

NORTH DAKOTA

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I. MECHANICS' LIENS BASICS

Following is a summary of construction liens as governed by Chapter 35-27 of the North Dakota Century Code.

A. Requirements

Any person who improves real estate by the contribution of labor, skill, or materials, whether under contract with the owner of such real estate or with any contractor, subcontractor, or agent of the owner, has a lien upon the improvement and upon the land on which it is situated. Provided, however, that the amount of lien is only for the difference between the price paid by the owner or agent and the price or value of the contribution. If the owner or agent has paid the full price or value of the contribution, no lien is allowed.ⁱ

Thus, a subcontractor who performs his work, files a notice of intention to claim construction lien and otherwise complies with the construction lien law can still be precluded from obtaining any construction lien if the owner has already paid the full price to his contractor. This does not prohibit the subcontractor from suing the contractor, but merely prohibits the subcontractor from obtaining any construction lien on the land involved.

Written notice that a lien will be claimed must be given to the owner of the real estate by certified mail at least 10 days before the recording of the construction lien.ⁱⁱ

The owner may withhold so much of the contract price from the contractor as may be necessary to meet the demands of all persons, other than the contractor, having a lien for which the contractor is liable.ⁱⁱⁱ

B. Enforcement and Foreclosure

Any lien-holder may bring an action to enforce in the district court in the county in which the property is located. Before a lien may be enforced, however, the lien-holder must give written notice, by personal service, upon the record owner of the property at least ten days before an action to enforce is commenced. Otherwise, if by registered mail, notice must be given at least twenty days before the action is commenced.^{iv} A lien-holder may file for a deficiency if the same remains after sale of the property.^v

Any owner that successfully contests the validity or accuracy of a construction lien by any action in district court must be awarded the full amount of all costs and reasonable attorney fees incurred.^{vi} The costs and fees sought by an owner contesting the accuracy of a construction lien are limited to “recovering only those costs and fees reasonably expended contesting the lien.”^{vii} Accuracy in a construction lien is important because even if a contractor is deemed a prevailing party for purposes of an award of costs, an owner may be entitled to an award of attorneys’ fees for successfully defending against the accuracy of the contractor’s lien.^{viii}

C. Ability to Waive and Limitations on Lien Rights

The mingling of charges for materials to be used in the construction, alteration, repair, or improvement of the property of different persons, except in the cases of joint ownership or ownership in common, defeats the right to a lien against either or any of such persons.^{ix}

The entire land upon which any building, structure or improvement is placed is subject to a lien filed under Chapter 35-27.^x

A construction lien shall be subordinate to a mortgage given for the purpose of providing funds for the payment of labor or materials for the improvement, unless a construction lien is filed prior to such mortgage.^{xi}

A lien may not be filed more than three years after the first materials are furnished.^{xii}

II. PUBLIC PROJECT CLAIMS

A. State and Local Public Work

Notices and Enforcement. A person that has furnished labor or material for any public improvement for which a bond is furnished and has not been paid in full within ninety days after completion of the contribution of labor or materials may sue on the bond for the amount unpaid at the time of institution of suit. However, a person having a direct contractual relationship with a subcontractor, but no contractual relationship with the contractor furnishing the bond, does not have a claim for relief upon the bond unless that person has given written notice to the contractor, within ninety days from the date on which the person completed the contribution, stating with substantial accuracy the amount claimed and the name of the person for which the contribution was performed. The notice must be served by registered mail in an envelope addressed to the contractor at any place the contractor maintains an office, conducts business, or has a residence.^{xiii} This suit must be commenced within one year after completion and acceptance of the project to be valid against the contractor and the contractor's surety.^{xiv}

B. Claims to Public Funds.

There is no specific legislation in North Dakota regarding what claims can be made for public funds, other than those discussed in §§ 48-01.2-11 and 48-01.2-12.

III. STATUTES OF LIMITATION AND REPOSE

A. Statutes of Limitation and Limitations on Application of Statutes

Contract for Sale Under UCC – 4 years. In the original agreement the parties may reduce the period of limitation to not less than one year, but may not extend it.^{xv}

Contract Action – 6 years.^{xvi}

Suit to foreclose construction lien – 3 years after date of recording.^{xvii}

B. Statutes of Repose and Limitations on Application of Statutes

No action, whether in contract, oral or written, in tort or otherwise, to recover damages:

For any deficiency in the design, planning, supervision, or observation of construction or construction of an improvement to real property;

For injury to property, real or personal, arising out of any such deficiency; or

For injury to the person or for wrongful death arising out of any such deficiency, may be brought against any person performing or furnishing the design, planning, supervision, or observation of construction, or construction of such an improvement more than ten years after substantial completion of such an improvement.^{xviii}

For injuries occurring during the tenth year after substantial completion, the action may be brought within two years after the date on which such injury occurred, but not later than twelve years after the substantial completion of such improvement.^{xix}

The statute may not be asserted by way of defense by any person in actual possession or control of such improvement at the time any deficiency constitutes the proximate cause of an injury for which it is proposed to bring an action.^{xx}

The statute does not apply to a manufacturer of building materials used in an improvement to real property.^{xxi}

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

Before a lien holder may enforce a lien, he must give written notice to the owner of his intention to do so by personal service at least 10 days or by registered mail at least 20 days before an action is commenced.^{xxii}

A lien is perfected by recording with the Register of Deeds in the county where the property is located, within 90 days after all contribution is done, a construction lien describing the property, stating the amount due, the dates of the first and last contribution, and the person with which the claimant contracted.^{xxiii}

A lien is not lost for failure to file within 90 days except as to purchasers or encumbrancers whose rights accrue after the 90 days and before a claim is filed and against the owner, to the extent they have made payment before the recording of the lien.^{xxiv} A lien may not be filed more than 3 years after the date of the first item of material is furnished.^{xxv}

Upon written demand of the owner, suit must be commenced and filed with the county recorder within 30 days thereafter or the lien is forfeited. No lien is valid or may be enforced unless the holder thereof asserts the same by complaint, filed with the county recorder, within 3 years after the date of recording of the lien.^{xxvi} Thus, an owner's written demand to enforce the lien shortens the statute of limitations.^{xxvii}

Contractors and owners involved with one- and two-family residential improvements must provide notice of alleged defects before bringing suit.^{xxviii} Before making any non-emergency repair or commencing a breach of warranty action, the purchaser or owner of the dwelling must give written notice to the contractor by mail within six months after knowledge of the defect, advising the contractor of the defect and providing reasonable time to cure.^{xxix} "Reasonable time" is defined as within thirty business days after the notice is mailed or any shorter period of time as may be appropriate under the circumstances.^{xxx} A contractor must provide the purchaser written notice of these requirements at the time of sale closing or completion of the improvement.^{xxxi}

V. INSURANCE COVERAGE AND ALLOCATION ISSUES

A. General Coverage Issues

The interpretation of insurance contracts follows that of contract law, which is governed by Title 9 of the Century Code. A contract for insurance is construed to give effect to the mutual intent of the parties at the time of formation.^{xxxii} If the contract is clear on its face, there is no room for a court to construe its provisions.^{xxxiii}

The courts regard insurance policies as contracts of adhesion, and resolve all ambiguity against the insurer.^{xxxiv} Further, "exclusions from coverage in an insurance contract must be clear and explicit and are strictly construed against the insurer."^{xxxv}

B. Trigger of Coverage

This is not a well-settled issue of law in North Dakota. There are two main cases that have dealt with the issue of when coverage applies to a claim for damage. In *Friendship Homes v. American States Ins. Companies*, the court held the insurance policy did not extend to liability for a fire due to negligent installation, and seemingly applied the 'injury-in-fact' rule, which is that coverage isn't triggered until the actual property damage first occurs.^{xxxvi} In *Kief Farmers v. Farmland Mutual*, the court, in an apparently contradictory decision, seemed to hold that the event which triggers liability exposure should be judged on a case by case basis depending on the interpretation of each insurance contract at issue.^{xxxvii}

C. Allocation Among Insurers

There is no legislation in North Dakota regarding the allocation of risk amongst parties to a construction contract. Nor are there limitations, statutory or otherwise, on contracts for additional insurance.

VI. CONTRACTUAL INDEMNIFICATION.

There are no specific statutes in North Dakota that limit the enforceability of indemnity provisions in construction contracts.^{xxxviii} However, North Dakota law generally provides that “an indemnity agreement will not be construed to indemnify a party against the consequences of its own negligence unless that interpretation is clearly intended.”^{xxxix}

The North Dakota Supreme Court has interpreted a contract to indemnify a party against the consequences of its own negligence where the indemnity agreement contained no language of limitation or qualification and required the indemnitor to procure liability insurance, including an endorsement adding the indemnitee as an additional insured.^{xl} A right to indemnity may arise by express agreement or by implication.^{xli}

In *Barsness*, a construction worker was injured when he fell from a crane leased from General Diesel & Equipment Co., Inc. The trial court determined that General Diesel was entitled to contractual indemnity from Barsness’ employer, First Assembly. On appeal, the North Dakota Supreme Court reversed the trial court’s decision stating that it did “not believe that the lease agreement, when read in its entirety, reflect[ed] a clear intent that General Diesel be indemnified for its own negligence.” Of particular significance were the following: (d) the lease did “not require indemnification for ‘any and all claims,’ but merely for ‘liability arising out of the operation’ of the crane: and (e) while there was an insurance requirement, it required insurance for damage to the crane but not for person injury damages.

Even if a contractual indemnification provision allows the indemnitee to recover all attorney fees and costs, the indemnitee may not recover attorney’s fees and expenses incurred to establish the existence of an obligation to indemnify, unless the agreement explicitly says otherwise.^{xlii}

Note: indemnity agreements involving “motor carrier contracts” that purport to indemnify or hold harmless the promisee for their own fault are void as a matter of law.^{xliii}

VII. CONTINGENT PAYMENT AGREEMENTS

There is no legislation or case law on this issue as it pertains to contracts for construction. However, North Dakota recognizes “a major public policy of freedom to contract on terms not specifically prohibited by statute,” seemingly indicating pay-if-paid and pay-when-paid clauses will be upheld.^{xliv}

Title 9 of the North Dakota Century Code contains the general provisions of contract law; Chapter 9-08 governs unlawful and voidable contracts, generally. Further, any provision which would make the contractor liable for deficiencies in the plans and specifications is void.^{xlv}

VIII. SCOPE OF DAMAGE RECOVERY

North Dakota does not currently have specific damages limitations applicable to the construction industry. Chapter 32-03 governs the proper measure of damages generally.

In all cases, no more than reasonable damages may be recovered.^{xlvi} Whether a verdict is excessive does not depend on any objective measure, but is a matter of the quality of evidence on the record.^{xlvii}

A. Personal Injury Damages vs. Construction Defect Damages

There is no express limitation on the recovery of damages generally in either a claim for personal injury or due to construction defect. Note, however, that the limit on damages has been held to be narrower in claims for breach of contract as opposed to tort claims.^{xlviii}

Pursuant to claims for wrongful death, a plaintiff may recover for mental anguish, loss of society, comfort, and companionship.^{xliv} In all other tort cases, the measure of damages is limited to the amount that would reasonably compensate the plaintiff for their loss, whether the detriment caused is anticipated or not.^l The measure of damages for breach of contract, however, is a reasonable amount that will compensate the aggrieved party for that which would likely result from the breach thereof, and any damages must be clearly ascertainable.^{li} In short, the measure of damages for breach of contract is that which will compensate for any loss the fulfillment of the contract would have prevented.^{lii} Damages for a breach of contract for a construction project may exceed the contract price.^{liii}

B. Attorney's Fees Shifting and Limitations on Recovery

In civil actions, upon a finding that the claim for relief was frivolous, the court shall award costs including reasonable attorney's fees to the prevailing party.^{liv}

C. Consequential Damages

The provisions of North Dakota law governing damages would exclude consequential damages for any claim arising from breach of contract. As previously stated, the measure of damages in tort claims generally is that which would compensate the plaintiff for its loss, *whether that loss is anticipated or not*. However, damages for breach of contract are limited to that which would "likely result." Yet, the "substantial performance" doctrine is alive and well in North Dakota. Under this doctrine, if defects can be repaired with necessitating substantial reconstruction, then the contractor may still recover the contract price less the cost of repair. However, if substantial reconstruction is necessary, the aggrieved party may recover the value of a properly constructed project less the value of the project actually constructed.^{lv}

D. Delay and Disruption Damages

“No-damages-for-delay clauses” will be enforced if not unconscionable.^{lvi} The standard for unconscionability is high. Courts will find an agreement unconscionable “if it is one no rational, undeluded person would make, and no honest and fair person would accept, or is blatantly on-sided and rankly unfair.”^{lvii} North Dakota courts follow the well-recognized exception to enforceability of a no-damages-for-delay clause for active interference.^{lviii}

E. Economic Loss Doctrine

The economic loss doctrine bars tort claims when the only damage was to the defective product. Such claims must be brought in an action to recover for breach of warranty or contract.^{lix}

F. Interest

Except where there is a dispute between a state agency and a contractor, every state agency must make payment for property or services as specified in the contract or within 45 days after receipt of the invoice.^{lx} Interest shall accrue at the rate of 1¾% per month unless a different rate is specified within the contract.^{lxi} Subcontractors are likewise entitled to be paid within 45 days after payment from such agency to the prime contractor. Interest accrues at the rate of 1¾% per month unless a different rate is provided in the contract.^{lxii}

On public building contracts, in the event the governing board fails or neglects to consider any estimate properly submitted, pay any estimate approved, or make final payment upon completion and acceptance for a period of more than 30 days then said estimate or final payment shall draw interest two percentage points below the Bank of North Dakota prime interest rate.^{lxiii}

Interest for any legal indebtedness must be at the rate of 6% per annum unless a different rate, not exceeding the usury rate, is contracted for in writing.^{lxiv}

G. Punitive Damages

Punitive damages may not be awarded in a case arising out of breach of contract.^{lxv} In a case not arising out of breach of contract where the defendant has been guilty by clear and convincing evidence of oppression, fraud or actual malice, punitive damages may be awarded, however, they may not be sought in the complaint. After filing of the suit, a motion to amend the pleadings to claim exemplary or punitive damages may be made and will be allowed if the court finds that there is sufficient evidence to support a finding by the trier of fact that a preponderance of evidence proves oppression, fraud or actual malice.^{lxvi}

Punitive damages may be allowed if tortious conduct exists independently of the breach of contract and there is proof of actual damages resulting from the independent tort.^{lxvii}

H. Liquidated Damages

Every contract by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation is determined in anticipation thereof is to that extent void, except that the parties may agree therein upon an amount presumed to be the damage sustained by a breach in cases in which it would be impracticable or extremely difficult to fix the actual damage.^{lxxviii}

I. Other Damages Limitations

Any provision in a construction contract which would make the contractor liable for the errors or omissions of the owner or the owner's agents in the plans and specifications is against public policy and void.^{lxxix}

Damages for unjust enrichment claims are measured by the benefit to the defendant, not the plaintiff's loss.^{lxxx}

Except for certain contracts with governmental agencies, contracts with contractors are subject to a maximum retainage of 10% of each estimate presented until such time as a project is 50% complete, after which no further retainage is allowed.^{lxxxi}

North Dakota requires contractors to be properly licensed with the state.^{lxxxii} A contractor who fails to obtain proper licensing may not maintain any claim, action, suit, or proceeding in any court in North Dakota related to the contractor's business or capacity as a contractor without first having a license as provided by Chapter 43-07.^{lxxxiii} Thus, an unpaid, unlicensed contractor cannot recover for services and materials during the time in which it was unlicensed; however, if the contractor subsequently becomes licensed to perform work in North Dakota, it can seek recovery for the timeframe in which the contractor was licensed.^{lxxxiv}

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- ⁱ N.D.C.C. § 35-27-02. Note that oil and gas liens are governed under Chapter 35-24. A subcontractor with a valid lien on a project is not obligated to pursue a breach of contract action against the general contractor for non-payment before “resorting to the security of his lien.” *SWMO LLC v. Eagle Rigid Spans Inc.*, 2019 ND 207, ¶ 14, 932 N.W.2d 120.
- ⁱⁱ N.D.C.C. § 35-27-02.
- ⁱⁱⁱ N.D.C.C. § 35-27-09.
- ^{iv} N.D.C.C. § 35-27-24.
- ^v N.D.C.C. § 35-27-24.
- ^{vi} N.D.C.C. § 35-27-24.1.
- ^{vii} *N. Excavating Co. v. Sisters of Mary of Presentation Long Term Care*, 2012 ND 78, ¶ 11, 815 N.W.2d 280.
- ^{viii} *Id.* at ¶¶ 10-12.
- ^{ix} N.D.C.C. § 35-27-10.
- ^x N.D.C.C. § 35-27-19.
- ^{xi} N.D.C.C. § 35-27-04.
- ^{xii} N.D.C.C. § 35-27-14.
- ^{xiii} N.D.C.C. § 48-01.2-11.
- ^{xiv} N.D.C.C. § 48-01.2-12.
- ^{xv} N.D.C.C. § 41-02-104(1).
- ^{xvi} N.D.C.C. § 28-01-16(1).
- ^{xvii} N.D.C.C. § 35-27-25
- ^{xviii} N.D.C.C. § 28-01-44(1).
- ^{xix} N.D.C.C. § 28-01-44(2).
- ^{xx} N.D.C.C. § 28-01-44(3).
- ^{xxi} *Hebron Public School Dist. No. 13 of Morton County v. U.S. Gypsum Co.*, 475 N.W.2d 120, 127 (N.D. 1991).
- ^{xxii} N.D.C.C. § 35-27-24.
- ^{xxiii} N.D.C.C. § 35-27-13.
- ^{xxiv} N.D.C.C. § 35-27-14.
- ^{xxv} N.D.C.C. § 35-27-14.
- ^{xxvi} N.D.C.C. § 35-27-25.
- ^{xxvii} *Snider v. Brinkman*, 2017 ND 31, ¶ 20, 889 N.W.2d 867.
- ^{xxviii} N.D.C.C. § 43-07-26.
- ^{xxix} *Id.*
- ^{xxx} *Id.*
- ^{xxxi} *Id.*
- ^{xxxii} *K & L Homes, Inc. v. American Family Mut. Ins. Co.*, 829 N.W.2d 724, 728 (N.D. 2013).
- ^{xxxiii} *Id.*
- ^{xxxiv} *Id.*
- ^{xxxv} *Id.*
- ^{xxxvi} *Friendship Homes, Inc. v. American States Ins. Companies*, 450 N.W.2d 778 (N.D. 1990).
- ^{xxxvii} *Kief Farmers Co-op Elevator Co. v. Farmland Mut. Ins. Co.*, 534 N.W.2d 28 (N.D. 1995); *see also Grinnell Mut. Reinsurance Co., v. Thies*, 2008 ND 164, 755 N.W.2d 852.
- ^{xxxviii} While there are no statutes specific to contractual indemnity in the construction context, North Dakota does have specific statutory rules for the interpretation of a contract of indemnity, which will apply in the construction context. N.D.C.C. § 22-02-07. *See also* Chapter 22-02, Indemnity; *Smith v. Hartman Walsh Painting Co.*, No. 1:15-CV-94, 2017 WL 3051524, at *1 (D.N.D. June 30, 2017), *report and recommendation adopted*, No. 1:15-CV-94, 2017 WL 3037438 (D.N.D. July 18, 2017) (addressing contractual indemnification issues in construction context).
- ^{xxxix} *Barsness v. General Diesel & Equipment Co, Inc.*, 422 N.W.2d 819, 825 (N.D. 1988) *citing Vanderhoof v. Gravel Products, Inc.*, 404 N.W.2d 485 (N.D. 1987); *Bridston v. Dover Corp.*, 352 N.W.2d 194 (N.D. 1984).
- ^{xl} *Bridston v. Dover Corp.*, 352 N.W.2d 194, 197 (N.D. 1984).
- ^{xli} *SNAPS Holding Co. v. Leach*, 2017 ND 140, ¶ 26, 895 N.W.2d 763.
- ^{xlii} *Rupp v. Am. Crystal Sugar Co.*, 465 N.W.2d 614, 619 (N.D. 1991).
- ^{xliii} N.D.C.C. § 22-02-10.

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- xliv *Markwed Excavating, Inc. v. City of Mandan*, 2010 ND 220, ¶ 16, 791 N.W.2d 22.
- xliv N.D.C.C. § 9-08-02.1.
- xlvi N.D.C.C. § 32-03-37.
- xlvii *Miller v. Breidenbach*, 520 N.W.2d 869 (N.D. 1994).
- xlviii *Bumann v. Maurer*, 203 N.W.2d 434 (N.D. 1972).
- xliv *Hopkins v. McBane*, 427 N.W.2d 85 (N.D. 1988).
- ¹ N.D.C.C. § 32-03-20.
- li N.D.C.C. § 32-03-09.
- lii *Ehrichs v. Kearney*, 730 F.2d 1170 (D.N.D. 1984), cert. denied 469 U.S. 930.
- liii *Jalbert v. Eagle Rigid Spans, Inc.*, 2017 ND 50, ¶ 17, 891 N.W.2d 135 (Jury awarded building owner \$650,000 for contractor's breach related to building's structure when contractor's bid price was \$374,879.)
- liv N.D.C.C. § 28-26-01(2).
- lv *Curtis Const. Co., Inc. v. American Steel Span, Inc.*, 707 N.W.2d 68 (N.D. 2005).
- lvi *Markwed Excavating, Inc. v. City of Mandan*, 2010 ND 220, ¶ 24, 791 N.W.2d 22.
- lvii *Id.* at ¶ 22.
- lviii *C & C Plumbing & Heating, LLP v. Williams Cty.*, 2014 ND 128, ¶ 15, 848 N.W.2d 709.
- lix *Stiener v. Ford Motor Co.*, 606 N.W.2d 881, 884 (N.D. 2000).
- lx N.D.C.C. § 13-01.1-01.
- lxi N.D.C.C. § 13-01.1-02.
- lxii N.D.C.C. § 13-01.1-06.
- lxiii N.D.C.C. § 48-01.2-14.
- lxiv N.D.C.C. § 47-14-05.
- lxv N.D.C.C. § 32-03.2-11.
- lxvi N.D.C.C. § 32.03.2-11.
- lxvii *Pioneer Fuels, Inc. v. Montana-Dakota Utilities Co., a Div. of MDU Res. Grp.*, 474 N.W.2d 706, 709 (N.D. 1991).
- lxviii N.D.C.C. § 9-08-04.
- lxix N.D.C.C. § 9-08-02.1.
- lxx *KLE Const., LLC v. Twalker Dev., LLC*, 2016 ND 229, ¶ 15, 887 N.W.2d 536.
- lxxi N.D.C.C. § 43-07-23.
- lxxii N.D.C.C. § 43-07-02.
- lxxiii *Id.*
- lxxiv *Snider v. Dickinson Elks Bldg., LLC*, 2018 ND 55, ¶ 14, 907 N.W.2d 397.