

# The Poison Pill in North Dakota's Mechanic's Lien Law

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Most jurisdictions, including North Dakota, have a remedy for non-payment to those who provide labor or materials to improve real property. In North Dakota that remedy is called a construction lien. In most other jurisdictions, it is called a mechanic's lien. But North Dakota's mechanic's lien statute contains a poison pill provision that makes it dangerous for contractors to exercise that remedy.

The various state legislatures enacted mechanic's lien statutes because construction is different from other commercial situations. If you stop making payments after buying a car, the bank or the dealership can repossess the car. It is much harder for a carpenter to take back the labor and material he or she put into building a house. A mechanic's lien provides the contractor with a mechanism to force the sale of the property that was improved to get compensated for his or her services.

However, North Dakota's construction lien statute contains an attorneys' fees provision that favors the owner of the real property. The relevant portion of the North Dakota statute provides: "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 attorneys' fees incurred by the owner." N.D.C.C. § 35-27-24.1 (emphasis added). This one-sided attorneys' fees provision makes it risky for contractors to invoke the construction lien remedy.

A 2012 North Dakota Supreme Court case demonstrates the danger the attorneys' fees provision poses to contractors. In *Northern Excavating Co., Inc. v. Sisters of Mary of the Presentation Long Term Care*, 815 N.W.2d 280 (N.D. 2012), an excavation contractor worked for an owner on a time and materials contract. At the end of the project, the owner disputed the contractor's charges and did not pay. The contractor sued and asserted a mechanic's lien against the owner's property. At trial, the jury awarded the contractor more than 82% of the amount it sought, which was more than twice the amount the owner claimed it should have to pay. The court ruled that the contractor was the prevailing party, but under the mechanic's lien statute's fee provision, it awarded the owner \$3,231 in attorneys' fees because the owner successfully challenged the amount of the lien. After an appeal to the North Dakota Supreme Court and further proceedings at the district court level, the owner was ultimately awarded \$12,500 in attorneys' fees. The contractor's eventual recovery was reduced by over 15% through the attorneys' fee provision in the statute. It is easy to imagine cases where an attorneys' fee award to the owner could completely swallow or even exceed the amount the contractor wins, yielding the contractor a victory in principal, but a disastrous defeat in reality.

Contractors need to be cautious before using the mechanic's lien remedy in North Dakota. There are ways to mitigate the danger from the attorneys' fee provision. Contractors should consult with counsel before contracting for work in North Dakota to make sure they have adequate protection against non-payment in the contract. Contractors should also work with a knowledgeable attorney as soon as non-payment becomes an issue on a project.

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Construction Law

