

NEBRASKA

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I. MECHANIC’S LIENS BASICS

A. Requirements

The Nebraska Construction Lien Act (the “Act”) is found at NEB. REV. STAT. §§ 52-125 through 52-159. Generally, to perfect a construction lien under the Act, the lien must be recorded no later than 120 days after the final furnishing of services or materials.¹ The lien must be signed by the claimant and include (1) the legal description of the real estate; (2) the entity against which the lien is claimed; (3) the name and address of the claimant; (4) the name and address of the person with whom the claimant contracted; (5) a general description of the services performed; (6) the amount unpaid and (7) the time the last services or materials were furnished.² The lien must then be recorded with the Register of Deeds for the county where the land is situated.³

Under NEB. REV. STAT. § 52-131, in order to obtain a construction lien, one must have a valid “real estate improvement contract,” which is defined as “an agreement to perform services, including labor, or to furnish materials for the purpose of producing a change in the physical condition of land or of a structure” (e.g., excavation; construction on land; demolition, repair, or remodeling of a previously constructed structure; seeding or sodding; surface or subsurface testing; or preparing plans to change the land or structures).⁴ The Nebraska Supreme Court has also explained that the physical changes produced must be permanent in nature for the Act to apply.⁵ For instance, in *Taylor v. Taylor* it was not enough that the claimant merely cleaned up a yard and removed personal property from buildings—even though it “may have made the property more appealing to future buyers”—because it “did not produce a permanent improvement in the physical condition of the land,” and therefore the lien was unenforceable.⁶

B. Enforcement and Foreclosure

Under NEB. REV. STAT. § 52-140, a lien is enforceable for only two years and an action must be filed to foreclose the lien within that time period. That said, if a party with an interest in the property makes written demand on the claimant to institute judicial proceedings within thirty days, then the lien lapses thirty days after receipt of such demand unless the claimant institutes

proceedings or records an affidavit that the total contract price is not yet due under the involved contract. If an enforcement proceeding is instituted while the lien is effective under these limitations, then the lien continues during the pendency of the proceeding.⁷

Any entity or person who has a recorded lien may join as a plaintiff in a proceeding to foreclose a lien, and if a lienholder does not join as a plaintiff, it may be made a defendant.⁸ If an entity or person records a lien or obtains an interest in the property after the proceeding has commenced (but prior to a judgment), then it may become a defendant. The court will decide the amount owed to each party-claimant and the foreclosure of any liens against the property.⁹

C. Ability to Waive and Limitations on Lien Rights

The requirements for a waiver of a construction lien are provided in NEB. REV. STAT. § 52-144, which states:

- (1) A written waiver of construction lien rights signed by a claimant requires no consideration and is valid and binding, whether signed before or after the materials or services were contracted for or furnished. Ambiguities in a written waiver are construed against the claimant.
- (2) A written waiver waives all construction lien rights of the claimant as to the improvement to which the waiver relates unless the waiver is specifically limited to a particular lien right or a particular portion of the services or materials furnished.
- (3) A waiver of lien rights does not affect any contract rights of the claimant otherwise existing.
- (4) Acceptance of a promissory note or other evidence of debt is not a waiver of lien rights unless the note or other instrument expressly so declares.

As noted above, lien rights are limited in time—once recorded, a lien is enforceable for two years. If a party with an interest in the real estate submits a written demand that the claimant institute judicial proceedings within thirty days, however, the lien lapses unless the claimant institutes such proceedings or records an affidavit confirming the total contract price is not yet due.¹⁰ And again, the lien remains in effect during the pendency of any such proceeding.¹¹

In addition, there are special statutory provisions regarding liens with respect to railroads, bridges, and similar improvements.¹² It should be noted that construction liens are not permitted for public construction since bonds are statutorily required on such projects.¹³

II. PUBLIC-PROJECT CLAIMS

When construction involves the State of Nebraska or a local subdivision, the general framework for mechanic's liens discussed above does not apply. Instead, the protections and obligations contained in NEB. REV. STAT. § 52-118 to 52-118.02 control. Generally speaking, the

scheme requires the State, any department thereof, or a local board to cover the contract price by acquiring a bond through a corporate surety company “for labor that is performed and for the payment for material and equipment rental which is actually used or rented” in performing the contract.¹⁴ No such bond is required if the contract is not of sufficient size—contracts with the state are exempt if they are less than \$15,000, and contracts with a local public entity are exempt if they are less than \$10,000.¹⁵

Recovering for non-payment is then detailed in NEB. REV. STAT. § 52-118.01. Under that section, “[e]very person who has furnished labor or material . . . and who has not been paid in full therefore before the expiration of ninety days after the day on which the last of the labor was done . . . shall have the right to sue on such bond or bonds for the amount of the balance thereof unpaid at the time of the institution of such suit.” Provision is also made for those who have “a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing such bond or bonds.”¹⁶ In that case, the party must give “written notice to the contractor within four months from the date on which such person performed the last of the labor,” and the notice must specify “with substantial accuracy the amount claimed and the name of the party to whom the material was furnished.”¹⁷ Thus, the existence (or non-existence) of a contractual relationship between the general contractor and a supplier or subcontractor affects whether proper notice must be given—when tasked with deciding what sort of contractual relationship is sufficient, the Nebraska Supreme Court provided an overview but declined to answer given the facts at hand, so the issue remains unresolved.¹⁸

III. STATUTES OF LIMITATION AND REPOSE

A. Statutes of Limitation and Limitations on Application of Statute

In Nebraska, the statute of limitation for contracts depends on whether an oral or written contract is involved—if *oral*, the party must commence suit within *four* years;¹⁹ if *written*, the party must commence suit within *five* years.²⁰

Actions involving improvements to real property are governed by NEB. REV. STAT. § 25-223, which contains a four-year limitations period, reasonable-discovery extension, and ten-year period of repose. Subsection (1) of the statute provides:

Any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency. If such cause of action is not discovered and could not be reasonably discovered within such four-year period, or within one year preceding the expiration of such four-year period, then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. In no event may any action be commenced to recover damages for an alleged breach of warranty on improvements to real property or deficiency in the design, planning, supervision, or observation of construction, or construction of an

improvement to real property more than ten years beyond the time of the act giving rise to the cause of action.

This section, “as a special statute of limitations concerning negligent construction of an improvement on real estate, applies only to actions, whether based on negligence or breach of warranty, brought against contractors and builders.”²¹ When the claim is based on allegations of “improper workmanship resulting in defective construction,” the limitation period begins to run upon “substantial completion of the project, not the date of any specific act which resulted in the defect.”²² A contractual warranty does not extend the four-year limitations period, either.²³ Additionally, whether the claims is pled in tort or contract, this section contains a ten-year period of repose that begins at “the time of the act giving rise to the cause of action.”²⁴

Under Nebraska law, “liability under the implied warranty of workmanlike performance has been further implied and extended to subsequent home purchasers as against general contractors,” in some instances.²⁵ “This extension of liability is . . . limited to latent defects which manifest themselves after the subsequent purchase and are not discoverable by the subsequent purchaser’s reasonably prudent inspection at the time of the subsequent purchase,” and further limited by the time requirements imposed by NEB. REV. STAT. § 25-223.²⁶

Any claim for professional negligence based on deficient design or planning of improvements to real property is governed by § 25-222, rather than § 25-223.²⁷ This section states:

Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

Therefore, if a plaintiff’s claims are “for professional malpractice, whether pled in tort or in contract, the statute of limitations for professional negligence contained in this section applies.”²⁸ For instance, the Nebraska Supreme Court has specifically held that § 25-222 applies to an architect who has a duty to inspect throughout construction, and to an engineer with no other duty than to provide a design to an architect.²⁹

“A cause of action accrues for negligence in professional services when ‘the alleged act or omission in rendering or failure to render professional services takes place.’”³⁰ As a result, the two-year statute of limitations may begin to run before the full extent of damage has been sustained.³¹ That said, the Nebraska Supreme Court has also made clear that the period of repose does not

begin to run until construction is completed when the contractor had a duty to inspect throughout the entirety of construction.³²

B. Statutes of Repose / Contribution and/or Indemnification Claims

As stated above, the statutes of repose for negligent construction and negligent design/planning for improvements to real estate, are both ten years. The statutes of repose for actions on breach of warranty on improvements to real property are not limited to actions for damages to property and therefore, have applied to claims for wrongful death.³³

As for contribution and indemnification claims, Nebraska law holds that “a claim for indemnity accrues at the time the indemnity claimant suffers loss or damage.”³⁴ Further, “an action for contribution does not accrue until a co-obligor has paid more than his or her proportionate share of the debt as a whole.”³⁵

IV. PRE-SUIT NOTICE OF CLAIM AND OPPORTUNITY TO CURE

There is no Nebraska law requiring any kind of pre-suit notice or opportunity to cure in a non-UCC context. The contract between the parties will be the sole source of law on the matter.

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

In Nebraska, an insurer has two general obligations to its insureds: the duty to defend, and the duty to indemnify.³⁶ An insurer’s duty to defend is broader in that it exists whenever there may be coverage under the policy, as based on the allegations in the complaint and the insurer’s own “reasonable investigation of the actual facts” (even if the claim appears meritless).³⁷ And although the duty does not apply to claims that fall outside the policy, the insurer has the burden to prove a policy exclusion applies.³⁸

It has long been the rule in Nebraska that contractual exculpatory clauses and limitation-of-damages provisions are not enforceable against claims of gross negligence.³⁹ But the same cannot be said for contractual provisions that waive subrogation rights, which are enforceable even for claims involving gross negligence.⁴⁰ Though the Nebraska Supreme Court has recognized there are similarities between such provisions, it has also explained the underlying policy considerations are enough to demand a different result:

We, like other jurisdictions, recognize the important policy goal that waivers of subrogation serve in avoiding disruption of construction projects and reducing litigation among parties to complicated construction contracts. Concluding that waivers of subrogation cannot be enforced against gross negligence claims would undermine this underlying policy by encouraging costly litigation to contest whether a party’s conduct was grossly negligent. Therefore, we conclude that “public policy favors enforcement of waivers of subrogation even in the face of gross negligence [claims].”⁴¹

The Nebraska Supreme Court has since reaffirmed the public policy interests favoring enforceability, enforcing a contract provision that “encourage[d] the anticipation of risks and the procurement of insurance against those risks,” particularly when sophisticated business entities are involved.⁴² These two cases demonstrate the Court’s recognition that invalidating contracts on public-policy grounds is a “very delicate and undefined power which should be exercised only in cases free from doubt.”⁴³

B. Trigger of Coverage

The Nebraska Supreme Court analyzed what does—and what does not—constitute an “occurrence” so as to trigger coverage in *Auto-Owners Ins. Co. v. Home Pride Companies, Inc.* There, the court held “that faulty workmanship, standing alone, is not covered under a standard CGL policy because it is not a fortuitous event.”⁴⁴ But “although faulty workmanship, standing alone, is not an occurrence under a CGL policy, an accident caused by faulty workmanship is a covered occurrence.”⁴⁵ Thus, the result hinges on whether the “faulty workmanship causes bodily injury or property damage to something other than the insured’s work product”—if so, then “an unintended and unexpected event has occurred, and coverage exists.”⁴⁶

As far as timing, Nebraska follows the general rule that an occurrence arises “when the complaining party was actually damaged,” not when the wrongful act was committed.”⁴⁷

C. Allocation Among Insurers

The Nebraska Supreme Court has recognized how difficult it is to apportion loss between multiple insurers—at least when there are no allocation provisions within the policies themselves—going so far as to say “few areas in the field of insurance law give courts and parties more difficulty than that of duplicating or overlapping insurance.”⁴⁸

Unfortunately, there is no uniformity as to the rules of apportionment and contribution since true concurrency of policies never does exist. It is veritably impossible for the insurance policies to relate to the same subject matter, against the same risk, for the same insured or interest, and at the same identical time.⁴⁹

Therefore, since “there is no definitive rule in every case,” courts look to a variety of equitable factors like “the nature of the claim, the relation of the insured to the insurers, the particulars of each policy, and other equitable considerations.”⁵⁰

VI. CONTRACTUAL INDEMNIFICATION

In Nebraska, a provision that purports to require an innocent party indemnify or hold harmless another party for that party’s own negligence is generally unenforceable. More specifically, the relevant statute, NEB. REV. STAT. § 25-21,187, provides in relevant part:

In the event that a public or private contract or agreement for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction or for

any moving, demolition, or excavation connected with such construction contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless another person from such person's own negligence, then such covenant, promise, agreement, or combination thereof shall be void as against public policy and wholly unenforceable. This subsection shall not apply to construction bonds or insurance contracts or agreements.

This section does not bar contractual provisions requiring that one party merely provide liability insurance for another party, as opposed to personally indemnify that other party, and thus, those provisions are enforceable.⁵¹ Further, when a provision is only partially unenforceable under Section 25-21,187, the Nebraska Supreme Court has made clear only the offensive language should be stricken, and the rest of the contract remains enforceable.⁵²

The Court has also recognized that the obligation to indemnify may be implied if an express obligation is lacking.⁵³ While indemnification normally requires the recovering party to be without fault, Nebraska law in this area draws a distinction between active wrongdoers (who cannot recover) and passive wrongdoers (who may be able to recover from an active wrongdoer).⁵⁴

Section 25-21,187 also limits the extent to which an architect, engineer, or surveyor can be held liable:

No professional . . . shall be liable in tort for any case of personal injury to or death of any employee working on a construction project arising out of and in the course of employment on the construction project and occurring as a result of a violation of a safety practice by any third party unless the responsibility for supervision of safety practices has been assumed by contract or by other conduct.

VII. CONTINGENT-PAYMENT AGREEMENTS

A contingent-payment agreement—sometimes referred to as a “pay if paid” or “pay when paid” provision—is a risk-shifting provision under which the obligation to pay is predicated on some condition precedent being satisfied. In the construction context, these agreements often link a general contractor's obligation to pay a subcontractor to when the owner pays the general contractor—when that higher-level payment is made, only then is the lower-level payment required.

A. Enforceability

Though there is no statute or case that specifically addresses contingent-payment agreements, the Nebraska Construction Prompt Pay Act suggests they are valid.⁵⁵ Specifically, NEB. REV. STAT. § 45-1203 provides that a contractor must pay any subcontractor “within ten days after receipt by the contractor or subcontractor of each periodic or final payment,” provided “all conditions precedent to payment contained in the subcontract have been satisfied.”⁵⁶ In essence, then, statutes now impose a de facto “pay when paid” provision into every construction contract.

B. Requirements

In Nebraska, there are no specific requirements for a contingent-payment agreement in the construction arena. As such, normal contract principles apply and parties seeking to impose (or avoid) such a provision should carefully analyze whether it unambiguously establishes payment by a third-party to be a condition precedent.

VIII. SCOPE OF DAMAGE RECOVERY

A. Personal Injury Damages vs. Construction Defect Damages

There is a limit on what a party can recover for construction defects, and that limit depends on what is required to remedy the defect—if the remedy can be fixed through minor repair, then that is all that is required; if the remedy would require significant reconstruction, then more is required. As put by the Nebraska Supreme Court, “where defects in materials, construction or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the damage which the owner is entitled to recover is the expense of making the work conform to contractual requirements.”⁵⁷ However, when the defects cannot be corrected without reconstructing a substantial portion of the building, “the measure of the owner’s damages is the difference between its value when constructed and what its value would have been if built according to contract.”⁵⁸ In discussing defect claims, it should also be noted that the implied warranty of workmanlike performance by general contractors is extended to subsequent purchasers, even without any privity between the parties. That said, this extension is limited to latent defects that could not be reasonably discovered, and the general contractor retains all normal defenses.⁵⁹

While defect damages are limited, the same cannot be said for damages related to personal injury. The Nebraska Supreme Court’s affirmance of a \$183,000 jury verdict is one example of that—there, the plaintiff was awarded damages for past medical expenses, lost wages, pain and suffering, and permanent disfigurement.⁶⁰

B. Attorney’s Fees Shifting and Limitations on Recovery

The rule in Nebraska is that attorney’s fees and expenses are not available unless specifically provided for by statute or a uniform course of procedure.⁶¹ Contracting parties cannot override this rule either—a provision that seeks to make a breaching party liable for attorney’s fees is void.⁶²

When an insurance policy is involved, NEB. REV. STAT. § 44-359 controls:

In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy, except workers’ compensation insurance, or upon any certificate issued by a fraternal benefit society, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney’s fee in addition to the amount of his or her recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney’s fee for the appellate proceedings,

except that if the plaintiff fails to obtain judgment for more than may have been offered by such company, person, or association in accordance with section 25-901, then the plaintiff shall not recover the attorney's fee provided by this section.

Where a statute speaks only to attorney's fees and costs, a party may recover (1) attorney's fees, (2) the costs of the filing of the action, and (3) any other expenses that are specifically delineated as taxable costs by statute (not litigation expenses).⁶³

C. Consequential Damages

Like noted above, Nebraska law looks to what is required to fix a construction-caused problem in deciding what remedy is required. If the damages arising from faulty workmanship can be easily remediated, then the damages are measured by the "reasonable cost of remedying the defects."⁶⁴ But if the substantial reconstruction would be required to remedy the defect, then "the damages are measured by the difference between the value of the building as constructed compared to what its value would have been if constructed according to the contract."⁶⁵

D. Delay and Disruption Damages

In appropriate circumstances, a party can also recover damages stemming from a delay in the performance of a contract. As put by the Nebraska Supreme Court:

[A] contractor has the right to recover damages resulting from delay caused by a breach of contract by the other party. Thus, [1] where there is a breach of the contract by the owner or other party, and [2] the breach of contract results in delay in the work of the contractor, and [3] the delay in the work causes damage to the contractor, the contractor has a right of recovery in the absence of a "no-damage clause" or other provision to the contrary in the contract and even though the contract contains a provision for an extension of time.⁶⁶

This right to recover is limited by the well-established rule requiring damages be causally connected to the breach.⁶⁷ That is, they cannot be "uncertain, conjectural, or speculative as to the existence, nature, or proximate cause thereof"—a supposed ripple effect will not suffice.⁶⁸

E. Economic-Loss Doctrine

The economic-loss doctrine is a judicially created limit on a party's ability to recover in tort when there are strictly economic damages arising from performance of a contract. In *Lesiak v. Central Valley Ag Co-Op, Inc.*, the Nebraska Supreme Court recognized the doctrine is "difficult to apply," noting it "has been compared to the ever-expanding, all-consuming life form portrayed in the 1958 B-movie classic *The Blob*."⁶⁹ Fortunately, the *Lesiak* Court attempted to clarify "the doctrine's application and scope in Nebraska" providing recent insight into how the Court might apply (or not) the doctrine in a construction case.⁷⁰ The Court put it like this:

Where only economic loss is suffered and the alleged breach is of only a contractual duty . . . , then the action should be in contract rather than in tort. In other words,

the doctrine would apply to bar a tort action for the negligent performance of a contract when only economic losses were incurred.⁷¹

In *Lesiak*, the plaintiff's crops were damaged due to the alleged negligent application of herbicide by the defendant. The Court held the economic-doctrine did not bar tort recovery, because the crops were "other property—that is, property other than the property that was sold pursuant to the contract."⁷²

The Court reached the opposite conclusion just a year before, in *Dobrovolny v. Ford Motor Co.*⁷³ There, the dispute was over defective car parts that resulted in damage to the plaintiff's truck. Applying the same rule stated above, the *Dobrovolny* Court held that because the only damage was to the truck itself—i.e., the product covered by the contract—"the economic loss doctrine bars recovery under products liability law."⁷⁴

F. Interest

The default interest rate for monetary judgments fluctuates. That is, under NEB. REV. STAT. § 45-103, the rate is fixed to be equal to "two percentage points above the bond investment yield, as published by the Secretary of the Treasury of the United States, of the average accepted auction price for the first auction of each annual quarter of the twenty-six-week United States Treasury bills in effect on the date of the entry of the judgment." The most current rate—as well as a table of all effective rates dating back to 1987—can be found online, and is 6.9% as of April 20, 2023.⁷⁵ This rate is just the default, however, and does not apply when there is a different rate provided by law or contract between the parties.⁷⁶

One way prejudgment interest accrues is in accordance with NEB. REV. STAT. § 45-103.02, which provides:

- (1) Except as provided in section 45-103.04, interest . . . shall accrue on the unpaid balance of unliquidated claims from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the entry of judgment if all of the following conditions are met:
 - (a) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
 - (b) The offer is made not less than ten days prior to the commencement of the trial;
 - (c) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and
 - (d) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

- (2) Except as provided in section 45-103.04, interest as provided in section 45-104 shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the entry of judgment.

Thus, calculating prejudgment interest depends on whether the claim is liquidated or unliquidated. A claim is liquidated—meaning prejudgment interest begins accruing when the cause of action arises, no written demand required—“when there is no reasonable controversy as to both the amount due and the plaintiff’s right to recover.”⁷⁷ A dispute as to liability or damages is therefore sufficient to make a claim unliquidated.

The exceptions to this rule in NEB. REV. STAT. § 45-103.04 relate to cases of divorce or suits against the state or its employees for negligence.

A separate, independent way prejudgment interest accrues is when payment is due under certain contracts. In that case, NEB. REV. STAT. § 45-104 controls and provides for a rate of twelve percent per year:

Unless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum on money due on any instrument in writing, or on settlement of the account from the day the balance shall be agreed upon, on money received to the use of another and retained without the owner’s consent, express or implied, from the receipt thereof, and on money loaned or due and withheld by unreasonable delay of payment. Unless otherwise agreed or provided by law, each charge with respect to unsettled accounts between parties shall bear interest from the date of billing unless paid within thirty days from the date of billing.

The Nebraska Supreme Court recently outlined and clarified how prejudgment interest operates based on the nature of the claim (contract vs. non-contract) and damages (liquidated vs. unliquidated) in *Weyh v. Gottsch*, which has and will continue to assist parties in analyzing the issue.⁷⁸ *Weyh* overruled the previous ruling of *Roskop Dairy L.L.C. v. GEA Farm Techs., Inc.*, expressly disapproving of prior cases holding or implying that NEB. REV. STAT. § 45-103.02 is the exclusive means of recovering prejudgment interest in Nebraska.

G. Punitive Damages

It is generally accepted that punitive damages are expressly prohibited in Nebraska by the Nebraska Constitution.⁷⁹

H. Liquidated Damages

In Nebraska, liquidated damages provisions are enforceable, while penalty provisions are not.⁸⁰ Per the Nebraska Supreme Court, a liquidated damages provision calling for a “stipulated sum” is enforceable when these two conditions are met:

- (1) [W]here the damages which the parties might reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and
- (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be

caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach.⁸¹

To be clear, these conditions only apply when the contract provision seeks to set in advance the amount of damages should a breach occur—the rule does not apply when payment is called for without a breach (i.e., payment is merely for performance, a service, or goods).⁸²

VIII. CASE LAW AND LEGISLATION UPDATE

There are no other cases or statutes of relevance that are not already mentioned above.

¹ NEB. REV. STAT. § 52-137.

² NEB. REV. STAT. § 52-147(1).

³ NEB. REV. STAT. § 52-127(13).

⁴ NEB. REV. STAT. § 52-130(1).

⁵ *Taylor v. Taylor*, 277 Neb. 617, 764 N.W.2d 101 (2009).

⁶ *Id.* at 621.

⁷ NEB. REV. STAT. § 52-140.

⁸ NEB. REV. STAT. § 52-155.

⁹ *Id.*

¹⁰ NEB. REV. STAT. § 52-140(1)–(2).

¹¹ NEB. REV. STAT. § 52-140(3).

¹² NEB. REV. STAT. §§ 52-115 to -117.

¹³ NEB. REV. STAT. § 52-132.

¹⁴ NEB. REV. STAT. § 52-118(1).

¹⁵ NEB. REV. STAT. § 52-118(2).

¹⁶ NEB. REV. STAT. § 52-118.02.

¹⁷ *Id.*

¹⁸ *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins. Co.*, 269, 697–98, 695 N.W.2d 665, 670–71 (2005).

¹⁹ NEB. REV. STAT. § 25-206.

²⁰ NEB. REV. STAT. § 25-205.

²¹ *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 281, 481 N.W.2d 422, 428 (1992).

²² *Adams v. Manchester Park, L.L.C.*, 291 Neb. 978, 983, 871 N.W.2d 215, 218–19 (2015); *see also McCaulley v. C L Enters., Inc.*, 309 Neb. 141, 959 N.W.2d 225 (2021) (involving a case involving claims against multiple subcontractors, and holding: “[T]he limitations period against each contractor beg[ins] to run upon the substantial completion of each contractor’s project.”).

²³ *Adams*, 291 Neb. at 985, 871 N.W.2d at 220.

²⁴ *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 124, 362 N.W.2d 35, 41 (1985); *Ag Valley Co-Op v. Servinsky Engr.*, 311 Neb. 665, 974 N.W.2d 324 (2022) (applying the 10-year statute of repose found in NEB. REV. STAT. § 25-223 to a claim against a contractor alleging failure to properly design and construct a grain bin in a workmanlike manner).

²⁵ *Moglia v. McNeil Co.*, 270 Neb. 241, 248, 700 N.W.2d 608, 615–16 (2005).

²⁶ *Id.*

²⁷ *Omaha v. Hellmuth, Obata & Kassabaum, Inc.*, 767 F.2d 457 (8th Cir. 1985).

²⁸ *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 449, 590 N.W.2d 380, 388 (1999) (quoting NEB. REV. STAT. § 25-222).

²⁹ *Witherspoon* 219 Neb. at 126-27, 362 N.W.2d at 43.

³⁰ *Murphy*, 240 Neb. at 281, 481 N.W.2d at 427 (quoting NEB. REV. STAT. § 25-222).

³¹ *Sass v. Hanson*, 5 Neb. App. 28, 37, 554 N.W.2d 642, 648 (1996).

³² *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 239, 404 N.W.2d 32, 34 (1987).

³³ *Durre v. Wilkinson Dev., Inc.*, 285 Neb. 880, 885, 830 N.W.2d 72, 77 (2013).

³⁴ *Wood River v. Geer-Melkus Constr. Co.*, 233 Neb. 179, 188, 444 N.W.2d 305, 311 (1989).

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- ³⁵ *Cepel v. Smallcomb*, 261 Neb. 934, 941, 628 N.W.2d 654, 660 (2001).
- ³⁶ *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 824, 716 N.W.2d 87, 99 (2006).
- ³⁷ *Peterson v. Ohio Cas. Co.*, 272 Neb. 700, 709, 724 N.W.2d 765, 773 (2006).
- ³⁸ *Id.*
- ³⁹ *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 525 N.W.2d 25 (1994).
- ⁴⁰ *Lexington Ins. Co. v. Entrex Commc'ns Servs., Inc.*, 275 Neb. 702, 711, 749 N.W.2d 124, 131 (2008).
- ⁴¹ *Id.*
- ⁴² *Hearst-Argyle Props., Inc. v. Entrex Comm'ns Servs., Inc.*, 279 Neb. 468, 478, 778 N.W.2d 465, 473 (2010).
- ⁴³ *Id.*
- ⁴⁴ *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 535, 684 N.W.2d 571, 577 (2004).
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- ⁴⁶ *Id.* at 535, 684 N.W.2d at 578.
- ⁴⁷ *Farr. v. Designer Phosphate & Premix Int'l.*, 253 Neb. 201, 207, 570 N.W.2d 320, 325 (1997).
- ⁴⁸ *Am. Family Mut. Ins. Co. v. Regent Ins. Co.*, 288 Neb. 25, 41, 846 N.W.2d 170, 184 (2014).
- ⁴⁹ *Id.* at 42, 846 N.W.2d at 184 (citation and internal quotation marks omitted).
- ⁵⁰ *Id.*
- ⁵¹ *Anderson v. Nashua Corp.*, 251 Neb. 833, 838, 560 N.W.2d 446, 449 (1997).
- ⁵² *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 768, 443 N.W.2d 872, 875 (1989).
- ⁵³ *Id.*
- ⁵⁴ *Id.* at 769–70, 443 N.W.2d at 876.
- ⁵⁵ NEB. REV. STAT. §§ 45-1201, *et seq.*
- ⁵⁶ NEB. REV. STAT. § 45-1203.
- ⁵⁷ *Jones v. Elliot*, 172 Neb. 96, 107, 108 N.W.2d 742, 748 (1961) (citation and internal quotation marks omitted).
- ⁵⁸ *Id.*
- ⁵⁹ *Moglia*, 270 Neb. at 248, 700 N.W.2d at 616.
- ⁶⁰ *Orduna v. Total Const. Servs. Inc.*, 271 Neb. 557, 569–70, 713 N.W.2d 471, 482 (2006).
- ⁶¹ *Quinn v. Godfather's Inv., Inc.*, 217 Neb. 441, 444, 348 N.W.2d 893, 895 (1984).
- ⁶² *Id.*
- ⁶³ *McGill v. Lion Place Condo. Ass'n*, 291 Neb. 70, 95, 864 N.W.2d 642, 660 (2015).
- ⁶⁴ *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 352, 377 N.W.2d 98, 100 (1985).
- ⁶⁵ *Id.*
- ⁶⁶ *In re Roberts Const. Co.*, 172 Neb. 819, 825, 111 N.W.2d 767, 771 (1961).
- ⁶⁷ *Omaha Pub. Power Dist. v. Darin & Armstrong, Inc.*, 205 Neb. 484, 497, 288 N.W.2d 467, 474 (1980) (citation and internal quotation marks omitted).
- ⁶⁸ *Id.*
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- ⁷⁰ *Id.*
- ⁷¹ *Id.* at 123, 808 N.W.2d at 83.
- ⁷² *Id.*
- ⁷³ *Dobrovolny v. Ford Motor Co.*, 281 Neb. 86, 92, 793 N.W.2d 445, 449 (2011).
- ⁷⁴ *Id.*
- ⁷⁵ *Judgment Interest Rate*, STATE OF NEB., JUDICIAL BRANCH, <https://supremecourt.nebraska.gov/rules/administrative-policies-schedules/interest-rate> (last visited April 18, 2023).
- ⁷⁶ NEB. REV. STAT. § 45-103.
- ⁷⁷ *Roskop Dairy L.L.C. v. GEA Farm Techs., Inc.*, 292 Neb. 148, 184–85, 871 N.W.2d 776, 802 (2015).
- ⁷⁸ *Weyh v. Gottsch*, 303 Neb. 280, 301–17, 929 N.W.2d 40, 55–65 (2019).
- ⁷⁹ NEB. CONST. art. VII, § 5; *Miller v. Kingsley*, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (1975).
- ⁸⁰ *Berens & Tate, P.C. v. Iron Mountain Information Mgmt., Inc.*, 275 Neb. 425, 430, 747 N.W.2d 383, 387 (2008).
- ⁸¹ *Id.*
- ⁸² *Id.*