

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 \$2,000,000 to backfill this fund.

Historical Extraordinary Litigation Fund Expense		
Session	Bill #	Amount
2004	HB 1068	\$1,650,000
2005	HB 1057	\$1,280,000
2008	SB 48	\$3,201,534
2010	SB 48	\$944,610
2012	HB 1040	\$1,042,828
2016	HB 1047	\$1,974,502
2017	HB 1023	\$1,004,242
2018	SB 54	\$423,598
2019	HB 1264	\$2,300,000
2020	HB 1024	\$800,000
2021	HB 1026	\$400,000
2022	HB 1019	\$1,500,000
2023	SB 19	\$2,000,000

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.

Historical ELF Cases

Case	Case Closed or Settled	Total Paid
Health Care Bill	August-12	\$ 10,447
SRE Real Estate	January-14	177,217
Legislation	February-15	961
Attachmate	March-15	1,637,072
Gant	July-15	10,266
Planned Parenthood (2005 Informed Consent)	October-15	4,344
Rosenbrahn	October-15	246,948
MPC/Gateway	June-16	525,000
Darley	June-16	359,641
Rick Law	August-16	1,311
Flandreau Sioux Tribe	August-16	22,879
Charlie Rose	July-17	243,950
Laura Zylstra Kaiser	June-18	562,852
Libertarian Party	October-19	636,145
Terri Bruce	January-19	330,919
LP6-2	April-19	17,642
Wickett	May-19	15,835
McKenzy Pickner	August-19	4,682
Jennifer Stanwick-Klimek	October-19	106,831
Dakota Rural Action	November-19	172,935
EEOC/Goodman	January-20	790,616
SD Voice	January-20	34,335
SD Newspaper Association	January-20	80,512
LP6	June-20	46,618
Luden	June-20	8,759
Oglala/Rosebud Sioux Tribes	January-20	949,120
Buffalo Chip	December-20	33,542
Austin Mahoney	July-20	23,748
SD Voice #2	February-21	109,836
SDSU Data Breach	December-20	139,211
Amendment A	November-21	154,037
Kurtenbach v. Means	November-21	2,085
Blue State Refugees	April-22	32,741
Legion Lake	July-22	71,957
Planned Parenthood	July-22	27,258
Hanson, Jason/Jenna	August-22	107,746
SD v. Dept. of Interior	August-22	229,876
Rosebud, et al	September-22	700,675
Dakotans for Health	November-22	143,969
Total		\$ 8,774,518

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PENDING CASES:

1. **Tobacco #1.** This is for Tobacco Enforcement actions, and includes litigation costs of enforcement actions concerning compliance with the MSA requirements and the escrow account requirements applicable to non-participating tobacco product manufacturers. Opened 9/27/2005.
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. Opened 9/27/2005.
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. Opened 11/2/2011.
4. **Dr. Thomas Orr v. Northern State University.** Plaintiff claims denial of tenure, discrimination, and retaliation. Opened 4/17/2018.
5. **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. Opened 7/9/2019.
6. **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. Opened 4/27/2020.
7. **Julie Irvine v. HSC.** Irvine is the guardian ad litem of Juan Alvarez, Aubrey Archambeau, and Joseph Baker, who are accused of crimes and have been incompetent. They have been ordered committed but are housed in a county jail. Opened 8/26/2021.
8. **League of Women Voters v. Noem, Vargo and Barnett.** Plaintiff claim that SB180 violates the 1st and 14th amendments to the US Constitution. Plaintiffs allege that this limits petition circulators to residents of South Dakota who have lived in the state for more than 30 days, restricting voters' access to ballot measures and voter engagement organizations' ability to engage in political activity. Opened 6/28/2022.

CLOSED CASES:

1. **Oglala Sioux Tribe and Rosebud Sioux Tribe v. Dept. of Social Services.** Plaintiffs challenged the State's procedures in emergency removal hearings, claiming violations of constitutional rights and of the Indian Child Welfare Act. The 8th Circuit Court of Appeals issued an order to the district court to vacate its order granting summary judgment to Plaintiffs. The State asked the court to dismiss the remaining failure to train claim. Opened 12/30/2008. The court dismissed this case.
2. **State of SD v. Austin Mahoney.** Defendant was an inmate in the custody of DOC and received medical care from DOH. The State requested a court order that Defendant receive necessary treatment or, in the alternative, that the State and its employees are absolved from liability to all adverse medical consequences related to Defendant's refusal of treatment. Opened 1/25/2017. Defendant was released from custody and the State dismissed the case.
3. **SD Voice & Heidelberger v. Noem, Ravensborg and Barnett.** Plaintiffs challenged the constitutionality of Initiated Measure 24 (passed in November 2018) on 1st and 14th Amendment grounds. Opened 3/1/2019. The court ruled it unconstitutional and ordered the State to pay plaintiff's attorney's fees.
4. **SD Newspaper Association v. Ravensborg and Barnett.** Plaintiffs challenged the constitutionality of IM 24 (passed in November of 2018) on 1st and 14th Amendment grounds. Opened 4/17/2019. The court ruled it unconstitutional and ordered the State to pay plaintiff's attorney's fees.
5. **LP6 Claimants LLC v. GOED.** Plaintiff alleged fraud in soliciting investments in Northern Beef Packers processing plant to allow Plaintiff's members to participate in the EB-5 Program, which resulted in a loss of investment dollars. Opened 1/12/2016. The case was dismissed and Plaintiff appealed to the SD Supreme Court, which issued a ruling in favor of

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GOED.

6. **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 SD Supreme Court decision was that the circuit court's judgment provided that the Buffalo Chip was here by dissolved. Opened 3/29/2018. The case is closed.
7. **SDSU Data Breach**. A data breach was detected at SDSU in July 2020. ELF paid the self-insured retention for the cyber liability insurance coverage, per SDCL 1-14-3.1. Opened 7/20/2020. This case has been concluded.
8. **Luden v. UJS**. Plaintiff alleged the defendants violated the due process and equal protection clauses of the 5th and 14th Amendments. Also, that they violated his constitutional rights by failing to the plaintiff proper notice of the reason he was denied a license to practice law in SD. Opened 6/17/2019. Plaintiff filed a Notice of Voluntary dismissal.
9. **Legion Lake Fire**. There was a fire in 2017 that began in Custer State Park. Private landowners were claiming that they had been damaged as a result of the fire, which was said to have been caused by a tree falling across a powerline. Opened 12/12/2017. This matter was settled.
10. **SD Voice & Heidelberger v. Noem, Ravnsborg and Barnett #2**. Plaintiffs challenged the constitutionality of HB1094 (passed in the 2019 legislative session), claiming it discriminates against disfavored speakers and is therefore content based discrimination. Opened 3/1/2019. This matter has been concluded with plaintiff's attorney fees and costs.
11. **Hanson, Jason/Jenna v. Dept. of Corrections**. Plaintiff, who is incarcerated, claimed constitutional violations. Opened 9/27/2019. This matter was settled but the plaintiff filed a motion to enforce the settlement. Counsel is continuing to monitor the case but recommended closing our file.
12. **Amendment A**. Superintendent of the SD Highway Patrol alleged that Amendment A violated Article XXII and should never have been initiated or submitted to voters for approval. Opened 11/20/2020. As a result of the constitutional violation the court declared the amendment invalid.
13. **Kurtenbach v. Carmen Means**. The plaintiff claimed that his 6th Amendment right to a speedy trial was violated. Opened 3/3/2021. This case was dismissed.
14. **Blue State Refugees v. Noem, Bollinger, Gill and Svendsen**. The plaintiffs claimed that the defendants violated their 1st Amendment rights. They claimed that petition for demonstration was denied due to the Capitol Christmas activities therefore depriving them of their right to free speech and petition rights. Opened 10/29/2021. This claim was settled for plaintiffs' attorney fees.
15. **SD v. Haaland as US Secretary of the Interior**. The DOI denied the State of SD the permit request to allow a fireworks show at Mt. Rushmore over the 4th of July, 2021. Opened 4/30/2021. Appeals court found case was moot.
16. **Planned Parenthood v. Noem**. The plaintiffs claimed that rule imposed an undue burden and imposed arbitrary classifications on physicians who prescribe Misoprostol for use in medication abortion in violation of the 14th amendment. Opened 1/19/2022. The plaintiffs voluntarily dismissed this matter without prejudice.
17. **Rosebud, et al v. Barnett, et al**. Plaintiffs claimed that the defendants failed to provide voter information, registration opportunities and assistance as required by Section 5 of the National Voter Registration Act. Opened 9/16/2020. This matter was settled during mediation.
18. **Dakotans for Health v. Noem, Ravnsborg and Barnett**. The plaintiffs asked for the federal court to enjoin the state from enforcing SD 180 from 2020. This was a bill designed to remediate some of the issues raised regarding requirements for the petition circulators that were brought up during the SD Voice legislation. Opened 3/3/2021. This matter was settled for plaintiff's attorney fees and costs.

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