IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert Ackre,	)	
	)	
Plaintiff and Appellant	)	
	)	**Supreme Court No. 20100044**
vs.	)	
	)	
Chapman & Chapman, P.C.	)	
	)	
Defendant and Appellee	)	

Appeal from Rolette County District Court

Order entered December 1, 2009; Opinion and Order dated November 30, 2009

The Honorable Michael G. Sturdevant, District Judge

PETITION FOR REHEARING

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The Court's Opinion dated August 31, 2010, relative to Mr. Ackre's claims premised upon the alleged violations of North Dakota's Unlawful Sales or Advertising Practices Act (Chapter 51-15, N.D.C.C.), the Court held:

1. The Act does authorize a private cause of action by "any person against any person who has acquired moneys or property by means of any practice declared to be unlawful" (para. 19);

2. Causes of action under the Act are not limited to claims involving consumer transactions (para. 20 and 23);

3. Legal services offered by an attorney fall within the intended scope of the statutory definition of "merchandise" and "services" defined within the Act (para. 21);

4. Section 51-15-09, N.D.C.C., of the Act allows an action by an attorney against a competitor for alleged unlawful practices under N.D.C.C. ch. 51-15 (para. 23);

5. To have jurisprudential standing to bring an action under the Act, the Plaintiff must "show the putatively illegal action caused some threatened or actual injury to his or her legal rights and interests" (para. 23)

The Court's opinion did not rule on whether or not Mr. Ackre had standing, but only assumes "arguendo" that he does for purposes of further analysis of the statutory lynch pin required to be demonstrated – the existence of an "unlawful act" as that term is used in Section 51-15-02, N.D.C.C., which provides:

> "Unlawful practices - Fraud - Misrepresentation. The act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice."

The Court follows by stating:

> "the undisputed facts in this record are such that reasonable minds could only conclude that Chapman and Chapman's alleged conduct does not constitute an unlawful practice." (para. 25)

Such conclusion is neither supported by the facts nor the law. The Court's analysis of the "facts" stops at the point in time when Chapman had lawfully obtained the insurance proceeds and then looks no further to subsequent conduct. Such analysis is in error and incomplete. Mr. Ackre would agree, up until the point in time relied upon by the Court, Chapman's conduct was lawful. It is what Chapman did thereafter that separates the lawful practice of law from the unlawful. The conduct of Chapman after it had lawfully gained possession of the insurance company's settlement proceeds violates both Federal and State criminal law.

Mr. Ackre's Complaint does not allege this one example as an isolated incident. Rather, Mr. Ackre's Complaint alleges such conduct represents a regular practice engaged in by the members of the Chapman and Chapman Law Firm causing serious economic damage to Mr. Ackre's own lawful practice of law. Further, due to the wanton criminal nature of Chapman's conduct, Mr. Ackre seeks not only seeks actual damages, but has reserved the right to seek punitive damages.

FACTS

This statement of the facts is abbreviated to only those facts occurring after Chapman obtained insurance company settlement funds from the insurer of a third party tort feasor who had injured an American Indian in an automobile accident for whom all medical expenses had been paid for by the United States (in the amount of $30,861.65) under the terms of a discounted medical services contract with Trinity Hospital (whose usual and customary charges for such services were billed in the amount of $46,481.22).

Immediately upon receipt of the Fifty Thousand Dollar ($50,000.00) settlement check, Chapman proceeded to deposit the same to its trust account, and to divide the entire amount between itself and its client. Chapman made no contact with either Trinity Hospital or the Indian Health Services to determine if either were still due any sums for the medical services rendered to their American Indian client. Chapman concealed from both the United States and Trinity Hospital its receipt of the such tort feasor insurance settlement funds.

At the time Chapman received the insurance proceeds, Chapman had in its possession a copy of the Trinity Hospital billing statement that documented both the gross amount of the Trinity billing and that fact that Indian Health Service of the United States government was the responsible payor.

Subsequently, on January 31, 2007, Chapman was contacted by the Office of the General Counsel for Region VII of the Department of Health & Human Services for the

purposes of filing a claim on behalf of the Indian Health Service relating to the medical expenses incurred by Mr. Donald Malaterre (Chapman's Indian client). On February 1, 2007, a lawyer with the Chapman & Chapman Law Firm directed its reply to the United States, stating: "Let her know we no longer represent him." By such statement, the Chapman Law Firm continued its concealment of the receipt of insurance settlement funds from the United States.

To this date, the United States government has not recovered its $30,861.65; and Trinity Hospital has not recovered its unpaid billing balance of S 15,619.57. On or about February 10, 2004, the insurance proceeds were converted to the private property of Chapman and its client. Even the filing of this civil action has not encourage Chapman to "come clean" with either the United States or Trinity Hospital.

Had Chapman followed the applicable law set forth herein, such insurance proceeds should have been first paid to Trinity Hospital (to the extent of medical expenses actually incurred in the amount of $46,481.22); and then Trinity Hospital would thereafter be required to reimburse the United States in the amount of $30,861.65, pursuant to its contract and applicable federal regulations.

On or about February 10, 2004, Chapman, together with its client, conspired to convert to their own use and benefit $46,481.22 of the $50,000.00 insurance proceeds that had been turned over to it by the tort feasors' insurance company. Thereafter, Chapman further concealed its acts of conversion of said funds on February 1, 2007, by denying its representation of its client in the recovery of IHS health care expenses and

thereby further concealing its conversion of those funds.

North Dakota state law grants the treating hospital of a tort victim an automatic statutory lien for the full value of medical services it renders. (§35-18-01, N.D.C.C. and cases interpreting the same). Federal law and Federal regulations require Federal Health Care dollars to be payments of last resort. (42 C.F.R. Part 136.61; Federal Medical Recovery Act, 42 U.S.C. Sections 2651-2653; 42 U.S.C.A.; 42 USC § 1395qq (e)(1) and (2).)

I. CHAPMAN'S CONDUCT VIOLATES STATE CRIMINAL LAW.

On February 10, 2004, when Chapman negotiated the $50,000.00 insurance settlement proceeds, it was obligated by the provisions of North Dakota state law (§35-18-01, N.D.C.C. and cases interpreting the same) to pay over $46,481.22 of such proceeds to Trinity Hospital. The legislature, and this Court, requires full payment of all medical expenses incurred by the tort victim out of the insurance proceeds before Chapman or its client can receive one dollar.

Independently, pursuant to both IHS contract and federal regulations, Trinity Hospital would thereafter be required to pay over $30,861.65 of such insurance settlement proceeds to the United States.

Had Chapman followed the law, Chapman and its client would have been free to divide the remaining $3,518.78 between itself and its client. [Similar results occur under the provisions of §65-01.09, N.D.C.C., whereby Workforce Safety Insurance would be reimbursed a statutory percentage of all medical expenses it had advanced]. To the

contrary, Chapman chose to retain one hundred percent of such insurance proceeds and to divide the same between itself and its client. **Chapman and its client are now $46,481.22 richer than allowed by Federal and State law, and the Court's opinion dated August 31, 2010, opines such conduct is not unlawful!**

North Dakota has consolidated numerous common law theft concepts into one "theft" offense, including the common law crimes of "obtaining money or property by false pretenses, extortion, blackmail, fraudulent conversion, receiving stolen property, misappropriation of public funds, swindling, and the like". §12.1-23-01, N.D.C.C. Section 12.1-23-02, now defines Theft of property as:

1. Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof;

2. Knowingly obtains the property of another by deception or by threat with intent to deprive the owner thereof, or intentionally deprives another of his property by deception or by threat;

Section 12.1-23-05, N.D.C.C., grades theft offenses by the value of the property taken, stating "theft under this chapter is a class B felony if the property or services stolen exceed ten thousand dollars in value."

Pertinent definitions found within §12.1-23-10, N.D.C.C., include:

3. "Deprive" means:

   a. To withhold property or to cause it to be withheld either permanently or under such circumstances that a major portion of its economic value, or its use and benefit, has, in fact, been appropriated;

6. "Obtain" means:

a. In relation to property, to bring about a transfer or purported transfer of an interest in the property, whether to the actor or another.

8. "Property of another" means property in which a person other than the actor or in which a government has an interest which the actor is not privileged to infringe without consent, regardless of the fact that the actor also has an interest in the property" .... "Owner" means any person or a government with an interest in property such that it is "property of another" as far as the actor is concerned."

Under North Dakota law, Chapman is guilty of felony theft of property belonging to Trinity Hospital and the United States of America.

While the directly injured parties in this case are Trinity Hospital and the United States, the law practice of Mr. Ackre, as a law abiding attorney, is substantially impaired because he cannot compete with the ongoing unlawful practices of Chapman.

Would this Court's opinion have been different if the concealed payments were due North Dakota Workforce Safety Insurance for medical expenses or for the reimbursement of North Dakota Human Services medical expenses? Like provisions affect the divisions of tort feasor insurance proceeds. Mr. Ackre's lawful practice in those areas of the law would also be damaged if Chapman could get away with non-disclosure to those entities as well.

II. CHAPMAN'S CONDUCT VIOLATES FEDERAL CRIMINAL LAW.

The Chapman Law Firm conspired with its client to unlawfully convert to their own joint use and benefit the property of the United States of America. Although the Chapman Law Firm had first obtained possession of the third party tort liability insurance proceeds lawfully, it thereafter, in concert with its client, unlawfully converted that portion of the tort

settlement funds owed to the United States. They conspired to conceal the receipt of such funds and furthered such conspiracy in February of 2007. The principal amount due the United States was $30,861.65 (See attached District Court exhibit #3, four pages).

Pertinent provision of the United States Code specifically relating to health care fraud (which definitions include conversion of reimbursement proceeds) provide in pertinent part:

> 42 USC § 1320a–7b. **Criminal penalties for acts involving Federal health care programs**
>
> (a) Making or causing to be made false statements or representations
> Whoever—
>
> (3) *having knowledge of the occurrence of any event affecting*
> (A) *his initial or continued right to any such benefit or payment*, or
> (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, *conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized*,
>
> . . .
>
> (f) "Federal health care program" defined. For purposes of this section, the term "Federal health care program" means—
> (1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5)
> . . .
> (5) Health plan. The term "health plan" means an individual or group plan that provides, or pays the cost of, medical care (as such term is defined in section 300gg–91 of this title). Such term includes the following, and any combination thereof:
> . . .
> (L) The Indian health service program under the Indian Health Care Improvement Act (25 U.S.C. 1601 et seq.).

Within Title 18 of the U.S. Code, numerous In additional concepts are made specifically

applicable to Federal health care programs by the provisions of 18 U.S.C. §24, which provides:

> "Definitions relating to Federal health care offense
>
> (a) As used in this title, the term "Federal health care offense" means a violation of, or a criminal conspiracy to violate—
> (1) section 669, 1035, 1347, or 1518 of this title;
> (2) section 287, 371, 664, 666, 1001, 1027, 1341, 1343, or 1954 of this title, if the violation or conspiracy relates to a health care benefit program.
> (b) As used in this title, the term "health care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract."

In the instant case, nearly all of the cited provisions of Title 18 of the U.S. Code are applicable. Set forth within the Addendum are the applicable provisions of Sections 669, 1035, 1347, 1518 , 371, 1001, and Section 1341.

The conduct of Chapman, after if had lawfully obtained the tort feasor's insurance company settlement funds, violates every one of the above cited provisions of Federal criminal law.

CONCLUSION

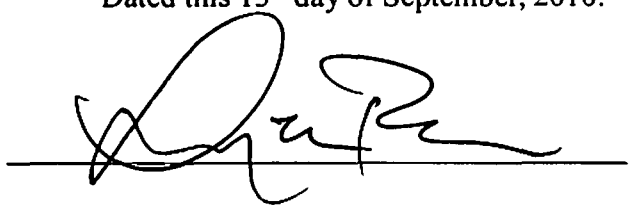
If the Court deems it appropriate, it may certify the question of criminal culpability to the Office of Regional Counsel of the U.S. Department of Health & Human Services; or to the U.S. Attorneys Office of the District of North Dakota; or to the Office of the North Dakota Attorney General. The law of theft by conversion does not make the conduct lawful if the perpetrator "promised to do the right thing" at the time he

obtained the money or is never caught.

There is no free lunch in health care. Presently both the Hospital and the United States have subsidized the windfall now enjoyed by Chapman and its client. Chapman didn't even go through the motion to place the insurance proceeds into an interest bearing trust account and then wait until the statutory time period had passed for the presentation and enforcement of all known liens before making distributions to itself and its client. Criminal conversion occurred on February 10, 2004, was furthered on February 1, 2007, and continues to this day.

Plaintiff asks the Court for re-hearing on the issue of the criminal character of Defendant Chapman's conduct as alleged in this case.

Dated this 13th day of September, 2010.



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LMBAER@MCHIS.COM

ADDENDUM

"18 USC § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. . . .

18 USC § 641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
Whoever receives, conceals, or retains the same *with intent to convert it to his use or gain,* knowing it to have been embezzled, stolen, purloined or converted— . . . .

.

18 USC § 645. Court officers generally

Whoever, being a United States marshal, clerk, receiver, referee, trustee, or other officer of a United States court, or any deputy, assistant, or employee of any such officer, retains or converts to his own use or to the use of another or after demand by the party entitled thereto, unlawfully retains any money coming into his hands by virtue of his official relation, position or employment, is guilty of embezzlement and shall, where the offense is not otherwise punishable by enactment of Congress, be fined under this title or not more than double the value of the money so embezzled, whichever is greater, or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both. It shall not be a defense that the accused person had any interest in such moneys or fund.

18 USC § 669. Theft or embezzlement in connection with health care

(a) Whoever knowingly and willfully embezzles, steals, or otherwise without authority converts to the use of any person other than the rightful owner, or intentionally misapplies any of the moneys, funds, securities, premiums, credits, property, or other assets of a health care benefit program, shall be fined under this title or imprisoned not more than 10 years, or both; but if the value of such property does not exceed the sum of $100 the defendant shall be fined under this title or imprisoned not more than one year, or both.
(b) As used in this section, the term "health care benefit program" has the meaning given

such term in section 24 (b) of this title.

18 USC § 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
(1) falsifies, *conceals, or covers up by any trick, scheme, or device a material fact;*
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
shall be fined under this title, imprisoned not more than 5 years or . . .

18 USC § 1035. False statements relating to health care matters

(a) Whoever, in any matter involving a health care benefit program, knowingly and willfully—
(1) falsifies, *conceals, or covers up by any trick, scheme, or device a material fact*; or
(2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.
(b) As used in this section, the term "health care benefit program" has the meaning given such term in section 24 (b) of this title

18 USC § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, *places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service,* or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

18 USC § 1347. Health care fraud

Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—
(1) *to defraud any health care benefit program*; or
(2) *to obtain*, by means of false or fraudulent pretenses, representations, or promises, *any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits*, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. . . .

18 USC §1518. Obstruction of criminal investigations of health care offenses

(a) *Whoever willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator* shall be fined under this title or imprisoned not more than 5 years, or both. (Emphasis added)

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the General Counsel

Region VIII
1961 Stout Street, Room 325
Denver, CO 80294-3538
Telephone (303) 844-5101
Fax (303) 844-6665

June 4, 2007

Robert G. Ackre, Esquire
517 Main Street
P.O.Box 685
Cando, ND 58324

STATEMENT OF CLAIM

Re: Donald Malaterre
Accident of May 11, 2003

Dear Mr. Ackre:

Our claim under 42 U.S.C. § 2651 for the medical care and treatment furnished by or at the expense of the Indian Health Service to the above-named individual is itemized as follows in accordance with rates established by the Office of Management and Budget:

Inpatient care at Government facilities:	None
Outpatient care at Government facilities:	
4 visits at $196.00 per visit	$ 784.00
Medical care at IHS expense in non-Government facilities at actual cost to IHS to date	$30,077.65
TOTAL:	$30,861.65

When this matter has been concluded, the remittance in payment of our claim should be made payable to "**DHHS - Public Health Service**" and should be forwarded directly to this office.

Sincerely,

Jay A. Swope
Chief Counsel, Region VIII

By
Gary Fahlstedt
Assistant Regional Counsel

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the General Counsel

Region VIII
1961 Stout Street, Room 325
Denver, CO 80294-3538
Telephone (303) 844-5101
Fax (303) 844-6665

Via Fax 701-968-3100
and First-Class Mail

June 4, 2007

Robert G. Ackre, Esquire
517 Main Street
P.O.Box 685
Cando, ND 58324

Re: Donald Malaterre
Accident of May 11, 2003

Dear Mr. Ackre:

Thank you for your letter of May 24,2007 asking that we research other medical treatments that Mr. Malaterre has incurred in order for IHS to determine whether we have a subrogation interest. With this letter, we are submitting our Statement of Claim.

Under Public Law 87-693, the Federal Medical Recovery Act (FMCRA), 42 U.S.C. §§ 2651-2653, the United States is entitled to recover the reasonable value of medical care provided to persons who are injured as a result of the negligence of a third party. In this case, medical care related to this accident was provided to Mr. Malaterre at the expense of the Indian Health Service (IHS), an agency of this Department. Our Statement of Claim under the FMCRA is enclosed.

The claim consists of the value of patient care provided directly by the Government at the Belcourt PHS Indian Hospital, Belcourt, North Dakota as well as the value of private-sector care paid for by the IHS. Direct care at the IHS facility related to the accident consists of four outpatient visits. These visits occurred on the following dates: 05/30/03, 06/11/03, 06/13/03, and 06/27/03. Care provided directly at IHS facilities is valued according to officially promulgated rates established by the Office of Management and Budget (OMB). These rates are revised periodically and published in the Federal Register. Our Statement of Claim applies the rate that was in effect on the dates the services were rendered. The rate applicable to these visits is $196.00 per visit. These rates were published in the Federal Register on 12/26/01 at 66 Fed. Reg. 66485.

Care rendered by private providers and paid for by the IHS is valued in the amount of the Government payment. In this case, the IHS reimbursed private providers a total of $30,077.65 for medical care provided to Mr. Malaterre related to the accident. These payments are detailed as follows:

Provider	Dates of Service	Amount
Health Care Assessorie	05/19/03	$249.90
The Oral and Facial Su	05/11/03	$5,474.70
Trinity Hospital	05/23/03	$146.02
Trinity Hospital	06/26/03	$101.04
Trinity Medical Center	06/26/03	$46.80
Trinity Hospital	06/06/03	$101.04
The Oral and Facial Su	07/07/03	$65.00
Trinity Hospital	07/16/03	$101.04
Trinity Hospital	05/11/03	$12,890.91
Trinity Medical Center	08/13/03	$30.60
Radiology Consultants	05/11/03	$1,472.00
Trinity Medical Center	10/10/03	$102.60
Trinity Medical Center	05/10/03	$3,060.00
Trinity Medical Center	05/19/03	$194.00
Trinity Medical Center	05/11/03	$4,731.30
Trinity Medical Center	06/02/03	$46.8s0
Trinity Medical Center	07/16/03	$46.80
The Oral and Facial Su	07/24/03	$590.00
Trinity Hospital	10/10/03	$111.18
Trinity Medical Center	10/28/03	$102.60
Trinity Medical Center	11/25/03	$81.90
Trinity Hospital	10/28/03	$111.18
Trinity Medical Center	01/25/04	$102.60
Trinity Hospital	08/13/03	$42.19
Trinity Hospital	02/06/04	$75.45

Provider	Dates of Service	Amount
	CHS TOTAL	$30,077.65

The **Total Indian Health Service claim is $30, 861.65.** When this matter has been concluded, the remittance in payment of our claim should be made payable to "**DHHS - Public Health Service**" and should be forwarded directly to this office.

Where an injured beneficiary is represented by counsel, we prefer not to negotiate separately with the insurance carrier in order to permit plaintiff's counsel the greatest possible control over the case. Consequently, we customarily authorize plaintiff's counsel to include our claim as part of the special damages, suing for the use and benefit of the United States. In this regard, we would appreciate hearing from you concerning your willingness to include the Government's claim in your negotiations with the third party. Although we cannot pay an attorney's fee (5 U.S.C. § 3106), we will cooperate in every way possible short of active participation in the suit.

In the event we can assist you further in this matter, please write to us or call the undersigned at (303) 844-7803.

Sincerely,

Jay A. Swope
Chief Counsel, Region VIII

By Gary Fahlstedt
Gary Fahlstedt
Assistant Regional Counsel

Enclosure
Statement of Claim

17

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert Ackre,	)	
	)	
Plaintiff and Appellant	)	
	)	**Supreme Court No. 20100044**
vs.	)	
	)	
Chapman & Chapman, P.C.	)	
	)	
Defendant and Appellee	)	

Certification of Service

I, Larry M. Baer, Counsel for the plaintiffs herein, do hereby certify that I did place in the U.S. Mails, with pre-paid postage attached and addressed to:

Mr. Patrick W. Durick
Pearce & Durick
314 Thayer Avenue
Bismarck, ND 58502-0400

Clerk, North Dakota Supreme Court
Judicial Wing, 1st Floor
600 East Boulevard Ave, Dept 180
Bismarck, North Dakota 58505-0530

true and correct copies of Plaintiff's Petition for Rehearing; and Addendum in the above entitled civil action. (Seven bound copies filed with the Court shipped separately from unbound copy an filing of copy of electronic disc.)

Dated this 13th Day of September, 2010

Larry M. Baer (N.D. #03284)
1550 South Deer Road
West Des Moines, Iowa 50266
Phone/Fax (800) 884-0452