

## Extraordinary Litigation Fund

### Background

The Extraordinary Litigation Fund (ELF) was established during the 2004 Legislative Session by House Bill 1068 with the purpose of paying for plaintiff attorney fee awards, retention of outside counsel, settlement costs, and other litigation expenses.

Prior to the creation of the Extraordinary Litigation Fund, expenses were coded to the Public Entity Pool for Liability (PEPL) Fund, which was created to cover risks associated with automobile liability and general tort liability for agencies and individuals of state government. The PEPL Fund allocates the cost of providing claims servicing and claims payment by charging a premium to each fund and agency based on the number of automobile titles to each agency (automobile liability) or employees (general tort liability).

This allocation method is included in the Statewide Cost Allocation Plan, however, the federal government deemed the non-PEPL related claims, such as claims that are paid as a result of lawsuits and decisions made either by the Legislature or the citizens of South Dakota, to be unallowable. Since these claims are unable to be allocated and billed out to agencies, the general fund is the only other option to pay for these costs.

Since the 2004 Legislative Session, the expenses related to non-PEPL claims have been coded to the Extraordinary Litigation Fund. The only source of revenue for this fund is funding provided through special appropriations. Since the creation of the Extraordinary Litigation Fund there have been twelve funding bills to backfill this fund. The Governor's budget recommendation includes funding of \$1,500,000 to backfill this fund.

**Historical Extraordinary Litigation Fund Expenses**

Session	2004	2005	2008	2010	2012	2016	2017	2018	2019	2020	2021	2022
Bill #	HB 1068	HB 1057	SB 48	SB 48	HB 1040	HB 1047	HB 1023	SB 54	HB 1264	HB 1024	HB 1026	HB 1019
Amount	\$1,650,000	\$1,280,000	\$3,201,534	\$944,610	\$1,042,828	\$1,974,502	\$1,004,242	\$423,598	\$2,300,000	\$800,000	\$400,000	\$1,500,000

### South Dakota Codified Law

1-14-3.1. Extraordinary litigation fund--Use--Continuous appropriation--Sovereign immunity--Life protection subfund. There is established in the state treasury the extraordinary litigation fund. The fund shall be maintained separately and administered by the Bureau of Administration. The fund may be used for plaintiff attorney fee awards, retention of outside counsel, settlement costs, or other litigation expenses not otherwise eligible to be paid under § 3-22-1. Unexpended money and any interest that may be credited to the fund shall remain in the fund. The extraordinary litigation fund, including any subfunds created within it, is hereby continuously appropriated and shall be budgeted through the informational budget process. The creation and funding of this fund does not constitute a waiver of the state's sovereign immunity.

The life protection subfund is established within the extraordinary litigation fund. The subfund shall be used to cover the litigation costs, including expert witness fees and attorney fees awarded under 42 U.S.C. § 1988 or other applicable statutes, associated with defending South Dakota statutes that regulate or proscribe abortion or contraception. In addition to moneys that the Legislature may appropriate to the subfund, the commissioner of the Bureau of Administration may accept private contributions for the subfund's purposes and deposit those moneys in the subfund. The life protection litigation subfund shall retain the interest income derived from the moneys credited to the subfund in accordance with § 4-5-30.

Source: SL 2004, ch 56, § 1, eff. Mar. 8, 2004; SL 2005, ch 7, § 1; SL 2006, ch 3, § 1, Mar. 6, 2006.

## Extraordinary Litigation Fund-December 2021

### PENDING CASES:

1. **Tobacco #1.** This is for Tobacco Enforcement actions, and includes travel for state training meetings as well as litigation costs of enforcement actions concerning compliance with the MSA requirements and the escrow account requirements applicable to non-participating tobacco product manufacturers.
2. **Tobacco #4.** This is for the 2018 Tobacco Diligent Enforcement Proceeding, which places the State's annual tobacco payments from the Participating Manufactures under the Master Settlement Agreement at risk. The 2018 Diligent Enforcement arbitration proceeding is in abeyance until other states finish their 2004 arbitration. Discovery has been completed and the case will most likely be heard outside of South Dakota once litigation commences.
3. **Planned Parenthood v. State** (2011 waiting period). This is a challenge to the 2011 abortion legislation. Discovery has been initiated and is continuing in this case. Due to rescheduling, the depositions that were set to occur have been pushed back. Depositions, many of which may be done out-of-state, may occur in FY21.
4. **Dr. Thomas Orr v. Northern State University.** Plaintiff claims denial of tenure, discrimination, and retaliation.
5. **Legion Lake Fire** (claim). Fire in 2017 that began in Custer State Park. Private landowners are claiming they have been damaged as a result of the fire, which was said to have been caused by a tree falling across a powerline.
6. **Christiansen, et al v. Marlette.** Plaintiffs, who are members of the SD Air National Guard, are alleging discrimination by denying employment benefits on the basis of their obligation to perform in a uniformed service.
7. **Hideaway Hills vs. School and Public Lands, FKA Trudo, et al v. SD Housing Authority.** Plaintiffs claim negligence in relation to the underground gypsum mine by the Hideaway Hills subdivision of Blackhawk. The court determined that a class action could be maintained and certified the class.
8. **Dakotans for Health v. Noem, Ravnsborg & Barnett.** Plaintiffs are challenging the constitutionality of SB 180 (passed in the 2020 legislative session), which was designed to remedy issues from 2019's HB 1094 at issue in the SD Voice litigation.
9. **South Dakota v. Deb Haaland, in her official capacity as U.S. Secretary of the Interior.** South Dakota is challenging DOI's denial of its application for a permit to allow fireworks at Mt. Rushmore for the July 4, 2021 celebration.
10. **Blue State Refugees v. Noem, et.al.** The plaintiffs claim Defendants violated their First Amendment rights as they were denied their right to demonstrate at the Capitol because of decorating activities related to Christmas at the Capitol. Plaintiffs also sought injunctive relief. A settlement was agreed too and the parties are working out attorneys fees.
11. **Hansen, Jason/Jenna v. Dept. of Corrections.** Plaintiff, who is incarcerated, claims constitutional violations, and alleges necessary gender dysphoria treatment has not been provided. This case was originally settled on March 4, 2021. On October 1, 2021 Plaintiff filed a motion to enforce the settlement. The parties counsel worked to address Plaintiff's concerns and after advising the Court, the Plaintiffs motion was denied on November 2, 2021. Counsel is continuing to monitor.

### CLOSED CASES:

1. **Buffalo Chip Incorporation.** The State filed suit challenging the incorporation of Buffalo Chip, based upon a SD Supreme Court opinion that the validity of acting municipalities may only be challenged by the State. The Circuit Court ultimately dissolved Buffalo Chip's incorporation.
2. **SD Voice & Heidelberg v. Noem, Ravnsborg and Barnett - #2.** Plaintiffs are challenging the constitutionality of HB 1094 (passed in the 2019 legislative session), claiming it discriminates against disfavored speakers and is

December 31, 2021