



LEGAL SERVICES
of North Dakota

THE LEGAL SERVICES SENTINEL

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Legislature Approves House Bill 1516 Civil Filing Fees

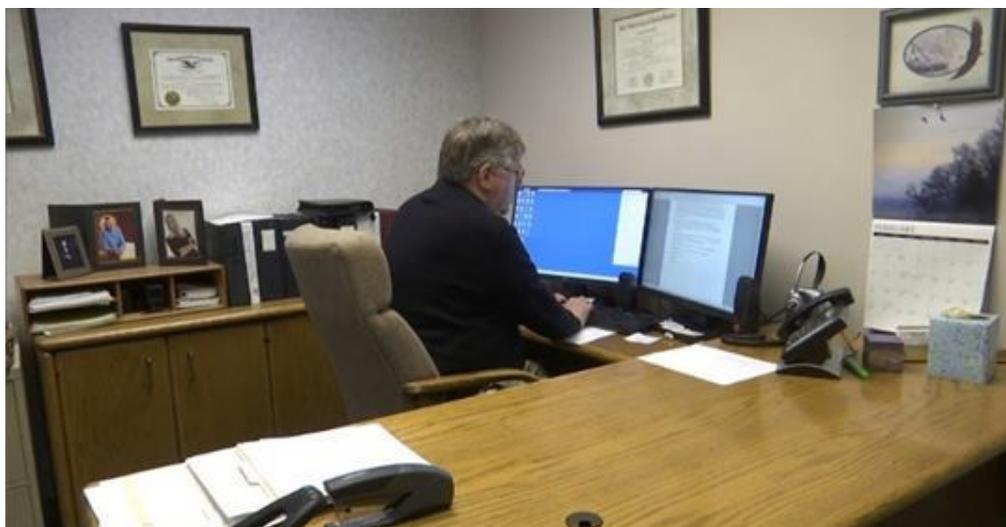
Everyone who files a civil claim for relief with the clerk of court must pay to the clerk eighty dollars. Of that eighty dollars, fifteen dollars are paid by the clerk of court to the state treasurer for deposit in the civil legal services fund. The advisory committee of the civil legal services fund then distributes the funds to any legal services program in the state. Legal Services of North Dakota (LSND) is the state-wide legal services program in North Dakota.

LSND's portion of the civil filing fees, or surcharge as it is often referred, is LSND's only funding derived from the State of North Dakota. The surcharge is a user fee and is not funds derived from taxes. Generally, when the number of civil filings goes up so does the number of applications for legal services. The surcharge amount is capped by the North Dakota Legislature.

On April 1st, 2019, Governor Burgum signed into law HB 1516. HB 1516 increased the cap on the amount of filings fees that are deposited into the civil legal services fund. In 1999 the cap was set at \$400,000 a biennium; in 2009 the cap was increased to \$650,000. HB 1516 increased the cap to \$750,000 a biennium.

LSND is very grateful to Representative Don Longmuir, the bill's chief sponsor, and to the North Dakota Legislature for realizing the importance of the services that LSND provides to the citizens of the state.

Pictured below is Executive Director Richard LeMay as he prepares testimony for the legislative committee hearings. Also testifying at the hearings was LSND Board President Wade Enget, Attorney from Stanley, ND



Immigration Then and Now: A Historical and Legal Perspective

Like many Americans today, my ancestors came here as immigrants in the 19th century, mostly from Germany and Ireland. For the purposes of North Dakota and its proud German heritage, we will set the Irish aside and examine the 19th-century immigration experience of an archetypical German forebear, “Johann.” Then, we will fast forward to 2019 as Johann’s great-great-grandson, still in Germany, attempts to “get in line” and immigrate to the United States. A comparison of these two experiences sheds helpful light on the debate surrounding contemporary American immigration policy.

The Immigration of Johann: Then

The year is 1842 — a decade of economic depression in Germany — and the setting is a half-timbered farmhouse in Bavaria. Live-in cows are plentiful; plumbing, not so much. Johann looks around at his seven siblings, and reasonably concludes that one farm is no place for everyone. He decides to come to America.

Must Johann consult an immigration lawyer to apply for a visa before entry? Happily, no. He simply gets on a boat, endures a harrowing sea voyage, manages not to succumb to cholera, and enters his new home.

Between 1815 and the Civil War, two million Germans immigrated to the United States. During this period, U.S. immigration was essentially unrestricted. Ellis Island did not open as an immigration station until 1892, a full 50 years after Johann’s arrival.

In the 1870s and 1880s, Congress started passing federal immigration laws. This included the explicitly race-based Chinese Exclusion Act of 1882, as well as laws excluding other groups, such as prostitutes, convicts, and “lunatics.” Eventually, categories such as polygamists and the “diseased” were added. However, the vast

majority of immigrants were allowed to enter; exact figures vary, but until World War I, only one to two percent of immigrants who arrived at Ellis Island were turned away.’

The average immigrant spent three to five hours in the inspection process before walking out onto the streets of New York. None of them needed advanced permission to come to America, as no visas were required under our system until 1924.

The Immigration of Johann: Now

Imagine that in 1842, Johann overslept and missed his boat to America, and remained in Germany with his cows and family. His great-great-grandson, also named Johann, now desires to come to the United States. He is mindful of the current immigration debate in America, especially the statements of politicians who support immigration generally, but urge immigrants to “get in line” and complete the process legally. He eagerly meets with an American immigration lawyer who is, inexplicably, working in Germany at Legal Services of Nördlingen-Dinkelsbühl. Below is an abbreviated version of their intake interview.

Johann: I am ready to immigrate to America! Look, I have no criminal record and I am a hard worker. I know I will not be a citizen for years and years, but I want to get in line! How do I start?

LSND: Oh, dear. Let’s start at the beginning. Are you an immediate relative of a United States citizen or permanent resident?

Johann: Well, no. I don’t have any immediate relatives in the US.

LSND: How about employment? Do you have a job lined up with an American employer willing to sponsor you?

Immigration Then and Now: A Historical and Legal Perspective Continued

Johann: No, I just work as a farmer here. I don't know any Americans at all. Do I really need an employer to sponsor me?

LSND: Hmm, well, in certain cases you petition for yourself. For instance, there's the investor visa. Do you have \$500,000 to \$1,000,000 you can invest in a company that will hire at least 10 Americans? Let's see. There's the "extraordinary ability" category. Have you won any Nobel Prizes?

Johann: *Och!* No.

LSND: Darn. Well, all we really have left for permanent immigration are the humanitarian options, such as refugee status. Do you have a well-founded fear of persecution based on race, religion, membership in a particular social group, political opinion, or national origin? Or, have you been a victim of a crime, like human trafficking?

Johann: I don't think so. Isn't there another way?

LSND: Well, there's the diversity lottery. Each year, 50,000 visas are available for members of certain countries. No sponsor required!

Johann: Oh! Maybe that's the way for me. What are my odds?

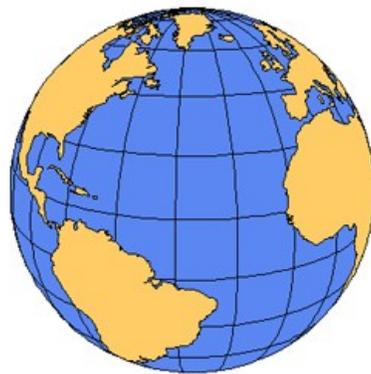
LSND: Unfortunately, millions of people enter each year. Your odds are less than one percent.

This interview is obviously fictionalized and over-simplified, but it illustrates the one of the more underappreciated points of immigration law today: under our system, the majority of people on the planet have no legal basis to even *apply* to immigrate to the United States.

Under our modern immigration system, founded on the 1952 Immigration and National Act, permanent immigration has generally been restricted to three grounds: employment-based, family-based, or humanitarian, such as asylees and refugees. Of course, many of those who *do* have a legal basis to apply will ultimately be rejected, or face wait times of years or decades, or other numerical limitations. For instance, the United States only accepted 22,491 refugees in 2018, a population roughly the size of Mandan.

But the majority of people, like our friend Johann, will not get so far as being rejected; they simply have nothing to apply to. In stark contrast to the experience of immigrants in previous centuries, there simply is no "line" to stand in.

Article by Jane Sportiello, LSND Attorney



The Effects of North Dakota's Harsh Weather Conditions: Rental Property Repairs and Maintenance

Parts of North Dakota have experienced record setting winter weather this year. Grand Forks recorded 22.5 inches of snowfall in February, breaking its 100 year old snowfall record of 19.6 inches.

Snow accumulation has caused building structural concerns. Roofs have been reported as collapsing in North Dakota, South Dakota, and Minnesota. Snow melt is causing leaky roofs, ceilings, and windows. Significant flooding is likely in many areas of North Dakota. Cities have or plan to declare States of Emergency in advance of spring flooding. In response to these conditions, Legal Services of North Dakota has received questions from tenants who are unsure how to handle repair issues.

North Dakota law imposes general repair and maintenance obligations on landlords and tenants that are applicable to this year's weather conditions. Landlords are obligated to repair leaky or collapsed roofs or windows caused by snow accumulation and snow melt because North Dakota law states that landlords comply with applicable building and housing codes materially affecting health and safety, and must make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition. A dwelling may be uninhabitable if the walls are substantially damaged or improperly constructed, floors or roofs have an improper weight distribution or strength to be reasonably safe, or it has been damaged by fire, wind or other causes as to endanger health, safety, and welfare.

Landlords are obligated to remove snow from roofs, side walks, and parking lots. Landlords should clear snow away from garden level

apartment windows to prevent water leakage. This obligation arises from the statutory requirement that landlords keep all common areas of the premises in a clean and safe condition. Common areas include sidewalks, hallways, parking lots, lawns, and other areas commonly used by tenants. Notably, these obligations may be shifted to the tenant in some limited circumstances.

Tenants also have obligations relating to the repair and maintenance of rental property. Tenants must comply with all duties imposed upon them by building and housing codes relating to health and safety and keep their units as clean and safe as the premises permit. In the event of a leaky ceiling or window, tenants should keep the area dry to prevent warping and mold growth.

Tenants should promptly notify their landlords when repairs are necessary. If the landlord does not respond to verbal notice of the need for repairs, the tenant should send a written notice to the landlords requesting necessary repairs. The tenant should keep a copy of this notice. The tenant must give the landlord a reasonable amount of time in which to make repairs. What is reasonable depends on the type of repair.

If the landlord still does not make repairs, the tenant has three options. First, the tenant may repair the defect and deduct the expense from the rent. It is recommended the tenant notify the landlord in writing in advance that the tenant intends to do this. Tenants should

The Effects of North Dakota's Harsh Weather Conditions: Rental Property Repairs and Maintenance (continued)

be cautious in exercising this option because some landlords may attempt to terminate a tenant's lease or sue the tenant for loss of rent. Second, the tenant may sue the landlord in small claim court for the costs of the repairs and other expenses incurred as a result of the failure to make repairs. Third, the tenant may elect, after notice, to vacate the premises, which would terminate the lease. Vacating the premises should be considered a measure of last resort and only if there is a serious repair problem or code violation. The tenant should notify the local health inspector to confirm that a serious problem or code violation exists.



A landlord may enter a dwelling unit at any time in case of emergency or during reasonable hours and in a reasonable manner for the purpose of inspecting the premises, making necessary or general repairs. A tenant may not unreasonably deny access to the dwelling unit.

Lastly, tenants are not excused from paying rent because a landlord has failed to make repairs, unless the greater part of the property leased, or the part which was the material reason for the lease, is destroyed from any cause other than the ordinary negligence of the tenant. For example, a tenant is not excused from the payment of rent for a minor leaky roof or a leaking window. On the other hand, a tenant is relieved from paying rent if the roof collapses into the majority of the dwelling unit.

Most repairs and maintenance issues can be easily resolved. Tenants should work with their landlords to handle weather related rental property repairs and maintenance.

Article by Breezy Schmidt, LSND Attorney

Mock Trial Competition

In January, the State Bar sent out notices about a first annual High School Mock Trial competition. Brittany Christenson was the school advisor and Legal Services of North Dakota stepped in and agreed to be one of the trial coaches for Bismarck Legacy High School.

The group of Junior and Seniors met with their attorney coaches Brad Peterson of Legal Services of North Dakota and Bobbie Weiler of Jackson, Thomason & Weiler, P.C. twice a week in preparation for the state competition. The students received a crash course in trial advocacy. The students worked on opening/closings, witness preparation, cross-examination, rules of evidence, and general trial techniques.

The State competition was held on March 23, 2019 at the Burleigh County Courthouse. Three teams participated, Hettinger High School, Surrey High School and Bismarck Legacy. After a very busy day, Legacy was awarded second place in the team category, an advocate award, a witness award, with Hettinger taking first place.

The State Bar of North Dakota has plans for this again next year with hopes of more teams joining.

Article by Brad Peterson, LSND Attorney



The Affidavit of Support (I-864) In a Divorce Action

Mary walks into her local law office. Her husband just filed for divorce. Mary is 23 and has a one year old child. She has no employment history. She is scared and does not know how she can support herself and her child. She asks if she can get spousal support in addition to child support.

While interviewing Mary, the lawyer realizes she has few job skills and a young child. Rehabilitative spousal support may be possible for a limited time, but there is another basis for support: the I-864 Affidavit of Support signed by her husband, and it survives divorce.

Mary is from Australia but has been living in the United States for two years. She met her husband Ron when he was doing a semester abroad in Australia. They got married when they were twenty and at first resided in her home town of Perth, Australia. But soon thereafter, Ron wanted to return to the US to finish his degree and begin his engineering career. Ron went home to the U.S., but within 13 months he sent for Mary. She came to the U.S. under a Petition for Alien Relative or an I-130. At the same time, Ron, who now had an engineering job, had to sign an I-864 Affidavit of Support.

An individual seeking admission to the United States is inadmissible if he or she “is likely at any time to become a public charge.” See 8 U.S.C. § 1182(a)(4). In determining whether an individual is excludable as likely to become a public charge, the government considers the individual’s age, health, family status, assets, resources, financial status, education, and skills. See *id.* at 4(B). Submission of an acceptable I-864 Affidavit of Support is generally sufficient to overcome a public charge finding. See U.S. Dept. of State Foreign

Affairs Manual 9 Fam 40.41 N4.3 (Effect of Form I-864 on Public Charge Determinations). The Affidavit of Support is a binding enforceable contract between the sponsor, here Ron, and the U.S. government. Mary is a third party beneficiary of that contract.

The Affidavit identifies that the consideration for the contract is the intended immigrant’s admission to the United States as a lawful permanent resident. Mary is a lawful permanent resident. The terms of the contract require Ron to provide any support necessary to maintain her at an income that is at least 125% of the Federal Poverty Guidelines for her household size until the obligations terminate.

The time period during which the I-864 Affidavit is an enforceable contract is predicated upon 8 U.S.C. § 1183a (a)(2), (3), which sets out that the obligations under the I-864 Affidavit terminate only under five limited circumstances.

The contractual Affidavit of Support will terminate if Mary does one of the following.

1. She becomes a citizen of the United States;
2. She has worked, or can be credited with, 40 qualifying quarters of Social Security earnings,
3. She ceases to hold the status of an alien lawfully admitted for permanent residence and departs the United States.
4. She obtains in removal/deportation proceeding a new grant of adjustment of

Support in Divorce Action Continued

status as relief from removal (in this case, any individual(s) who signed an Affidavit of Support or Form I-864A Contract between Sponsor and Household in relation to the new adjustment application will be subject to the affidavit of support obligations, rather than those who signed an Affidavit of Support or Form I-864A Contract between Sponsor and Household in relation to an earlier grant of Lawful permanent resident status or

5. She dies.

The Affidavit of Support survives divorce. Mary's lawyer files an Answer to Ron's Divorce Complaint and asks for spousal support both under North Dakota law but also under the federal law governing the contractual Affidavit of Support.

Mary needs support in part because she is barred from receiving most public benefits during the first five years after execution of an Affidavit of Support. Ron will need to make sure that Mary and his child are supported to at least 125% of Federal Poverty Level until one of the contractual bases for termination occurs.

Article by Adele Page, LSND Attorney



Huge Changes to Medigap

The (MACRA) Medicare Access and CHIP Reauthorization Act of 2015 was signed into law on April 16, 2015. Section 401 of MACRA prohibits the sale of Medigap policies that cover Part B deductibles to “newly eligible” Medicare beneficiaries defined as those individuals who: (a) have attained age 65 on or after January 1, 2020; or (b) first become eligible for Medicare due to age, disability or end-stage renal disease, on or after January 1, 2020.

This prohibition applies in all states including waiver states. Issuers selling such policies to “newly eligible” Medicare beneficiaries on or after January 1, 2020 are subject to fines, and/or imprisonment of not more than five years, and/or civil money penalties of not more than \$25,000 for each prohibited act. For “newly eligible” persons, references in the law to Medigap Plans C and F are deemed as references to Plans D and G.

In today's Medicare Supplemental Plans (Medigap plans), Plan F is the only plan that covers Medicare Part B deductibles. Medicare Plan C, also known as a Medicare Advantage Plan, is also available and also pays for the Medicare Part B deductibles, but this plan is not sold by the federal government. It is instead sold by private companies who pay for the costs somewhat like the regular Medicare plans. Even though the Medigap Plan C is sold by private companies, the law passed in 2015 also regulates this plan and prohibits them from paying for the Medicare Part B deductible.

Disabled elderly individuals, in a lot of cases, are not eligible for regular Medigap plans as the underwriters for these plans would not insure a person who was disabled prior to reaching age 65 as the medical costs often

Medicare (continued)

become too high. For these individuals, Medicare Plan C was the only option for them. The Medicare Plan C however, does not have as good a coverage as regular Medigap Plans.

How will this affect people who are grandfathered in on their Medigap Plan F? Although the exact costs are not yet known, there will be a significant rise in the premiums for anyone still choosing to purchase a Medigap Plan F. This rise in premium is caused by not having new healthy 65 year old individuals paying into the pool of money used for this plan.

You'll need to weigh the costs of the rise in premium with the costs of the deductible and make a comparison as to how much each will cost. It is likely that paying the deductible will be cheaper than the rise in premium costs, effectively forcing those who chose that option to downgrade to the Medigap Plan G which does not cover the Medicare Part B deductible. Medicare Part B deductibles in 2018 were \$183 and rose to \$185 in 2019. There is a high probability that these costs will again rise in 2020 when the law goes into affect.

How will this affect people who currently have a Medicare Advantage Plan (Medigap Plan C)? They will find themselves forced to pay for Medicare Part B deductibles making the plan more expensive. This is important because a high percentage of the individuals on this plan are usually disabled prior to turning 65 years of age or are on a lower fixed income comprised of only retirement income and cannot afford to pay more out of their pocket for health care. In some cases, it may become more beneficial to change to a regular Medigap Plan administered through Medicare, but you'll need to take a very close look at the ramifications of this.

Changing from a Medicare Advantage Plan is sometimes problematic also. To buy a Medicare Supplement plan, you must first leave your Medicare Advantage Plan and return to Medicare, Part A (hospital insurance) and Part B

(medical insurance) administered under the federal Medicare program. But here's what you need to know about changing from Medicare Advantage to Medicare Supplement:

- You can only leave your Medicare Advantage plan during certain times of the year, in most cases: during the Medicare Advantage Disenrollment Period (January 1 – February 14), or during the Medicare Advantage and Prescription Drug Annual Election Period (October 15 – December 7). There are some exceptions, such as if you move from home to an institutional setting such as a nursing home, or from an institutional setting to home.
- Once you've returned to Original Medicare, you can apply for a Medicare Supplement plan anytime you want – but your acceptance into a plan isn't always guaranteed. For example, if you have health problems, the insurance company can base its decision on your health history in a process known as medical underwriting. The company can decide not to sell you a plan, or to charge you more because of your health condition. If you do not purchase a supplemental plan when first eligible for it you may not be guaranteed coverage. Guaranteed coverage comes as follows:
 - You enrolled in a Medicare Advantage Plan when you were first eligible for Medicare and you aren't happy with the plan, which you've had for a year or less. You generally have a special right to purchase a Medicare Supplement Plan if you return to Medicare Part A and Part B within 12 months of enrolling in the Medicare Advantage Plan.
 - You move to an area your Medicare Advantage Plan does not serve.
 - Your Medicare Advantage Plan no longer serves the area where you live.
 - Your plan no longer has a contract with Medicare.
- You applied for coverage as soon as you were eligible.

By Gale Coleman - LSND Paralegal

Right to Cancel Contracts

Most people have heard of the 3 day right to cancel when they buy something. The 3 day right to cancel comes from North Dakota law, in Chapter 51-18 of the North Dakota Century Code, which is titled Regulation of Home Solicitation Sales. The North Dakota Century Code has some very specific rules on when the right to cancel applies, when it doesn't, and the duties of buyers and sellers.

The Home Solicitation Sales statute contains regulations on other activities related to personal solicitation sales. These include referral sales, specific types of telephone sales, and promissory notes related to personal solicitation sales. This article will focus on the more general regulations on personal solicitation sales (most often thought of as door to door sales).

Some people think that any purchase can be cancelled in 3 days. That's not true – only some types of purchases can be cancelled. The right to cancel also depends on the age of the buyer. The rule is slightly different for buyers 65 or over.

The general rule is that a sale of consumer goods or services can be cancelled by midnight of the third business day after a contract that meets the requirements of the statute is signed.

A contract meets the requirements of the statute when:

- The contract is for goods or services purchased, leased, or rented primarily for personal, household, or family use.
- The contract is the result of a "personal solicitation sale," which is a sale that happens somewhere besides the seller's place of business. This can include the buyer's home (as with door to door salesmen) or a trade show (like a craft show or farm show held at a convention center).

- The sale price is at least \$25.00.
- The contract is in writing, dated, and signed by the buyer, and
- The contract contains a Notice to Buyer and Notice of Cancellation. These notices are in Section 51-18-04 of the N.D. Century Code. (Sellers are also required to verbally tell buyers about the right to cancel, in addition to the written notice.)

If a contract in a personal solicitation sale isn't written, dated, signed by the buyer, and doesn't contain the Notice of Buyer and Notice of Cancellation, then it is not enforceable.

A contract that is not enforceable is different from the 3 day cancellation rule. A contract has to be enforceable before it can be cancelled. If a contract results from a personal solicitation sale for \$25 or more, but is not written or dated or signed, or doesn't have the required notices, then it is unenforceable. Neither the buyer nor the seller can enforce the contract. Also, any attempt in the contract to have the buyer waive or give up rights under the statute is void and unenforceable.

Once the buyer and seller have a contract that is enforceable, then the buyer has until midnight of the third business day after the contract is signed to cancel the contract. The statute doesn't define business days. Most people assume that business days are Monday through Friday. That's how business days are defined in other parts of the Century Code, at least.

The notice of cancellation can be given in one of three ways:

- By delivering (as in hand delivery) written notice to the seller

Right to Cancel Continued

- Mailing written notice to the seller, or
- Sending an e-mail to the seller.

The notice of cancellation has to be written. It has to be either a letter or an e-mail. Calling the seller on the phone does not cancel the contract. It's always a good idea to keep a copy of a cancellation letter (or print out the e-mail).

No particular language is needed to cancel a contract. The letter or e-mail just has to indicate the intention of the buyer not to be bound by the personal solicitation sale.

When a contract is cancelled, the seller has 10 days to return any payments made by the buyer. If the buyer gave the seller any goods as a trade-in, the seller has to return the goods in "substantially as good condition" as when the seller got them. If the seller cannot return traded in goods, the buyer may recover the value of the trade-in stated in the contract.

The buyer has to keep any goods received under the contract at the buyer's residence, and must take reasonable care of them. The buyer may (but doesn't have to) follow the seller's instructions on how to return the goods. The seller has to pay for return of the goods. The goods must be in "substantially as good condition as when received." If the seller does not pick up the goods within 20 days of cancellation, the buyer can keep them, throw them away, or do whatever the buyer wants with the goods.

If the buyer does not keep the goods so the seller can come get them, then the buyer is "liable for performance of all obligations under the contract." In other words, a buyer who doesn't keep the goods so the seller can get them still has to pay for them.

For buyers 65 or older, the time to cancel is longer, if the contract has a certain value.

If the value of the contract is \$50.00 or more, then buyers 65 or older may cancel a personal solicitation contract by midnight of the 15th business day after a contract that complies with the statute is signed.

The Notice to Buyer and Notice of Cancellation for buyers 65 or over has to state either (1) that the buyer has 15 days to cancel, or (2) if the buyer is not satisfied with the product for any reason, that the buyer can contact the seller within 30 days and get a full refund, if the product has not been intentionally damaged or misused.

For sales over \$25 and under \$50, buyers 65 or over are limited to the three day cancellation period that applies to everyone else.

Buyers 65 or older must cancel by letter or e-mail, the same as everyone else.

None of these rules on cancellation of personal solicitation contracts apply to:

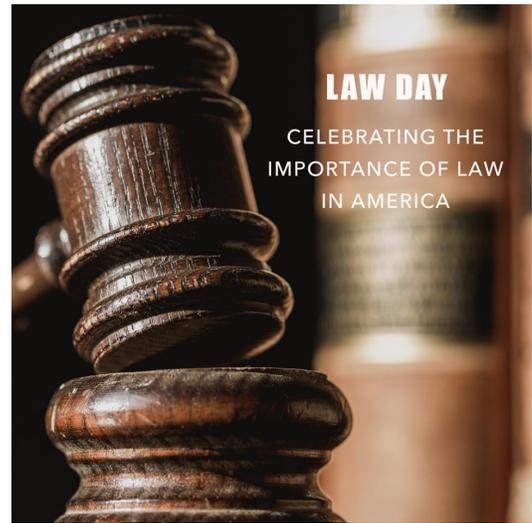
- Insurance sales
- Newspaper subscriptions
- Cable TV, when the cable company is city-licensed
- Sales by phone companies regulated by the Federal Communications Commission
- Sales of goods where the contract allows the buyer to request a refund in 15 days, and the refund is provided in 30 days, and
- Sales of services where the contract allows the buyer to request a refund in 15 days, and the refund for unused services is provided in 30 days.

Right to Cancel (continued)

Law Day 2019 May 1

The right to cancel statute is not the only statute affecting the rights of consumers in North Dakota. Other North Dakota statutes that govern contracts, sales of goods, and leases can also apply to contracts covered by (and not covered by) the right to cancel statute.

Article by Ed Reinhardt, LSND Attorney



Pictured above is one of our LSND Displays set up at one of the conferences. Staff are generally available to supply information on hours, outreach sites, and general topics of interest. Brochures are also available on a variety of topics.

On Law Day, we renew our commitment to the rule of law and our Constitution. The rule of law requires that no one be above the obligations of the law or beneath its protections, and it stands as a bulwark against the arbitrary use of government power.

Our Founding Fathers knew that to secure liberty our Government must be one of laws and not the whims of officeholders. "The true idea of a republic," wrote John Adams, "is an empire of laws, and not of men." The Constitution, therefore, granted only limited power to the Federal Government, leaving the remainder to the States, and divided the Federal powers between three separate, co-equal branches. This separation of powers has helped guarantee the rule of law and preserve liberty for generations.

Each branch of the Federal Government takes an oath to uphold the Constitution and laws of the United States and thus is duty bound to the rule of law. Today, we reflect on the many sacrifices our American forbearers made to secure and defend these rights for their posterity, and we aspire to be equally as dedicated to preserving them for future Americans.



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