

## NORTH DAKOTA CONSTRUCTION LIEN LAW SUMMARY

(NOT FOR WORK ON OIL OR GAS WELLS OR PIPELINES)

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Author: Douglas R. Hookland of Scott Hookland LLP. Contact Information: (503) 620-4540 or 1-800-334-8986; drh@scott-hookland.com

CAUTION: Lien laws are subject to constant change by the state legislature and interpretation by courts. As such, this summary could become outdated at any time. Regardless, this summary should be used as general information only, and never as legal advice either generally or for any specific situation. Seek independent legal advice from a competent attorney for each situation.

STANDING: a person or entity has lien rights who, at the request of the property owner, agent or trustee of the property owner, the prime contractor, or a subcontractor of any tier, furnishes labor, materials, rental equipment, architectural services, construction staking, engineering, land surveying, mapping, or soil testing, to build, alter, remove, repair, or demolish any improvement upon or beneath the surface of any land, or in grading, seeding, sodding, or planting for landscaping purposes, or in equipping any improvement with fixtures or permanent apparatus. NDCC 35-27-01 7. and 35-27-02. "Subcontractor", as defined in NDCC 35-27-01 7., may include a supplier, so a supplier to a supplier may have lien rights. **North Dakota is a derivative lien state: any lien is only for the difference between the price paid by the property owner to the prime contractor and the price or value of the contribution to improve the land. No lien is allowed if the property owner has paid the full price or value of the total contribution to improve the land. NDCC 35-27-02 and Kirkland v. Oberquell, 405 N.W. 2d 21 (ND Supreme Court 1987).** If the property owner has paid the prime contractor the full price or value of all labor, materials, equipment, and professional services provided to create the improvement, subcontractors and suppliers will have no lien rights even though they improved the property and have not been paid. See Kirkland v. Oberquell. Can lien only the interest in real property of a private person/entity.

JOB ACCOUNTS: A supplier's lien rights may depend on whether it has job accounted the materials/rental equipment. NDCC 35-27-10 prohibits commingling charges for materials (which includes rental equipment under NDCC 35-27-01 4.) going to different properties owned by different persons/entities. Although NDCC 35-27-11 requiring an itemized account was repealed in 2009, separate job accounts for each project is recommended.

### PRE-CLAIM NOTICES:

(a) **Optional:** Request for Legal Description and Title Owner Name. If your contract is not with the property owner, request the legal description of the property and name(s) of the title owner(s) of the property. NDCC 35-27-02. When: At time you

agree to furnish. Who receives this request: your customer. If you know who they are, also send the request to the prime contractor and property owner(s). How to send: no required method. Suggestion: send by certified mail and first class mail. Why send: to obtain information needed to record a lien.

(b) **Optional:** Notice of Claim. Any subcontractor or supplier may serve upon the property owner **at any time** a notice of their claim. NDCC 35-27-09. Who receives this notice: all property owners. When to send: send it when you **first start** furnishing. Contents: state you are furnishing or will soon start to furnish materials, generally describe your materials, identify your customer, and state you have a lien for these materials unless you are paid for such materials. How to send: no required method, but send by certified mail, return receipt requested, and by first class regular mail, to best prove when the property owner received it. Why send: it may cause the property owner to withhold payment from the prime contractor or otherwise make sure you get paid either before or after you record a lien. **Even though optional, it is strongly suggested this notice be sent, and sent when you first start furnishing labor, materials, or rental equipment. However, nothing in the statutes requires a property owner receiving this Notice of Claim to withhold money from the prime contractor to pay subcontractors and suppliers sending this Notice of Claim, or to actually pay subcontractors or suppliers who send this Notice of Claim.**

(c) **Required:** Notice Lien Will be Claimed. NDCC 35-27-02. Who must give: the prime contractor, all subcontractors, all suppliers, and all design professionals. Send it to: the property owner(s). When to send: At least ten (10) days before recording a lien. How to send: must be by certified mail, but also send by first class mail. Contents: a statement that a lien will be claimed. Discussion: it is not clear how soon this notice can be sent. The sooner the better, to increase the chance the property owner has not yet paid the value of all work (labor, materials, equipment, and professional services) provided to the project. The statutes do not prohibit sending this notice with the 35-27-09 Notice of Claim. However, this 35-27-02 notice states it must be sent at least 10 days before recording a lien, which suggests it is intended to be sent after the potential lien claimant as provided its work, has not been paid, and is about to record a lien. It appears this notice may be intended to help avoid or reduce the need to record a lien. Suggestion: send this notice soon after the claimant as completed providing its work and no later than when payment becomes delinquent. Must be given no later than ten (10) days before a lien is recorded. If a lien is recorded on the 90<sup>th</sup> day, this notice must be given no later than the 80<sup>th</sup> day after last furnishing work.

(d) **Required.** Notice of Right to Foreclose on Original, Complete, and Independent Improvement. NDCC 35-27-21. When to give: at time material is furnished for the improvement (so give when the first of the material is furnished). Who gives: the seller of the material, which could be the prime contractor, a subcontractor, or material/rental equipment supplier. Give notice to: purchaser of materials. So, a material supplier furnishing at the request of a subcontractor must give this notice to the subcontractor. Suggestion: also give to the property owner(s). Method of giving: no required method. Suggestion: send by certified mail and first class mail. Applies to what projects: the

erection or construction of an original, complete, and independent building, structure, or improvement. Notice contents: the seller claims the right to foreclose the construction lien under the laws of North Dakota, and in the event of default in payment for the improvement, to remove the building from the real estate upon which it is placed regardless of whether or not the building is placed upon a foundation. Why send this notice: upon lien foreclosure, the improvement may be sold separately from the land and may be removed from the land within 30 days after the sale. Sale and removal operate as full satisfaction and discharge of the lien upon the real estate. The lien will attach to the improvement in preference to prior title, claim, lien, encumbrance, or mortgage upon the land upon which the improvement is erected.

**THE LIEN CLAIM:** Record within 90 days after last furnishing work. Trifling or small amount may count, but best to run the 90 days from the date on which a substantial amount of work was last furnished that was not repair or warranty work. The lien must: described the property, state the amount due, provide the dates of first and last furnishing, and the name of the person/entity with whom the lien claimant contracted. NDCC 35-27-13. Must be notarized, and it is recommended it be verified. Lien can be recorded after the 90 day period, but it is void as against (a) good faith purchasers or encumbrancers whose rights accrue before the lien is recorded, and (b) the property owner to the extent of the amount paid to a contractor before the lien is recorded. NDCC 35-27-14. A lien can not be recorded more than 3 years after the first item of materials is furnished – this may be the first item of material furnished by any person or entity and not the lien claimant. NDCC 35-27-14.

**POST CLAIM NOTICE:** Must give written notice to the property owner of your intention to enforce the lien by foreclosure of it. Can give this notice by personal service at least 10 days before foreclosing, or by registered mail at least 20 days before foreclosing. NDCC 35-27-24. Within 15 days after completion of the contract (possibly the contract between the property owner and the prime contractor), the property owner (or any lender or other party having any interest in the property except another lien claimant) may send written request to a lien claimant for an itemized and verified account of the lien claim, the amount of it, and the name and address of the lien claimant, and no foreclosure action may be commenced until 10 days after such statement is furnished. NDCC 35-27-09.

**FORECLOSURE:** A foreclosure action must be commenced no later than 3 years after the lien is recorded. If the lien claimant receives written demand from or on behalf of the property owner (which demand is also filed with the County Recorder), the lien claimant must commence and file suit to foreclose the lien and record a lis pendens within 30 days or the lien is forfeited. NDCC 35-27-25.

**ATTORNEY FEES:** The property owner gets its attorney fees if it successfully contests the validity or accuracy of the lien in court. This is a one way statute, such that the lien claimant does not get its attorney fees if it prevails on its lien. NDCC 35-27-24.1.