PLLC
NICHOLAS C. GRANT (# 07102)
2272 8th Street West
Dickinson, North Dakota 58601
T: 701.225.5297
ngrant@ndlaw.com

- and -

CLYDE & CO US LLP
AARON WARREN (PHV # P02165)
1221 Brickell Avenue
Suite 1600
Miami, Florida 35131
T: 305-329-1830
aaron.warren@clydeco.us
Attorneys for Kinsale Insurance Company

Table of Contents

Table of Authorities

Cases

Other Authorities

North Dakota Century Code

Statement of the Issue

[1] The motion to dismiss in this case presents the issue considered, but not resolved for precedential purposes, in Ziegler v. Meadowbrook Ins. Co., 2009 ND 192, 774 N.W.2d 782. That issue is whether an immediate appeal is available from a district court's duty-to-defend decision in a declaratory judgment action. In Ziegler, this Court split two, one, two, and did not reach a majority analysis. Based on section 32-23-01 of the North Dakota Century Code, which provides that a decision in a declaratory judgment action "*shall have the force and effect of a final judgment*", and the 1983 amendment to section 32-23-06, which provides that "*the court shall render . . . a declaratory judgment . . . to determine . . . duty-to-defend, although the insured's liability for loss may not have been determined*", this Court should adopt Justice VandeWalle's analysis in Ziegler and hold that a duty-to-defend decision is immediately appealable.

Statement of the Case

[2] This is an appeal from the decision of the Honorable Daniel El-Dweek ordering that Kinsale Insurance Company ("Kinsale") has a duty-to-defend QEP Energy Company ("QEP") in this personal injury oilfield accident lawsuit. Kinsale has appealed this case under the reasoning of Justice VandeWalle in Ziegler. Justice VandeWalle, in the opinion he authored, and in which Justice Sandstrom joined, concluded that a duty-to-defend decision is immediately appealable, without exception or qualification, under section 32-23-01 of the

North Dakota Century Code, and the 1983 amendment to section 32-23-06. 2009 ND 192, ¶ 34.

Statement of the Facts

[3] Jesse Dellinger brought this personal injury lawsuit for injuries arising out of an oilfield accident. (Appx. at 13). He sustained burn injuries when petroleum substances released from a heater treater tank. (Appx. at 15). The substances saturated his clothing, and then caught fire, causing his injuries. (Appx. 16). QEP, one of the defendants, has brought a third-party action against Kinsale, seeking a declaratory judgment that Kinsale, under a policy issued to Dellinger's employer, Legendary Field Services, LLC, ("Legendary"), has a duty-to-defend and indemnify QEP for Dellinger's claims against it, and for recovery of damages arising from a claimed breach of contract of the duty-to-defend. (Appx. at 23).

[4] On cross-motions for summary judgment, the district court ruled that Kinsale has a duty-to-defend, but otherwise denied both motions. (Appx. at 96). Kinsale appealed the district court's decision, and this Court remanded so that the district court could consider Kinsale's pending rule 54(b) motion. (Appx. at 99, 105). The district court denied the rule 54(b) motion, and QEP has moved to dismiss the appeal. (Appx. at 112, 113).

[5] On the cross-motions in the district court, Kinsale argued that QEP did not, as a matter of law, qualify as an additional insured since it had neither plead nor briefed the requirements. (Appx. at 20). Kinsale further argued that

even if QEP qualified as an additional insured, three exclusions existed to exclude coverage: (1) an Absolute Pollution Exclusion, (2) an Employer's Liability Exclusion, and (3) an Independent Contractor Limitation Endorsement. (Appx. at 68, 80, 84). The Absolute Pollution Exclusion excludes coverage because the indisputable facts are that Dellinger was injured when petroleum substances released from the treater tank, soaked him, and then ignited. (Appx. at 68-79). The Employer's Liability Exclusion excludes coverage because the indisputable facts are that Dellinger was an employee of Legendary, the policy's named insured. (Appx. at 80-83). Finally, the Independent Contractor Limitation Endorsement excludes coverage because Legendary hired a subcontractor to partially perform work at the oil site, triggering Legendary's obligation to satisfy numerous conditions precedent (including, among others, waiver of subrogation and indemnity. without obtaining from that contractor additional insured status under the contractor's policy, an indemnity agreement, and a waiver of subrogation. (Appx. at 84-85).

[6] Highlighting for purposes of this brief, the Absolute Pollution Exclusion, Kinsale argued that the district court should reach the same conclusion as the Eighth Circuit did in Hiland Partners GP Holdings, LLC v. Nat'l Union Fire Ins. Co., 847 F.3d 594, 600 (8th Cir. 2017). (Appx. at 70-71). In Hiland Partners the Eighth Circuit, interpreting and applying North Dakota law, held that a virtually identical Absolute Pollution Exclusion precluded coverage for a worker whose injuries resulted from an explosion of hydrocarbon condensate. 847 F.3d at

600. The application of the Absolute Pollution Exclusion to the undisputed and indisputable facts in this case is simple and straight forward.

[7] The district court denied the summary judgment motions except that it ruled that Kinsale has a duty-to-defend. (Appx. at 126). The district court's order has immediate consequences. The district court ordered Kinsale to "reimburse QEP for all attorneys' fees and expenses incurred" and "pay for QEP's defense of the Plaintiff's claims going forward." (Appx. at 197).

[8] Kinsale has appealed under the reasoning of Justices VandeWalle and Sandstrom, that an immediate appeal of a duty-to-defend decision is available. Justice VandeWalle, who authored the opinion in which Justice Sandstrom joined, said that he could not conclude that the language of the 1983 amendment to section 32-23-06, consideration of the duty-to-defend issue, "was merely intended to mandate a district court to decide the issue only to have the parties face the possibility it could be overturned after a full trial and appeal to this Court." Ziegler, 2009 ND 192, ¶ 34.

Argument

A. This Court in Ziegler considered, but did not resolve for precedential purposes, the issue presented here: whether a duty-to-defend decision in a declaratory judgment action is immediately appealable.

[9] In Ziegler, 2009 ND 192, ¶ 7, this Court considered whether a duty-to-defend decision in a declaratory judgment action is immediately appealable. The Court did not reach a majority decision. Of the five-member Court, two

justices, Justices Crothers and Maring, said "no", and two, Justices VandeWalle and Sandstrom, said "yes". Id. at ¶¶ 14, 34. The fifth justice, Justice Kapsner, also said "yes", but if claims other than the duty-to-defend claim remain unresolved, only with a rule 54(b) certification. Id. at ¶ 28. Justice Kapsner reached the same result as Justices Crothers and Maring, but noted at the outset of her opinion, that she had "employ[ed] a different analysis to reach that result." Id. at ¶ 20.

[10] QEP treats Justice Crothers' opinion as a majority decision, with its use of the language, "the Ziegler Court held", but only two justices subscribed to the analysis in that opinion, and it takes three. While scattered references to a "majority" or "majority opinion" exist in the Ziegler case, no opinion had the support of three justices.

[11] "A decision in which a majority of the court concurred only in the result – that is, in the judgment – is not precedent." 21 C.J.S. Courts § 188 (Feb. 2020 Update). "[A] majority of the Court must agree on a ground for decision in order to make that a binding precedent for future cases: if there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not an authority beyond the immediate parties." 20 Am. Jur. 2d Courts § 134 (Feb. 2020 Update). "The mere ability to construct, from various concurring and dissenting opinions, a common denominator of probable outcome on an issue addressed in only one of those opinions does not make for a majority holding of the state supreme court." 5 Am. Jur. 2d Appellate Review §

519 (Feb. 2020 Update). "When a specific issue or view fails to attract a majority of specific concurring votes, the threshold between dictum and rule of law is not crossed and no mandate is generated, nor legal authority granted as to that issue or view." Id.

B. The 1983 amendment to section 32-23-06 mandates that courts decide duty-to-defend claims, and this Court, in the 1990 Blackburn case, interpreted that amendment to also apply to coverage claims.

[12] The 1983 amendment to section 32-23-06, and this Court's 1990 decision in Blackburn, Nickels & Smith, Inc. v. Nat'l Farmers Union Prop. & Cas. Co., 452 N.W.2d 319 (N.D. 1990), provide context to the Ziegler case, and the issue presented there, and now here, of whether a duty-to-defend decision in a declaratory judgment action is immediately appealable.

[13] In 1983, the North Dakota Legislature amended section 32-23-06, to include the underscored language in the quote below:

> The court may refuse to render or enter a declaratory judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. However, the court shall render or enter a declaratory judgment or decree in an action brought by or against an insurance company to determine liability of the insurance company to the insured to defend, or duty-to-defend, although the insured's loss liability for the loss may not have been determined.

1983 N.D. Laws 1224 (emphasis in original).

[14] In 1990 this Court, in Blackburn, 452 N.W. 2d at 322-23, considered the issue whether the 1983 amendment required the court to also decide coverage issues. 452 N.W. 2d at 321. The Court stated that the language was ambiguous as

to its intended scope and application, and thus considered the amendment's legislative history and the circumstances under which it was enacted. Id. at 322. The Court determined that the legislature added the new language in response to two cases – United Pac. Ins. Co. v. Aetna Ins. Co., 311 N.W.2d 170 (N.D. 1981) and Aberle v. Karn, 316 N.W.2d 779 (N.D. 1982) – in which the Court held that neither coverage nor duty-to-defend could be judicially resolved until the liability of the insured had been determined. Blackburn, 452 N.W.2d at 322. Reasoning that the legislature intended with the amendment to reverse the holdings in those cases, this Court held that the district court must decide both coverage and duty-to-defend, regardless of whether the insured's liability has been decided. Id. at 323.

[15] The Blackburn take-away is that the 1983 amendment to section 32-23-06 is to be broadly construed.

C. The Court should hold that duty-to-defend decisions are immediately appealable because of the finality provision of section 32-23-01, and the 1983 amendment to section 32-23-01 mandating that courts decide the issue.

[16] In Ziegler, 2009 ND 192, this Court considered the same issue presented here, i.e., whether a duty-to-defend decision in a declaratory judgment action is immediately appealable. The Court split two, one, two and did not reach a majority decision. Summaries of the three opinions are set forth below:

[17] **Justice VandeWalle's opinion.** Justice VandeWalle, in the opinion he authored, and in which Justice Sandstrom joined, concluded that a duty-to-defend decision is immediately appealable. Id. ¶ 34. He reasoned that the finality

provision of section 32-23-01 of the North Dakota Century Code, coupled with the mandate in section 32-23-06 that the court must decide the issue, "are alone sufficient and . . . intended to make the declaratory judgment immediately appealable." 2009 ND 192, ¶ 34. He said that if further authority were needed, section 28-27-02(2), governing the right to appeal, provides that authority. That section states that a "final order affecting a substantial right made in special proceedings" is appealable. N.D. Cent. Code § 28-27-02(2).

[18] Justice VandeWalle addressed completeness of the record issues. He noted that declaratory judgment procedure allows for the taking of evidence. 2009 ND 192, ¶ 35. Responding to an argument that the district court had to make assumptions because evidentiary findings had not been made, he said they "could have been made before the declaratory judgment was issued." Id.

[19] Significantly, Justice VandeWalle concluded, with respect to the 1983 amendment to section 32-23-06, that the Legislative Assembly fully intended to make declaratory judgment duty-to-defend decisions immediately appealable:

> I cannot conclude the action taken by the Legislature in 1983 to specifically require a court to issue a declaratory judgment to determine the liability of an insurance company to the insured to defend, or duty-to-defend, was merely intended to require a district court to decide the issue only to have the parties face the possibility it could be overturned after a full trial and appeal to this Court.

2009 ND 192, ¶ 34. Based on this analysis, Justice VandeWalle and Justice Sandstrom voted to hear the Ziegler appeal on its merits.

[20] **Justice Kapsner's opinion.** Justice Kapsner, in her solo opinion, essentially agreed with Justice VandeWalle's opinion, except in one respect. Id. ¶¶ 26, 28. She concluded that when claims other than the duty-to-defend claim remain unresolved, a rule 54(b) certification is required. Id. ¶ 28. Otherwise, she noted that the 1983 amendment to section 32-23-06 supports the position "that there should be an expeditious decision, including appellate review, of decisions on the duty-to-defend." Id. ¶ 26.

[21] **Justice Crothers' opinion.** Justice Crothers, in an opinion in which Justice Maring joined, concluded that the trial court's decision ordering the insurer to defend and indemnify was not a final order under section 28-27-02(2), and that the 1983 amendment to section 32-23-06 did not authorize an immediate appeal. 2009 ND 192, ¶¶ 12, 14.

[22] This Court should adopt Justice VandeWalle's analysis that duty-to-defend decisions are immediately appealable because that analysis advances legislative intent. In Ziegler, Justice VandeWalle said that he could not conclude that the language the Legislative Assembly added to section 32-23-06, mandating decision of duty-to-defend claims, "was merely intended to require a district court to decide the issue only to have the parties face the possibility it could be overturned after a full trial and appeal to this Court." 2009 ND 192, ¶ 34.

[23] This reasoning falls in line with the statutory interpretation principle that "the spirit of the enactment must be considered, and the statute should, if possible, be construed in accordance therewith." Fireman's Fund Mortg. Corp. v.

Smith, 436 N.W.2d 246, 247 (1989) (internal quotation omitted). "Broadly speaking, courts will extend a statute to include situations which would reasonably have been contemplated by the legislature in light of the circumstances giving rise to the legislation." 2B Norman Singer & Shambie Singer, Sutherland Statutes & Statutory Construction § 54:5 (7th ed. Oct. 2019 Update). One court has colorfully described this principle as follows: "'[I]t is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" Id. (quoting Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908).

[24] The legislative history for the 1983 amendment to section 32-23-06 shows that the North Dakota Legislative Assembly intended the new language to require the North Dakota Supreme Court to decide appeals of duty-to-defend decisions. The original bill that led to the amendment had similar language as the amendment: "However, an action brought by or against an insurance company to determine liability and duty-to-defend is not open to objection on the grounds that the insured's liability for the loss has not been determined." H 1378 48th Leg. Sess. (Add. at 1). During the hearing before the senate judiciary committee, the senators and members of the public speaking about the original, similarly worded bill, said that it was aimed at changing a North Dakota Supreme Court decision that dismissed an interlocutory appeal of a district court's duty-to-defend decision. Hearing on House Bill No. 1378, Sess. (Feb. 16, 1983) Before the Senate Judiciary Committee, 48 Sess. 1. (Add. at 2).

[25] These discussions show that the bill and the resulting legislation was directly aimed at Supreme Court jurisdiction. One senator said during the discussions "that [the Supreme Court] will not accept a declaratory judgment under these circumstances. They made a blanket rule [denying jurisdiction]." Senate Committee Hearing 1. Another senator said that "[i]n this one case, the supreme court did hear it, but refused to act on it and threw it out, because [the whole case] had not been resolved." Id. One of the bill supporters said, directly on point, that "*[h]e feels this instrument would say the supreme court shall render a decision.*" Id. (emphasis added).

D. Immediate appeal of duty-to-defend decisions would serve the declaratory judgment statute's remedial purposes, advance certainty and judicial economy, and relieve the irreparable prejudice that necessarily follows from an insurer being put into a nonconsensual, legal relationship favoring the insured.

[26] Besides advancing clearly articulated legislative intent, immediate appeal of duty-to-defend decisions would serve the remedial purposes of the declaratory judgment statutes, and advance certainty and judicial economy. It also would relieve the irreparable prejudice that necessarily follows from an insurer being put into a nonconsensual, legal relationship favoring the insured.

1. **Immediate appeal of duty-to-defend decisions would serve the remedial purpose of the declaratory judgment statutes.**

[27] A holding that duty-to-defend decisions are immediately appealable would advance the remedial purpose of the declaratory judgment statutes. The declaratory judgment statutes state that they are "remedial", and are "to be

construed and administered liberally." N.D. Cent. Code § 32-23-12 (2010). They state that their purpose "is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations . . . ." Id. "A liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction." Singer, supra § 60:1. If any doubt remains, the liberal interpretation to be given the declaratory judgment statutes applies to make a duty-to-defend decision immediately appealable.

2. Immediate appeal of duty-to-defend decisions would advance certainty.

[28] A holding that duty-to-defend decisions are immediately appealable would advance certainty. Insureds need to know whether the insurer has an obligation to defend so that they can make decisions about how or whether to use their resources to settle or defend. Ziegler, 2009 ND 192 ¶ 23. Insurers also need a final decision because otherwise they may pay money to defend a case, only to find out later they had no obligation to do so. Id. As the court in Pac. Ins. Co. v. Burnet Title, Inc., No. Civ. 02-2767, 2003 WL 22768232, at *3 (D. Minn. Nov. 21, 2003), said in the context of granting a rule 54(b) certification, "[I]f the Court's decision on duty-to-defend was in error, both parties will benefit from an early determination of their respective rights and duties." See also Taco Bell Corp. v. Cont'l Cas. Co., No. 01 C 0438, 2003 WL 21372473, at *1-2 (N.D. Ill. June 11, 2003) ("Taco Bell and Continental should be entitled to the benefit—including the

enforceability . . . and the res judicata certainty . . . of a final judgment on the duty-to-defend claims."), aff'd in part, rev'd in part on other grounds, 388 F.3d 1069 (7th Cir. 2004)).

3. Immediate appeal of duty-to-defend decisions would advance judicial economy.

[29] A holding that duty-to-defend decisions are immediately appealable would advance judicial economy. It would end not only the duty-to-defend claim, but would also automatically end the claims for coverage and breach of contract. "An insurer does not have a duty-to-defend unless there is a possibility of coverage contained in the allegations of the claimant's complaint." Borsheim Builders Supply, Inc. v. Manger Ins., Inc., 2018 ND 218, ¶¶18-19, 917 N.W.2d 504. When no duty-to-defend exists, no coverage exists. And then when no coverage exists, no breach of contract exists.

[30] In the rule 54(b) context, several courts have noted that immediate appealability of duty-to-defend decisions advances judicial economy. See, e.g., Res. Bankshares Corp. v. St. Paul Mercury Ins. Co., 323 F.Supp.2d 709, 723 (E.D. Va. 2004) (judicial economy would be served by Rule 54(b) certification because an appellate ruling that the insurer was not obligated to defend would "end this coverage case . . . (e.g., mooting indemnification and breach of contract in bad faith."), aff'd in part, rev'd in part on other grounds, 388 F.3d 1069 (4th Cir. 2011); Lott v. Scottsdale Ins. Co., 827 F.Supp.2d 626, 640 n.24 (E.D. Va. 2011) ("An appellate ruling that [the insurer] is not obligated to defend would moot the

indemnification issue, thus the interests of judicial economy are best served by Rule 54(b) certification."). In this case, a ruling that there is no duty-to-defend would result in complete dismissal of the third-party action against Kinsale.

[31] QEP claims that the district court intends to revisit the duty-to-defend issue. The record, as well as logic, do not support this assertion. The pleadings and indisputable facts upon which the duty-to-defend analysis is based, have not, and will not change. Moreover, it would not be good appellate policy to allow the district courts to preclude appeals on important duty-to-defend issues simply by stating they intend to revisit the issue at some undisclosed time in the future. In any event, QEP's assertion is irrelevant to Kinsale's argument that based on section 32-23-01 of the North Dakota Century Code, and the 1983 amendment to 32-23-06, an immediate appeal is available, without exception and unconditionally.

[32] QEP also makes rule 54(b) arguments, but these arguments are irrelevant. Kinsale argues, in line with Justice VandeWalle's analysis, that sections 32-23-01 and 32-23-06 of the North Dakota Century Code, provide an absolute right to appeal. Interestingly, though, QEP in making its rule 54(b) arguments, does not mention that "the weight of authority suggests that a partial summary judgment on the insurer's duty-to-defend is appropriate for certification as a final judgment under Fed.R.Civ.P. 54(b)." Lauren Plaza Assocs., Inc. v. Gordon H. Kolb Dev., Inc., Civ. No. 91-703, 1993 WL 302695, at *2 (E.D. La. Aug. 3, 1993), aff'd sub nom., 12 F.3d 208 (5th 1993).

[33] Finally, QEP argues that allowing this appeal would delay the litigation of the main action. While the general rule is that a district court loses jurisdiction when a notice of appeal is filed, the rule is not absolute. Siewert v. Siewert, 2008 ND 221, ¶ 13, 758 N.W.2d 691. The appeal divests the district court of jurisdiction only over the subject matter involved in the appeal. Getchell v. Great N. Ry. Co., 133 N.W. 912, 913 (N.D. 1911). An interlocutory appeal does not divest the trial court of jurisdiction to proceed with other aspects of the case. Phelan v. Taitano, 233 F.2d 117, 119 (9th Cir. 1956). This appeal does not preclude litigation of the main action from moving forward. The litigation of the main action, which involves tort-based issues of fault and personal injury damages, can proceed despite the appeal, which involves only straight forward contract-based issues of duty-to-defend.

4. Immediate appeal of duty-to-defend decisions would relieve the prejudice that comes from putting the insurer into a nonconsensual, legal relationship favoring the insured.

[34] A holding that duty-to-defend decisions are immediately appealable would relieve the prejudice that comes from putting the insurer into a nonconsensual, legal relationship that favors the insured. "The duty-to-defend is in the nature of a fiduciary relationship in which the rights of the insured are paramount." 1 Robert P. Redemann & Michael Smith, Law & Practice of Ins. Coverage Litig. § 4:6 (June 2019 Update); see also Fetch v. Quam, 2001 ND 48, ¶ 12, 623 N.W.2d 357 (insurer, with respect to its insureds, has a duty to act fairly and in good faith).

[35] The non-consenting relationship that a duty-to-defend ruling imposes on the insurer could expose the insurer to future claims that it did not provide an adequate defense. "If the insurer is negligent in performing its duty [to defend], the insurer is liable for damages resulting to the insured, even if such damages exceed policy limits." 14 Couch on Insurance § 202:18 (3d. ed. Dec. 2019 Update). Once the relationship is imposed, the insurer cannot stop others from making claims against it, no matter the degree of care it exercises.

Conclusion

[36] The Court should adopt Justice VandeWalle's analysis in Ziegler and hold that duty-to-defend decisions under the declaratory judgment statutes are immediately appealable, and deny the motion to dismiss. The finality provision of section 32-23-01, coupled with the mandate of the Legislative Assembly in the 1983 amendment to section 32-23-06, make a duty-to-defend decision in a declaratory judgment action immediately appealable.

DATED this 14th day of February, 2020.

Pearce Durick PLLC

By: _____
LARRY L. BOSCHEE (#04293)
llb@pearce-durick.com
JACK E. ZUGER (# 06987)
jez@pearce-durick.com
314 E. Thayer Avenue
P.O. Box 400
Bismarck, North Dakota 58502-0400
T: (701) 223-2890

- and -

EBELTOFT, SICKLER, LAWYERS PLLC
NICHOLAS C. GRANT (# 07102)
2272 8th Street West
Dickinson, North Dakota 58601
T: 701.225.5297
ngrant@ndlaw.com

- and -

CLYDE & CO US LLP
AARON WARREN (PHV # P02165)
1221 Brickell Avenue
Suite 1600
Miami, Florida 35131
T: 305-329-1830
aaron.warren@clydeco.us
Attorneys for Kinsale Insurance Company

ADDENDUM

Table of Contents

Forty-eighth
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1378

Introduced by

Representatives Wentz, E. Pomeroy

A BILL for an Act to amend and reenact section 32-23-06 of the North Dakota Century Code, relating to the rendering of declaratory judgments.

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

SECTION 1. AMENDMENT. Section 32-23-06 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

32-23-06. Entering of declaratory judgment discretionary with court. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. However, an action brought by or against an insurance company to determine liability and duty to defend is not open to objection on the grounds that the insured's liability for the loss has not been determined.

CHAPTER 377

HOUSE BILL NO. 1378
(Wentz, E. Pomeroy)

DECLARATORY JUDGMENT ON LIABILITY ACTION

AN ACT to amend and reenact section 32-23-06 of the North Dakota Century Code, relating to the rendering of declaratory judgments.

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

SECTION 1. AMENDMENT. Section 32-23-06 of the North Dakota Century Code is hereby amended and reenacted to read as follows:

32-23-06. Entering of declaratory judgment discretionary with court. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. However, the court shall render or enter a declaratory judgment or decree in an action brought by or against an insurance company to determine liability of the insurance company to the insured to defend, or duty to defend, although the insured's liability for the loss may not have been determined.

Approved March 14, 1983

02/18 SENATE	REPORTED BACK, DO PASS, PLACED ON CALENDAR Y 000 N 000	SJ 969
02/24 SENATE	SECOND READING, PASSED, YEAS 050 NAYS 000	SJ1141
02/28 HOUSE	RETURNED TO HOUSE	HJ1500
03/02 HOUSE	ENROLLED	HJ1566
03/03 HOUSE	SIGNED BY SPEAKER	HJ1593
03/03 SENATE	SIGNED BY PRESIDENT	SJ1270
03/03 HOUSE	SENT TO GOVERNOR	HJ1618
03/07 HOUSE	SIGNED BY GOVERNOR	HJ1667

HB 1378

REP. WENTZ, E.POMEROY

A BILL FOR AN ACT TO AMEND AND REENACT SECTION 32-23-06 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO THE RENDERING OF DECLARATORY JUDGMENTS.

01/17 HOUSE	INTRODUCED, FIRST READING, REFERRED JUDICIARY	HJ 259
01/26 HOUSE	REPORTED BACK, DO PASS, PLACED ON CALENDAR Y 015 N 000	HJ 507
01/27 HOUSE	SECOND READING, PASSED, YEAS 102 NAYS 000	HJ 534
01/31 SENATE	RECEIVED FROM HOUSE	SJ 405
02/01 SENATE	INTRODUCED, FIRST READING, REFERRED JUDICIARY	SJ 460
02/10 SENATE	COMMITTEE HEARING 02/16 9:00	
02/24 SENATE	REPORTED BACK AMENDED, AMENDMENT PLACED ON CALENDAR Y 000 N 000	SJ1127
02/25 SENATE	AMENDMENT ADOPTED, PLACED ON CALENDAR	SJ1147
02/28 SENATE	SECOND READING, PASSED AS AMENDED, YEAS 051 NAYS 000	SJ1198
03/03 HOUSE	RETURNED TO HOUSE (12)	HJ1596
03/07 HOUSE	CONCURRED	HJ1685
03/08 HOUSE	SECOND READING, PASSED AS AMENDED, YEAS 100 NAYS 001	HJ1697
03/09 HOUSE	ENROLLED	HJ1740
03/10 HOUSE	SIGNED BY SPEAKER	HJ1767
03/10 SENATE	SIGNED BY PRESIDENT	SJ1413
03/11 HOUSE	SENT TO GOVERNOR	HJ1812
03/14 HOUSE	SIGNED BY GOVERNOR	HJ1848

HB 1379

REP. CONMY

A BILL FOR AN ACT TO CREATE AND ENACT A NEW SUBSECTION TO SECTION 39-06-14 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO PERMITS TO OPERATE MOTORIZED BICYCLES; TO AMEND AND REENACT SUBSECTIONS 2, 34, AND 36 OF SECTION 39-01-01, SUBSECTION 3 OF SECTION 39-06-14, AND SECTIONS 39-10.2-01 AND 39-28-01 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO THE DEFINITIONS OF BICYCLE, MOTOR VEHICLE, AND MOTORIZED BICYCLE, TO APPLICATION OF TRAFFIC LAWS TO PERSONS OPERATING MOTORCYCLES AND MOTORIZED BICYCLES, AND TO ADDITIONAL FEES FOR MOTORIZED BICYCLE AND MOTORCYCLE REGISTRATION FOR PURPOSES OF MOTORCYCLE SAFETY EDUCATION; AND TO REPEAL SECTION 39-10.1-07.1 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO MINIMUM AGE REQUIREMENTS FOR OPERATORS OF MOTORIZED BICYCLES.

01/17 HOUSE	INTRODUCED, FIRST READING, REFERRED TRANSPORTATION	HJ 260
02/01 HOUSE	COMMITTEE HEARING 02/03 10:15	
02/09 HOUSE	REPORTED BACK AMENDED, AMENDMENT PLACED ON CALENDAR Y 014 N 001	HJ 905
02/10 HOUSE	AMENDMENT ADOPTED, PLACED ON CALENDAR	HJ 936
02/11 HOUSE	ENGROSSED	HJ 986
02/14 HOUSE	SECOND READING, PASSED AS AMENDED, YEAS 094 NAYS 005	HJ1040
02/16 SENATE	RECEIVED FROM HOUSE	SJ 892
02/17 SENATE	INTRODUCED, FIRST READING, REFERRED TRANSPORTATION	SJ 959
02/28 SENATE	COMMITTEE HEARING 03/04 9:30	
03/04 SENATE	REPORTED BACK, DO PASS, PLACED ON CALENDAR Y 000 N 000	SJ1284
03/07 SENATE	SECOND READING, PASSED, YEAS 043 NAYS 006	SJ1315

1983 HOUSE JUDICIARY

HB 1378

HOUSE JUDICIARY COMMITTEE January 26, 1983

HB 1378 DECLARATORY JUDGMENT (Tape 25, Side 2)

Introduced by REPS. J. Wentz, E. Pomeroy

REP. WENTZ introduced HB 1378, and the speakers testifying on behalf of the bill.

Tom Smith, of the Domestic Insurance Companies of North Dakota, testified in favor of HB 1378. The bill provides that a declaratory judgment is required in an action brought by or against an insurance company to determine liability and duty to defend.

Mr. Joel Gilbertson of the American Insurance Association stated his support of HB 1378. He said that this is not a plaintiff, defendant, or insurance company's bill, it does not favor one side or work against someone.

REP. CONMY stated that without the declaratory judgment action the injured party would have to sue everybody involved to get satisfaction.

Mr. Gilbertson stated that because of the insurance company's duty to defend their clients, the fewer suits offered, the less money it would cost the insurance company. This could possibly result in lower insurance rates.

Mr. Michael Mandt of the Farmers Union Insurance Company spoke in favor of HB 1378.

REP. NOWATZKI said that he thought this legislation would expedite recovery of damages in some cases.

Mr. Michael Rost of the State Bar Association spoke in support of HB 1378 because he felt it would favor both parties involved.

There was no further testimony offered on the bill. The hearing was closed.

Laurie Holden, Clerk
House Judiciary Committee

Tape 26, Side 1
Final action on HB 1378 was taken later during the day. REP. MEIERS moved DO PASS, REP. WILLIAMS seconded. The vote was 15 aye, 0 nay, and 1 absent, not voting. REP. KENT will carry the bill on the floor.

Laurie Holden, Clerk
House Judiciary Committee

JUDICIARY

BILL NO: 1378

SUBJECT: declaratory judgments

SPONSOR: Reps. Wentz, & Pomeroy

HEARING DATE: 1-26

ACTION TAKEN: Do Pass

FLOOR ASSIGNMENT: Rep. Kent

COMMITTEE VOTE:

aye ANDERSON,	aye LINDERMAN	aye WENTZ
aye CONMY	aye MEIERS	aye WILLIAMS
aye GATES	aye MURPHY	aye NOWATZKI, V. Chair.
aye KELLER	aye RILEY	aye POMEROY, Chair.
aye KENT	aye SHOCKMAN	15 aye
aye KRETSCHMAR	absent VIG	0 nay
		1 absent, not voting

TESTIMONY:

REPORT OF STANDING COMMITTEE

Madam
XXXX (President/Speaker): Your committee on Judiciary to which was (re)referred HB 1378 has had the same under consideration and recommends (by a vote of 15 yeas, 0 nays, 1 absent and not voting) that the same:

[XX] do pass [ ] do not pass [ ] be placed on the calendar without recommendation

[ ] be amended as follows:

[illegible]

[ ] and when so amended, recommends the same ([ ] do [ ] do not) pass.

[ ] and be rereferred to the committee on _____.

[ ] statement of purpose of amendment

_____, Chairman

[XX] HB 1378 was placed on the Eleventh order of business on the calendar for the succeeding legislative day.

[ ] _____ was rereferred to the committee on _____

_____.

133(11-9-82)

1983 SENATE JUDICIARY

HB 1378

HOUSE BILL 1378 February 16, 1983

The Committee met on February 16, 1983, at 8:30, with all members present, except Senator Holmberg, who is in the hospital.

HB 1378 Relating to rendering of declaratory judgments
Tape 30, side 1-2

Tom Smith appeared for insurance companies in support of this bill, saying it has to do with declaratory judgments. He stated that this grew out of a decision the supreme court handed down last year on insurance policies. There was a dispute and the supreme court said they would dismiss this case as you cannot seek a declaratory judgment until liability issue is resolved. This places the insurance companies under difficulties and puts them in a position of bad faith lawsuit. The new language in this bill says a case shall not be dismissed when liability has not been determined. Both the insurance company and the insured would profit by this. Senator Christensen wondered if the supreme court could not do this, and he said they will not accept a declaratory judgment under these circumstances. They made a blanket rule. He gave an example of an accident where someone was injured by a driver who had a bad reputation in driving who had a policy with "name driver exclusion" and it provides no insurance for that person. They feel it is not a good decision, and the federal courts follow law of state. He was not sure this bill would absolutely remedy the situation, but the courts can interpret, but it is a step in the right direction. Senator Olson wondered if this bill doesn't give the courts the discretion yet, and he said they could not refuse the case solely because liability action had not been resolved. In this one case the supreme court did hear it, but refused to act on it and threw it out, because it had not been resolved. Senator Christensen said he did not understand the supreme court decision, and he said many others did not either, including attorneys. They just said they were not going to deal with it.

Orell Schmitz, Bismarck, appeared in favor of the bill, stating he represents the trial lawyers of North Dakota, stating he is surprised that he for the trial lawyers and the insurance companies are on the same side for once. He gave a simple example of what happens now when the supreme court fails to act and throws it out. He stated this could be serious as sometimes the defendant would settle out of court with the insurance company, and feels this bill would accomplish something.

Joel Gilbertson representing the American Insurance Company, feels this instrument would tell the court the insurance company does not want to overlook duty to defendant, and they want to defend him. He said otherwise, the costs of action would be more than the cost of judgment. He feels this instrument would say the supreme court shall render a decision.

Hearing closed.

The committee met on February 23, 1983, for action. Motion by Senator Stenehjem, seconded by Senator Olson, for and amendment attached and the vote was unanimous. Motion by Senator Olson, seconded by Senator Stenehjem for DO PASS AS AMENDED, and the vote was unanimous. Senator Olson will carry the bill.

Pearl Berget, Clerk

REPORT OF STANDING COMMITTEE

Mr. (President/Speaker): Your committee on JUDICIARY to which was (re)referred HB 1378 has had the same under consideration and recommends (by a vote of _____ yeas, _____ nays, _____ absent and not voting) that the same:

☐ do pass ☐ do not pass ☐ be placed on the calendar without recommendation

☒ be amended as follows:

(see attached)

☒ and when so amended, recommends the same (☒ do ☐ do not) pass.

☐ and be rereferred to the committee on _____.

☐ statement of purpose of amendment

Hal Christensen, Chairman
Sen. Hal Christensen

☒ HB 1378 was placed on the SIXTH order of business on the calendar for the succeeding legislative day.

☐ _____ was rereferred to the committee on _____

_____.

Senate amendment to HB 1378

On page 1, line 12, after the period, delete the words "However, an action brought by or against an insurance" and insert in lieu thereof the words "However, the court shall render or enter a declaratory judgment or decree in an action brought by or against an insurance company to determine liability of the insurance company to the insured to defend, or duty to defend, although the insured's liability for the loss may not have been determined."

On page 1, delete lines 13 through 15

And renumber the lines accordingly