

## SOUTH DAKOTA

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### I. MECHANIC'S LIENS BASICS

The following is a brief summary of the relevant sections of the South Dakota Codified Laws Chapter 44-9 which govern the filing and perfection of mechanics' liens. However, it is important to note that § 44-9-49 provides that failure to comply with this Chapter does not bar the owner of a claim from bringing the claim as an "ordinary civil action."<sup>1</sup>

#### A. Requirements

**Notice.** As against the owner of the property, a mechanic's lien shall attach and take effect from the time the first item of material or labor is furnished upon the premises by the lien claimant, and shall be preferred to any mortgage or other encumbrance not then of record, unless the lien holder had actual notice thereof.<sup>2</sup> As against a bona fide purchaser, mortgagee, or encumbrancer without notice, no lien shall attach prior to the actual and visible beginning of the improvement on the ground, but a person having a contract for the furnishing of labor, skill, material, or machinery for such improvement, may file with the register of deeds of the county within which the premises are situated or of the county to which such county is attached for judicial purposes, or if claimed under subdivision 44-9-1(2), with the Secretary of State, a brief statement of the nature of such contract, which shall be notice of his lien for the contract price or value of all contributions to such improvement thereafter made by him or at his instance.<sup>3</sup>

**Mechanic's Lien Statement.** At the end of 120 days after doing the last of such work or after furnishing the last item of such skill, services, material or machinery, the lien shall cease within such period unless a statement of the claim is filed with the register of deeds of the county in which the improved premises are situated or of the county to which such county is attached for judicial purposes, or if the claim be under the provision of subdivision 44-9-1-(2), with the Secretary of State.<sup>4</sup> Such statement shall be made by or at the instance of the lien claimant, shall be verified by the oath of some person shown by such verification to have knowledge of the facts stated, and shall set forth:

- (1) A notice of intention to claim and hold a lien, and the amount thereof;
- (2) That such amount is due and owing to the claimant for labor performed, or for skill, services, material, or machinery furnished, and for what improvement the same was done or supplied;

- (3) The names and post office address of the claimant, and of the person for or to whom performed or furnished;
- (4) The dates when the first and last items of the claimant's contribution were made;
- (5) A description of the property to be charged, identifying the same with reasonable certainty;
- (6) The name and address of the owner at the time the statement is made, according to the claimant's best information at the time; and
- (7) An itemized statement of the account upon which the lien is claimed.<sup>5</sup>

Before filing the lien statement, the claimant must mail to the property owner at his or her last known address a copy of such lien statement by registered or certified mail. The receipt for such mailing shall be attached to the lien statement and filed in the office of the register of deeds.<sup>6</sup>

#### **B. Enforcement and Foreclosure**

The lien may be enforced by action in the circuit court of the county in which the improved premises or some part thereof are situated, or of the county to which such county is attached for judicial purposes, or if claimed under 44-9-1(2), of any county through or into which a railway or other line extends, the action shall be begun and conducted in the same manner as actions for the foreclosure of mortgages upon real estate.<sup>7</sup> Upon written demand of the owner, the owner's agent, or contractor, served on any person holding a lien, requiring the person to commence suit to enforce such lien, such suit shall be commenced within thirty days after such service, or the lien shall be forfeited.<sup>8</sup> The register of deeds shall cancel the lien of record if the owner, the owner's agent, or contractor files an affidavit stating that the person holding the lien has not commenced suit to enforce the lien within thirty days after the service of the written demand, a copy of the written demand that was served on the person holding the lien, and proof of service on the person holding the lien, no sooner than the fortieth day following the service of the written demand.<sup>9</sup>

At the time the action is commenced, the claimant must file notice of the pending claim with the register of deeds of the county in which the action is pending and of the several counties into which the utility extends, if the lien is claimed under subdivision 44-9-1(2).<sup>10</sup> After the filing, no other action may be commenced for the enforcement of any lien arising from the improvement described, but all such lien claimants can intervene in the original action by filing an answer as provided under subdivision 44-9-25.<sup>11</sup>

No lien shall be enforced in any case unless the holder asserts the same, either by complaint or answer, within six years after the date of the last item of his claim as set forth in the lien statement; nor shall any person be bound by judgment unless he is made a party within six

years.<sup>12</sup> If no action or suit has been commenced to enforce the lien during the six year period, the owner of the property, the owner's agent, or contractor may file an affidavit with the register of deeds stating that the lien holder has not commenced a suit to enforce the lien within the required period and may request that the lien be cancelled.<sup>13</sup> The register of deeds shall cancel the lien of record within 30 days of the filing of the affidavit.<sup>14</sup>

### **C. Ability to Waive and Limitations on Lien Rights**

Liens for materials, supplies, equipment, and services furnished under construction contracts to contractors or subcontractors may be expressly waived upon the execution of a joint check wherein the payees include the contractor or subcontractor and the person or corporation furnishing the materials, supplies, equipment, and services. The joint check must make reference to a separate written agreement of waiver in a conspicuous manner on the reverse side and must mention that the payees, by their endorsements and in consideration of the payment, jointly and severally waive all claims to which they might be entitled.<sup>15</sup>

Further, in order to enforce a mechanic's lien generally, the lien-holder must comply with the provisions of Chapter 44-9. Note: failure to comply with Chapter 44-9 does not limit the right to recover in an ordinary civil action from the party from which they have contracted, even if the lien is deemed waived for failure to comply.<sup>16</sup>

## **II. PUBLIC PROJECT CLAIMS**

### **A. State and Local Public Work**

**Notices and Enforcement.** Every person wishing to avail himself or herself of the provisions of the statutes providing liens on proceeds of public improvement contracts shall, within twenty days after any item claimed by him shall have been furnished or any work done by him shall have been performed, file with the officer of such public body who is by law made the custodian of its official records, a just and true account of the demand due or to become due to him or her after allowing all credits and verified by his affidavit. A failure to file within this time period does not defeat the lien upon the amount remaining due to the contractor at the time of filing.<sup>17</sup> Any person who performed labor or furnished materials shall procure from the contractor a settlement and statement of his account, signed by the contractor and verified by his own affidavit, the same may be filed and shall have the same force and effect as an account.<sup>18</sup>

The lien may be enforced by the circuit court for the county where the work or improvement or any part thereof shall be situated and the plaintiff must make all person who have filed liens, the contractor, and the public bodies party to the action.<sup>19</sup> Any person who is a defendant in the action may claim a lien by filing an answer.<sup>20</sup> Additionally, all claims to liens relating to public improvement contracts shall cease to have any validity or to be binding upon the public body or the contractor unless an action to enforce is commenced within thirty days from the acceptance of the work, unless asserted under the provisions of §§ 5-22-9 to 5-22-11.<sup>21</sup>

## **B. Claims to Public Funds**

**Notices and Enforcement.** Nothing in the statutes relating to such liens on public funds shall impair or affect the right of any person to whom any sum may be due for work, skill, materials, power, or supplies to maintain an action against the person liable.<sup>22</sup>

## **III. STATUTES OF LIMITATIONS AND REPOSE**

### **A. Statutes of Limitation and Limitations on Application of Statutes**

The following is a brief summary of the relevant sections of the South Dakota Codified Laws Chapter 15-2, which govern limitation periods for general claims of breach of contract, § 44-9-24, which provides the limitation for foreclosing liens specifically, and 15-2A, which specifically addresses the limitation periods relating to claims for construction deficiency.

#### **Limitation of Actions Generally**

An action upon contract, obligation or liability express or implied, can be commenced only within six years after the cause of action shall have accrued.<sup>23</sup>

#### **Limitation on Enforcement of Liens**

An action foreclosing a lien must be commenced within six years after the date of the last item of the claim as set forth in the lien statement. No person shall be bound by a judgment under this Chapter unless he is made a party within six years.<sup>24</sup> If no action or suit has been commenced to enforce the lien during the six year period, the owner of the property, the owner's agent, or contractor may file an affidavit with the register of deeds stating that the lien holder has not commenced suit to enforce the lien and requesting that the lien be cancelled. The register of deeds shall cancel the lien of record within thirty days of the filing of the affidavit.<sup>25</sup>

### **B. Statutes of Repose and Limitations on Application of Statutes**

No action to recover damages for any injury to real or personal property, for personal injury or death arising out of any deficiency in the design, planning, supervision, inspection, and observation of construction, of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury or death, may be brought against any person performing or furnishing the design, planning, supervision, inspection, and observation of construction, or construction, of such an improvement more than ten years after substantial completion of such construction. The date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or his representative can occupy or use the improvement for the use it was intended.<sup>26</sup>

The Eight Circuit has concluded that South Dakota would follow the standard rule adopted by many states in defining the phrase "improvement to real property" for the purposes of interpreting its limitation statutes. "Generally, in determining whether a modification of or addition to real property is an improvement, courts have adopted a commonsense interpretation of the word 'improvement.'...Among the factors considered are whether the modification or

addition enhances the use of the property, involves the expenditure of labor or money, is more than mere repair or replacement, adds to the value of the property, and is permanent in nature.”<sup>27</sup>

The statute may not be asserted by way of defense by any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time any deficiency constitutes the proximate cause of an injury or death for which it is proposed to bring an action.<sup>28</sup>

For injuries occurring during the tenth year after substantial completion of the construction, an action may be brought within one year after the date on which such injury occurred, but not later than eleven years after the substantial completion of construction of such improvement.<sup>29</sup>

The statute may not be asserted as a defense by any person guilty of fraud, fraudulent concealment, fraudulent misrepresentations, or willful or wanton misconduct in furnishing the design, planning, supervision, inspection, and observation of construction, or construction, of improvements to real property.<sup>30</sup>

The statute does not prohibit any action against a defendant who has expressly warranted or guaranteed the improvement to real property for a longer period from being brought within that period.<sup>31</sup>

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

Any person furnishing any of the items for which a lien may be claimed under the provisions of § 44-9-1 under a contract, either express or implied between the owner of the property or his duly authorized representative, and any contractor working upon the property, may serve upon the property owner or his agent or representative, a sworn account and notice of his claim showing the items and amounts and the dates that the same were furnished. The owner is then entitled to withhold payment from the contractor as may be necessary to meet the claims of persons who have served such accounts and notices.<sup>32</sup>

Before filing a lien statement as required prior to filing a claim to enforce a lien, the person claiming the lien shall mail the property owner by registered or certified mail, a copy of the lien statement at his last known address. The post office receipt for the mailing shall be attached to the lien statement and filed in the office of register of deeds.<sup>33</sup> The property owner is obliged to provide a copy of any claim to the contractor, and if the contract does not give written notice that he intends to dispute within 15 days, then the contractor is deemed to assent to the claim.<sup>34</sup> The owner may pay the claimant when it becomes due and deduct any moneys due the contractor, who may also deduct such amount from any moneys due to his subcontractor or the claimant.<sup>35</sup>

The right of redemption for all estates to be foreclosed other than leaseholds shall be the same as upon execution sales.<sup>36</sup>

Whenever a lien is claimed, and subsequently satisfied by payment, foreclosure, compromise, or another method, such satisfaction describing the lien, the date of its filing, the

amount claimed, a description of the property, the names of the lien claimants, and the name of the property owner, shall be executed and delivered to the owner of the property. The satisfaction is to be executed before two witnesses or acknowledged by a notary before being filed with the register of deeds.<sup>37</sup> Upon receiving the satisfaction, the register of deeds shall cancel the lien.<sup>38</sup> If the lien-holder fails to execute the satisfaction as provided in § 44-9-21 within ten days after written demand by the property owner, then the lien-holder becomes liable to the owner for all damages, costs, and expenses including attorneys' fees, and a one-hundred dollar penalty.<sup>39</sup>

## **V. INSURANCE COVERAGE AND ALLOCATION ISSUES**

### **A. General Coverage Issues**

An insurance contract will be interpreted according to its plain and ordinary meaning.<sup>40</sup> The scope of coverage of insurance policy is determined by intent and the objectives of the parties as expressed in the contract.<sup>41</sup> If an insurance contract is ambiguous, the contract will be construed liberally in favor of the insured, and strictly against the insurer.<sup>42</sup>

### **B. Trigger of Coverage**

The trigger of insurance coverage will be determined by the contract between the parties.<sup>43</sup> There are no specific statutory provisions regarding this issue in South Dakota.

### **C. Allocation Among Insurers**

South Dakota does have an anti-indemnity statute for the liability for negligence in construction, repair, or maintenance of a structure or equipment.<sup>44</sup> However, there is no bar against contracting to add another as an additional insured, thus effectively allocating risk of liability as if one was indemnifying the other.

## **VI. CONTRACTUAL INDEMNIFICATION**

Construction contracts, plans, and specifications which contain indemnification provisions shall include the following provisions:

The obligations of the contractor shall not extend to the liability of the architect or engineer, his agents or employees arising out of:

- (1) The preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs, or specifications; or
- (2) The giving of or the failure to give directions or instructions by the architect, or engineer, his agents or employees provided such giving or failure to give is the primary cause of the injury or damage.<sup>45</sup>

Any indemnification provision in a construction contract in conflict with § 56-3-16 shall be unlawful and unenforceable.<sup>46</sup>

A covenant, promise, agreement, or understanding in, or in connection with, or collateral to, a contract or agreement relative to the construction, alteration, repair, or maintenance of a building, structure, appurtenance and appliance, including moving, demolition, and excavating connected therewith, purporting to indemnify the promise against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promise, his agents or employees, or indemnitee, is against the policy of the law and is void and unenforceable.<sup>47</sup>

## **VII. CONTINGENT PAYMENT AGREEMENTS**

### **A. Enforceability**

No case or statutory law on the subject. Note, however that penalties imposed by contract for the nonperformance of the same are void, unless those provisions are commonly used, wherein the penal clause will be all that is void.<sup>48</sup>

### **B. Requirements**

No case or statutory law on the subject.

## **VIII. SCOPE OF DAMAGE RECOVERY**

### **A. Personal Injury Damages vs. Construction Defect Damages**

For the breach of an obligation not arising from contract, the measure of damages is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not, unless otherwise provided for.<sup>49</sup>

There is no further limitation on damages, or tort reform legislation, concerning claims that may arise from claims for personal injury or construction defect.

### **B. Attorney's Fees Shifting and Limitations on Recovery**

Attorney fees must be provided for in contract, or by statute, to be recoverable at the trial level.<sup>50</sup> There are no further limitations, other than general provisions governing unlawful contracts in Chapter 53-9.

### **C. Consequential Damages**

The measure of damages for breach of contract is for clearly ascertainable damages that are reasonably likely to occur, thereby preempting any claim for consequential damages.<sup>51</sup> The measure of damages for tort, however, do not require foreseeability.<sup>52</sup> There being no other applicable limitation on damages, a claim arising from tort as opposed to breach of contract would appear to allow for consequential damages.

#### **D. Delay and Disruption Damages**

No specific limitations for delay or disruption damages beyond those noted previously, and in Economic Loss Doctrine, along with more general provisions in Chapters 21-2 and 21-3.

#### **E. Economic Loss Doctrine**

A Plaintiff may not recover on a claim for damages in tort for economic loss alone. Damages for breach of contract must not be uncertain.<sup>53</sup>

#### **F. Interest**

Unless otherwise established, there is no maximum interest rate or charge, or usury rate restriction between any persons or entities so long as the rate is established by written agreement.<sup>54</sup> If the period of time is not specified, it is presumed an annual rate.<sup>55</sup>

#### **G. Punitive Damages**

A jury may award punitive damages for breach of any obligation not arising from contract when the defendant is guilty of oppression, fraud, malice, actual or presumed, committed intentionally or by willful and wanton misconduct.<sup>56</sup>

Negligence alone is not sufficient for punitive damages.<sup>57</sup>

#### **H. Liquidated Damages**

Generally, parties may agree on the amount to be paid in the event of a breach that is the result of a reasonable endeavor by the parties to provide only fair compensation for the loss that was sustained and not to penalize the defaulting party.<sup>58</sup> In every contract in which the amount of damages or compensation for an anticipated breach of an obligation is determined, it is void to that extent. Except the parties may agree upon an amount of damages for a breach in cases where it would be impracticable or extremely difficult to fix actual damages.<sup>59</sup>

#### **I. Other Damage Limitations**

No other damage limitations created by statute or provided by case law.

### **IX. CASE LAW AND LEGISLATION UPDATE**

There were no court decisions or legislative changes in the year 2017- April 2018 which were relevant to the subject matter addressed in this compendium.



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- <sup>1</sup> S.D. CODIFIED LAWS § 44-9-49.
- <sup>2</sup> S.D. CODIFIED LAWS § 44-9-7.
- <sup>3</sup> S.D. CODIFIED LAWS § 44-9-8.
- <sup>4</sup> S.D. CODIFIED LAWS § 44-9-15.
- <sup>5</sup> S.D. CODIFIED LAWS § 44-9-16.
- <sup>6</sup> S.D. CODIFIED LAWS § 44-9-17.
- <sup>7</sup> S.D. CODIFIED LAWS § 44-9-23.
- <sup>8</sup> S.D. CODIFIED LAWS § 44-9-26.
- <sup>9</sup> *Id.*
- <sup>10</sup> S.D. CODIFIED LAWS § 44-9-28.
- <sup>11</sup> *Id.*
- <sup>12</sup> S.D. CODIFIED LAWS § 44-9-24.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.*
- <sup>15</sup> S.D. CODIFIED LAWS § 44-9A-1 *et seq.*
- <sup>16</sup> S.D. CODIFIED LAWS § 44-9-49.
- <sup>17</sup> S.D. CODIFIED LAWS § 5-22-2.
- <sup>18</sup> *Id.*
- <sup>19</sup> S.D. CODIFIED LAWS § 5-22-4.
- <sup>20</sup> *Id.*
- <sup>21</sup> S.D. CODIFIED LAWS § 5-22-7.
- <sup>22</sup> S.D. CODIFIED LAWS § 5-22-12.
- <sup>23</sup> S.D. CODIFIED LAWS § 15-2-13(1).
- <sup>24</sup> S.D. CODIFIED LAWS § 44-9-24.
- <sup>25</sup> *Id.*
- <sup>26</sup> S.D. CODIFIED LAWS § 15-2A-3.
- <sup>27</sup> *Van Den Hul v. Baltic Farmers Elevator Co.*, 716 F.2d 504, 508 (8<sup>th</sup> Cir. 1983) (citations omitted).
- <sup>28</sup> S.D. CODIFIED LAWS § 15-2A-4.
- <sup>29</sup> S.D. CODIFIED LAWS § 15-2A-5.
- <sup>30</sup> S.D. CODIFIED LAWS § 15-2A-7.
- <sup>31</sup> S.D. CODIFIED LAWS § 15-2A-8.
- <sup>32</sup> S.D. CODIFIED LAWS § 44-9-10.
- <sup>33</sup> S.D. CODIFIED LAWS § 44-9-17.
- <sup>34</sup> S.D. CODIFIED LAWS § 44-9-11.
- <sup>35</sup> *Id.*
- <sup>36</sup> S.D. CODIFIED LAWS § 44-9-45.
- <sup>37</sup> S.D. CODIFIED LAWS § 44-9-21.
- <sup>38</sup> *Id.*
- <sup>39</sup> S.D. CODIFIED LAWS § 44-9-22.
- <sup>40</sup> *St. Paul Fire and Marine Ins. Co. v. Schilling*, 520 N.W.2d 884 (S.D. 1994).
- <sup>41</sup> *Id.*
- <sup>42</sup> *Id.*
- <sup>43</sup> *Id.*
- <sup>44</sup> S.D. CODIFIED LAWS § 56-3-18.
- <sup>45</sup> S.D. CODIFIED LAWS § 56-3-16; *see Hennigan, Durham & Richardson, Inc. v. Swift Brothers Construction Co.*, 739 F.2d 1341 (8<sup>th</sup> Cir. 1984).
- <sup>46</sup> S.D. CODIFIED LAWS § 56-3-17.
- <sup>47</sup> S.D. CODIFIED LAWS § 56-3-18.
- <sup>48</sup> S.D. CODIFIED LAWS § 53-9-4.
- <sup>49</sup> S.D. CODIFIED LAWS § 21-3-1.
- <sup>50</sup> *Lord v. Hy-Vee Food Stores*, 720 N.W.2d 443 (S.D. 2006).
- <sup>51</sup> S.D. CODIFIED LAWS § 21-2-1.
- <sup>52</sup> S.D. CODIFIED LAWS § 21-3-1.

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<sup>53</sup> S.D. CODIFIED LAWS § 21-2-1.

<sup>54</sup> S.D. CODIFIED LAWS § 54-3-1.1.

<sup>55</sup> S.D. CODIFIED LAWS § 54-3-3.

<sup>56</sup> S.D. CODIFIED LAWS § 21-3-2.

<sup>57</sup> *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 506 (S.D. 1997).

<sup>58</sup> *Anderson v. Cactus Heights Country Club*, 125 N.W.2d 491, 493 (S.D. 1963).

<sup>59</sup> S.D. CODIFIED LAWS § 53-9-5.